

DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1466

Environmental Quality Incentives Program

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Final rule.

SUMMARY: The Natural Resources Conservation Service (NRCS) is issuing a final rule for the Environmental Quality Incentives Program (EQIP). NRCS published a proposed rule for EQIP in the Federal Register on February 10, 2003, (68 FR 6655) and solicited comments from the public. This final rule establishes the process by which NRCS will administer EQIP, responds to comments received from the public during the 30-day comment period, and incorporates clarifications to improve implementation of the program.

EFFECTIVE DATE: [Insert date of publication in the FEDERAL REGISTER].

ADDRESSES: This final rule may be accessed via Internet. Users can access the Natural Resources Conservation Service (NRCS) homepage at <http://www.nrcs.usda.gov/programs/eqip/>. Select the EQIP rule from the menu.

FOR FURTHER INFORMATION CONTACT:

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SUPPLEMENTARY INFORMATION:

[Executive Order 12866](#)

Pursuant to Executive Order 12866, Regulatory Planning and Review, the Natural Resources Conservation Service has conducted a benefit cost analysis of the Environmental Quality Incentives Program (EQIP) as formulated for the final rule. The Department of Agriculture Reorganization Act of 1994 and the Unfunded Mandates Reform Act of 1995 also require analysis of costs, benefits and risks associated with major regulation. These requirements provide 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.

The analysis finds EQIP will have a beneficial impact on the adoption of conservation practices and, when installed or applied according to technical standards, will achieve economic and environmental gains. In addition, benefits would accrue to society for long-term productivity maintenance of the resource base, reductions in non-point source pollution damage, and wildlife enhancements. As a voluntary program, EQIP will not impose any obligation or burden upon agricultural producers that choose not to participate. In the Farm Security and Rural Investment Act of 2002 (FSRIA), EQIP funding was authorized at \$6.16 billion over the six-year period of FY 2002 through FY 2007, with annual amounts for the base program and the ground and surface water conservation provisions increasing to \$1.36 billion in FY 2007 after the initial authorization in FY 2002 of \$425 million. In addition, the 2002 Act authorizes a total of \$50 million for the Klamath Basin in California and Oregon.

In considering alternatives for implementing the program, NRCS followed the legislative intent to optimize environmental benefits, address natural resource problems and concerns, establish an open participatory process, and provide flexible assistance to producers who apply appropriate conservation measures while complying with Federal, State, and tribal environmental

laws. The analysis recognizes that several other Federal conservation programs will be implemented which will generate environmental benefits as well.

The analysis initially compared the 2002 NOFA (with certain changes required by the 2002 Farm Bill) to the original EQIP program as established in 1996. Then, benefits and costs for all alternatives for the rule were compared to the NOFA, which was used as the analytical baseline. Lastly, the new EQIP program as formulated for the final rule, is compared to the NOFA together with a display of how benefits compared with the original 1996 program.

Confined Animal Feeding Operations (CAFOs) may participate in the new program and it is estimated that \$563 million (12.5percent of the total) of EQIP funds will be allocated for that purpose. CAFOs are generally defined as those operations with greater than 1,000 animal units, subject to some exceptions. However, since the Environmental Protection Agency published its final rule for "National Pollutant Discharge Elimination System Permit Regulation and Effluent Limitation Guidelines and Standards for Concentrated Animal Feeding Operations" (EPA CAFO) on December 15, 2002, benefits from treatment of those CAFOs are attributed to that rule rather than to EQIP, regardless of the extent to which EQIP funds may be used to assist the CAFO managers with rule compliance. The economic analysis shows estimates from two perspective alternatives: 1) with CAFO benefits and costs included, and 2) with CAFO benefits and costs excluded.

THE FINAL RULE – ITS MAJOR FEATURES AND EFFECTS

Decisions leading to the final rule were made after consideration of all comments on the proposed rule and a review of their effects on program benefits and costs. Program benefits and costs under alternative scenarios in the main body of this report were available to guide decision-makers. Decision makers reviewed these alternatives as the final rule was defined.

The final rule allows for adoption of a combination of the alternatives to the NOFA that are described in the report. The following scenarios are recommended as a result of the benefit-cost analysis in order to achieve benefits described. In particular, the final rule incorporates a scenario with the following features:

- 1) Twenty five percent of livestock funds are allocated to each AFO/CAFO size class;
- 2) A \$450,000 payment ceiling to any contract and to any program participant over a six year period;
- 3) An average cost share rate of 65 percent on any practice;
- 4) National Priority targeting that implies lower cost share rates (55 percent) for practices linked to grazing, wind erosion, and wildlife habitats (since the benefits computed for the latter two do not match the specifications in the rule for air quality and at-risk species);
- 5) Fund allocation that varies as a function of cost-share (practice/benefit categories with higher priorities are the ones with higher cost share rates); and
- 6) A spatial evaluation process focusing on environmentally sensitive areas such as impaired watersheds that improves benefits by 10 percent in all categories except grazing.
- 7) Performance incentive for efficient implementation of EQIP.

The new EQIP program in the final rule has a substantial beneficial effect on the environment compared to continuation of the 1996 program. A total of 96 million acres of agricultural land will be treated over the six years of the program with the final rule, compared to 41 million acres under the 1996 program. This includes 70.3 million acres of cropland, 15.5 million acres of grazing land (pasture and rangeland), and 10.3 million acres for wildlife habitat improvement. Resource treatment increases compared to the 1996 rules include an additional 2.9 million acres for sheet and rill water erosion (USLE) reduction, 3.5 million acres for wind

erosion, 14.7 million acres for non-waste nutrient management, 22.0 million acres for net irrigation water reduction, 6.2 million acres for grazing productivity, and 5.5 million acres for wildlife habitat will occur on the landscape. Also, an additional, 31,000 animal feeding operations (5.6 million animal units) will be treated under the final rule, as compared to continuing the 1996 program, excluding CAFO treatments (34,000 animal feeding operations) and 11.4 million animal units if the CAFOs are included. Also, compared to the 1996 rules, an additional 12.8 million animal units and 39,468 animal feeding operations will be treated, and water induced soil loss from agricultural land will decrease by 24.5 million tons/year.

The Table below shows the costs and benefits (in \$ million) of the final rule compared to the NOFA and the 1996 program.

	1996 EQIP with \$200 million per year 2002- 2007	Rules and Funding According to the 2002 Legislation and NOFA		Final EQIP rule	
		Include CAFO Benefits & Costs^b	Exclude CAFO Benefits & Costs^c	Include CAFO Benefits & Costs^b	Exclude CAFO Benefits & Costs^c
Benefits:					
Animal Waste Management (Total) ^a	322	3,608	1,928	4,085	2,405
By Operation Size Class (AUs):					
>1000 ^b	0	1,680	0	1,680	0
500 - 1000	142	705	705	871	871
300 - 500	98	620	620	773	773
<300	82	602	602	761	761
Land Treatment Total	2,444	4,284	4,284	5,828	5,828
USLE Reductions	640	827	827	1,243	1,243
Grazing Improvement	671	934	934	1,078	1,078
Irrigation Improvement/ Water Savings	716	1,803	1,803	2,519	2,519
Wind Erosion Reductions	115	156	156	198	198
Non-waste Nutrient Management	167	320	320	482	482

Wildlife	135	244	244	309	309
Benefits from non-analyzed practices ^d	587	1,005	791	1,263	1,049
Grand Total Benefits	3,353	8,897	7,003	11,176	9,282
Costs:					
EQIP Funds	978	4,480	3,917	4,480	3,917
Grand Total Costs^e	2,374	6,600	5,673	7,620	6,626
Benefit Cost (BC) Ratios:	1.4	1.3	1.2	1.5	1.4
Net Benefits (Benefits – Total Costs)	979	2,296	1,329	3,555	2,656

^aAssumes 7.5 percent of EQIP funds for each small livestock class in "Old" and 12.5 percent for each class in "New".

^bBenefits and costs of treating Large CAFO benefits and costs are accounted for, even though the benefits are attributable to the EPA CAFO rule rather than EQIP.

^cBenefits and Costs of large CAFOs not accounted for.

^dAssumes that benefits per EQIP dollar for practices not assigned to a benefit category are on average the same as the practices analyzed.

^eTotal costs are calculated based on 74 percent of EQIP funds for cost sharing and 26 percent of EQIP funds for Technical Assistance (TA). Note that the costs here are not the sum of costs from analysis of individual benefit categories, since that would involve double counting. Total costs include both the EQIP funding as well as producers' cost-share.

CONCLUSIONS

As described in the above paragraphs, implementation of the final rule will generate significant environmental and economic benefits. The final rule benefit cost ratio is equal to the 1996 rule when the costs and benefits of CAFOs are excluded and is slightly higher when the costs and benefits of CAFOs are included. The final rule has higher net benefits than the NOFA because of the prioritization based on natural resource concerns.

This benefit cost analysis represents a comprehensive study of alternative ways to implement the new EQIP authorities contained in the 2002 farm bill. The best available data, including selected data on EQIP experiences, and economic and natural resource effects analytical models were used in its development.

Natural Resources Conservation Service decision-makers reviewed the findings of the analysis and chose a combination of the elements described in the report as they are formulated

for the final rule. For example, the significant benefits achievable by focusing on reducing water erosion and sedimentation from otherwise excessive levels on agricultural land resulted in it becoming a National priority. In addition, a definition of cost effectiveness was introduced in the final rule and will be used selecting conservation practices and emphasizing their adoption.

The complete analysis addressed several issues critical to the implementation of the final EQIP rule. These included the impacts of selected alternatives concerning: (1) fund allocations among different sized livestock facilities; (2) payment ceiling limits; (3) cost share rates; (4) National priority targeting; (5) variable cost-share rates to address higher priority problems; and (6) a spatial evaluation process to improve benefits.

A copy of this analysis is available upon request from Anthony J. Esser, Conservation Operations Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, D.C. 20013– 2890 or on the internet at <http://www.nrcs.usda.gov/programs/eqip>.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because NRCS is not required by 5 U.S.C. 533 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Analysis

NRCS has determined through an amendment to the “Environment Assessment for the Environmental Quality Incentives Program, April 2003” that the issuance of this final rule will not have a significant effect on the human environment. Copies of the Environmental Assessment, the amendment, and the finding of no significant impact may be obtained from Anthony J. Esser, Conservation Operations Division, Natural Resources Conservation Service,

P.O. Box 2890, Washington, D.C. 20013–2890 or on the internet at
<http://www.nrcs.usda.gov/programs/eqip>.

Paperwork Reduction Act

Section 2702(b)(1)(a) of the 2002 Act provides that the promulgation of regulations and the administration of Title II of the Act shall be made without regard to chapter 35 of Title 44 of the United State Code, the Paperwork Reduction Act. Accordingly, these regulations and the forms, and other information collection activities needed to administer the program authorized by these regulations, are not subject to provisions of the Paperwork Reduction Act, including review by the Office of Management and Budget.

NRCS is committed to compliance with the Government Paperwork Elimination Act (GPEA) and with the Freedom to E-File Act, which require Government agencies in general and NRCS in particular to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. The forms and other information collection activities required for participation in the program proposed under this rule are not yet fully developed for the public to conduct business with NRCS electronically. However, the application form will be available electronically through the USDA eForms Web site at <http://www.sc.egov.usda.gov> for downloading. Applications may be submitted at the local USDA Service Centers, by mail, or by facsimile. Currently, electronic submission is not available because signatures from multiple producers with shares in agricultural operations are required.

Executive Order 12998

This proposed rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this proposed rule are not retroactive. The provisions of this

proposed rule preempt State and local laws to the extent such laws are inconsistent with this proposed rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR Parts 614, 780, and 11 must be exhausted.

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

Pursuant to Section 304 of the Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994 (Public Law 103-354), USDA classified this proposed rule as major and NRCS conducted a risk analysis. The risk analysis establishes that the EQIP proposed rule will produce benefits and reduce risks to human health, human safety, and the environment in a cost-effective manner. A copy of the risk analysis is available upon request from Anthony J. Esser, Conservation Operations Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890, and electronically at <http://www.nrcs.usda.gov/programs/eqip>.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (Public Law 104-4), NRCS assessed the effects of this rulemaking action on State, local, and Tribal government, and the public. This action does not compel the expenditure of \$100 million or more 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.

Small Business Regulatory Enforcement Fairness Act of 1996

Pursuant to 5 U.S.C. Section 808 of the Small Business Regulatory Enforcement Fairness Act of 1996, it has been determined by NRCS that it is impracticable, unnecessary, and contrary to the public interest to delay the effective date of this rule. Making this final rule effective immediately will permit NRCS to offer the public timely, reliable information about funding for

conservation practices as early before the start of the spring 2003 planting season as possible. Information about the availability of the program for establishing conservation practices influence planting decisions and should, therefore, be disseminated to producers before planting decisions are made. Failure to provide this information in a timely manner may mean that the realization of important conservation benefits available under EQIP may be delayed for another year before the start of another planting season. Accordingly, this rule is effective upon publication in the Federal Register.

Discussion of Program

The Farm Security and Rural Investment Act of 2002 (the 2002 Act) (Public Law 107-171, May 13, 2002) re-authorized and amended the Environmental Quality Incentives Program, which had been added to the Food Security Act of 1985 (the 1985 Act) (16 U.S.C. 3801 et seq.) by the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act) (Pub. L. 104-127). The 2002 Act also amended the Environmental Conservation Acreage Reserve Program by changing the section name to the Comprehensive Conservation Enhancement Program and removing the authority for the Secretary of Agriculture to designate areas as conservation priority areas.

As provided by Section 1241 of the 1985 Act (16 U.S.C. 3841), as amended by the 2002 Act, the funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS for carrying out EQIP. (The Chief of the NRCS is a vice-president of the CCC.) Accordingly, where NRCS is mentioned in this rule, it also refers to the CCC's funds, facilities, and authorities where applicable.

Through EQIP, NRCS provides assistance to farmers and ranchers who face threats to soil, water, air, and related natural resources on their land. These include grazing lands,

wetlands, private non-industrial forest land, and wildlife habitat. Participation in the program is voluntary. Under EQIP, NRCS will provide assistance in a manner that will promote agricultural production and environmental quality as compatible goals, optimize environmental benefits, and help farmers and ranchers meet Federal, State, and local environmental requirements. NRCS will offer the program throughout the Nation using the services of NRCS and Technical Service Providers. NRCS will implement a consolidated and simplified process to reduce any administrative burdens that would otherwise be placed on producers.

In this rule, NRCS proposes to incorporate changes in the EQIP regulations, 7 CFR 1466, resulting from the passage of the 2002 Act. Several important changes were made in the 2002 Act that require changes to the regulation. These include:

- (1) Changing the maximum payment limitation from \$50,000 per person per contract to \$450,000 per individual or entity for all contracts entered into in fiscal years 2002 through 2007;
- (2) Revising the purpose from “maximize environmental benefits per dollar expended” to “optimize environmental benefits”;
- (3) Eliminating the competitive bidding by applicants;
- (4) Allowing payments to be made in the first year of the contract;
- (5) Removing language authorizing targeting of funds to Conservation Priority Areas;
- (6) Removing the provision prohibiting a producer from receiving cost-shares for an animal waste facility on an animal operation with more than 1,000 animal units;
- (7) Allowing cost-share rates of up to 90 percent for limited resource farmers or ranchers and beginning farmers or ranchers;
- (8) Reducing the minimum length of a contract from five years to one year after installation of the last practice;

(9) Increasing funding from \$200 million per year to \$400 million in FY 2002 and increasing to \$1.3 billion per year in FY 2007; and,

(10) Imposing an average adjusted gross income (AGI) limitation.

In an effort to make the program more effective and efficient, the Department has initiated several streamlining changes, including:

(1) Eliminating the program's dual administration by changing Farm Service Agency (FSA) participation from concurrence to consultation;

(2) Reducing the planning requirements needed to develop the contract; and

(3) Allowing producers to have more than one contract per tract at any given time.

The fundamental philosophy of the program, assisting agricultural producers install conservation practices to provide environmental benefits, has not changed. The statutory and Departmental changes respond to limitations and restrictions identified by agency staff and participants.

Agricultural producers who are interested in participating in the program will apply as they have in the past and should experience a quicker turn-around on their application. Producers also have some expanded financial opportunities with higher contract limits and the ability to receive payments earlier in the contract period.

On February 10, 2003, NRCS published a proposed rule with request for comments. The proposed rule described the program requirements, administrative processes, and eligibility criteria that NRCS would use in implementation of EQIP. The proposed rule also described how NRCS would manage the program to optimize environmental benefits and what information would be considered in designating program funds for natural resource concerns to states and to contracts. Over 1,250 separate responses containing about 4,900 specific comments were received during the 30-day comment period: 608 responses from farmers, ranchers, and other

individuals, 175 from agricultural and rural community organizations, 54 from environmental organizations, 268 from conservation districts and related groups, 37 from business entities, 118 from State and local agencies, 24 from tribes and tribal organizations, and nine from congressional representatives.

Additional responses were received from Federal agencies and employees; their comments are not included in the following analysis of public comments. These responses were treated as inter and intra-agency comments and considered along with the public comments where appropriate.

All comments received are available for review in Room 5229 South Building, 14th and Independence Ave., S.W., Washington, D.C., during regular business hours (8 a.m. to 5 p.m.) Monday through Friday.

Analysis of Public Comment

Overall, almost all respondents expressed appreciation for the opportunity to comment on the EQIP proposed rule. Many offered valuable suggestions for improving or clarifying specific sections of the proposed rule. Some of these suggestions were group efforts, where individual responses used similar or identical language to identify and describe their interests, concerns, and recommended modifications to the proposed rule.

The majority of comments centered on six major issues in the proposed rule: 1) funding, payments and cost-share rates; 2) setting priorities, ranking of applications and contract approval; 3) use of EQIP assistance for CAFO/AFO; 4) locally-led conservation; 5) limited resource producer/ranchers and beginning farmer or rancher; and 6) use of conservation planning in the EQIP program. These comments were considered as part of the rulemaking record to the extent that they were relevant to the provisions of the rulemaking. Numerous minor editorial and

other language clarification changes were suggested; these comments are not included in the following analysis but all were considered and many of the minor technical changes were included in the final rule.

To implement the final rule, NRCS will be responsible for establishing and documenting in program guidance the overall policies, priorities, procedures, and guidelines for EQIP. NRCS will seek the review and input by other Federal agencies, as appropriate, when developing the guidance documentation.

General Comments on 7 CFR Part 1466

Under the proposed rule, NRCS would set out EQIP regulations in 7 CFR part 1466. The following summarizes general comments received on the proposed rule and NRCS's response to them.

1. The 1996 Act

Support for both the legislative and Departmental changes to EQIP was expressed in two-thirds of the comments received. One-third of the comments expressed concern that proposed rule removed the conservation planning requirement from EQIP, provided for unrestricted cost-share assistance to new and expanding animal operations and CAFOs in flood plains. *The Department recognizes that Congress made adjustments to the EQIP legislation in response to concerns from their constituents. The Department included those concerns when developing the proposed rule. The Department is required to administer the laws as passed by Congress and provide EQIP assistance to all producers. Also, the Department feels EQIP, as proposed, fully supports the NRCS progressive planning policy by allowing producers to request assistance for only those conservation practices they are ready to implement.*

2. Preamble Language in the Proposed Rule

Two comments received were concerned with the length of the public comment period and requested an extension of the comment period. Several hundred comments appreciated the opportunity given for input and the varied mediums by which comments would be accepted. *Over 1,250 responses were received from a range of interested parties from across the Nation. NRCS believes that a sufficient length of time was provided and it has received sufficient input to proceed to a final rule.*

A basic element of EQIP implementation throughout the proposed rule is the use of the locally-led process to adapt EQIP to local conditions. The Department received 176 comments in support of locally-led conservation, frequently commenting that the process in the proposed rule over-rides local decision making and is a top down process. *NRCS believes that the locally-led process is the optimal mechanism for implementation of EQIP and believes that the proposed rule strengthens the process. The locally-led process utilizing the State Technical Committees and Local Work Groups has been discussed in detail in the preamble to the 1997 EQIP final rule (FR 28258, vol. 62, no. 99, May 22, 1997) and does not need to be reiterated.*

In the preamble NRCS requested comments on eight specific issues. *Where applicable the public comments and recommendations have been incorporated in the final rule or will be included in program guidance and delivery activities.*

One of the questions in the proposed rule asked for comments on adopting a limited waiver program, as well as on innovative mechanisms that NRCS could consider to institutionalize alternatives for encouraging conservation implementation. NRCS received 46 comments regarding credits and credit trading. Twenty seven respondents suggested pilot programs to resolve the issues discussed, three suggested proceeding with caution, seven respondents did not support the concept, 4 suggested that the waiver should apply to all

previously applied practices, and three respondents stated that USDA does not have any interest in credits a producer might receive from applying conservation practices with EQIP assistance. Some respondents interpreted the discussion in the proposed rule that NRCS would initiate, support and administer an environmental credit trading program. *The actual intent is that NRCS would waive all financial interest to any environmental credits that accrue to a participant implementing conservation practices using EQIP assistance. NRCS has determined that NRCS does not have any financial interest in any environmental credits that may accrue to a participant who implements conservation practices with EQIP assistance.*

The proposed EQIP rule also asked for comments regarding how to administer a loan program in accordance with the Ground and Surface Water Provisions of the 2002 Farm Bill. NRCS received 13 comments suggesting looking into existing funding programs such as the Nonpoint Source Partnership which is a collaborative effort between the state and EPA. *The Department believes that the 2002 Farm Bill authorizes the implementation of a loan program and does not need to address the issue in the final rule. NRCS will reserve the option to utilize a loan program in the future and will do so with policy and program guidance in appropriate manuals and handbooks.*

The proposed rule also requested comments regarding how the Klamath Basin water conservation provisions should be implemented. NRCS received 10 comments; five suggesting that the Klamath Basin issue was more than agriculture and that NRCS should cooperate with other stakeholders in the development of a basin plan; 4 recommending water quality improvements should be considered as “net savings” because the end result is more water available for wildlife purposes; and one comment that the administrative costs should not be borne by the Klamath Basin allocation. *NRCS reaffirms the language of the proposal rule that*

the two Klamath Basin State Conservationists will lead a basin planning effort that may require additional funding from sources other than EQIP funding. NRCS also believes that there is sufficient water in certain times of the year that can be captured with on-farm storage allowing participants to accomplish the statutory intent of “net-savings” without reducing irrigation water usage. NRCS will provide guidance through the EQIP Program Manual that “net-savings” in the Klamath Basin can be accomplished in three ways; reduced irrigation water usage, improved off-site water quality, and increased on-farm storage of water.

Section-by-Section Comments on 7 CFR Part 1466

Section 1466.1 Applicability

The proposed rule indicated that farmers and ranchers could receive program assistance to address soil, water, air, and related natural resources concerns, and to encourage enhancements on their lands in an environmentally beneficial and cost-effective manner. There were seven comments expressing support to include language that another purpose of the program is to assist producers in complying with environmental regulations. Several other comments suggested that wildlife should be specifically stated as a resource issue and that NRCS should explicitly state which land uses are eligible. *EQIP shall be implemented in a balanced manner in accordance with the statutory purposes for which EQIP was established, including the objective to optimize environmental benefits. The proposed rule contained broad language to facilitate the identification of a range of priority natural resource concerns at the state and local level based on National priorities and the Department believes that this is the appropriate approach. The final rule now contains, however, compliance with environmental regulations as a purpose of the program.*

Section 1466.2 Administration

In this section, NRCS is identified as an agent of CCC and that NRCS will consult with FSA at the National level in the development of policies, priorities and guidelines. This section also reaffirms NRCS's commitment to locally-led conservation through the State Technical Committees and Local Work Groups. One hundred and sixty-six comments express support for locally-led conservation. One comment suggest including private landowners on Local Work Groups. *USDA believes that it is important for both NRCS and FSA to consult on program implementation and that the proposed arrangement takes advantage of the proven expertise of both agencies. USDA strongly supports locally-led conservation and recommends that Local Work Groups include public comment periods in their meetings but must limit membership to representatives of state and local governments and political subdivisions and agencies thereof in accordance with the Federal Advisory Committee Act (FACA).*

Section 1466.3 Definitions

Agricultural Operation

NRCS received 23 comments in response. Ten respondents suggested it should be limited to the field where the practice is being implemented, whereas one respondent suggested the field plus any contiguous parcels, and 13 respondents suggested all the land operated by the producer. *The definition has been modified in the final rule to include all parcel or parcels of land, both contiguous and non-contiguous.*

At-Risk Species

The proposed rule identified at-risk species habitat recovery as a National priority. Eight respondents suggested the need for a definition of at-risk species. One respondent suggested the definition to include invertebrate pollinators, one suggested imperiled species and seven respondents suggested to include Federally listed and candidate species as well as species of

local concern. *The Department agrees with the suggestion to define at-risk species and a definition has been included in the final rule.*

Beginning Farmer and Rancher

Six comments suggesting the 10 year time frame is too long. Three respondents recommended five years and one recommended a maximum of three years. *The Department has an established definition for Beginning Farmer and will continue to use the existing definition in the final rule.*

Confined Livestock Feeding Operation

Two respondents recommended this definition was not necessary for implementation of EQIP. *The Department does not use confined livestock feeding operation in the implementation of EQIP and has removed the definition from the final rule.*

Indian Tribe

Four respondents commented on the definition of Indian tribe and how there appeared to be some inconsistency in how it was used in the Proposed Rule, including the lack of reference to Conservation District established under tribal law. *No change to the definition of Indian Tribe is proposed because it reflects the definition provided by 25 USC 3701. However, the rule has been clarified to reflect the appropriate use of Indian Tribe in the text. Conservation Districts established under Tribal law has been added to the definition of Conservation Districts.*

Limited Resource Farmer and Rancher

Six comments were received; three respondents suggesting that the gross farm sales value was too low and three respondents suggesting it was deficient by not identifying future year adjustments. *The Department's interagency task force reviewed the comments and modified the definition for the final rule.*

Priority Natural Resource Concern

Three comments were received. One respondent supported the definition of priority natural resource concern as written and two respondents suggested including a resource objective that is being addressed through an environmental regulation. *NRCS believe that optimization of environmental benefits can be achieved through a prioritization process. The definition in the final rule is not changed.*

Producer

Fifty one comments were received. Seventeen suggested that this definition specifically include private non-industrial forest land, 17 want assurance that the definition does not preclude agroforestry and 36 suggested language that provides assurance that private non-industrial forest land is eligible for EQIP assistance. *The Department recognizes forest products as an agricultural commodity and forest land as agricultural land. The definition in the final rule is not changed.*

Wildlife

NRCS received 10 comments to revise the definition of wildlife; five suggest a rewording and five respondents suggested crafting the definition to allow for exclusion of exotic species. *The Department believes that the National Invasive Species Council operating under the authority of Executive Order 13112 provides sufficient direction and guidance for USDA to implement EQIP without specifically including invasive species concerns in the definition. In the past, many state and local decision-makers have identified invasive species as a priority natural resource concern and used EQIP resources to support control.*

New Definitions

Several respondents suggest new definitions be included in the final rule, including: at-risk species (eight comments). One respondent suggested the definition to include invertebrate pollinators, one suggested imperiled species and seven respondents suggest the definition to include Federally listed and candidate species as well as species of local concern. *The Department agrees with the suggestion to define at-risk species and a definition has been included in the final rule.*

The 2002 Farm Bill established an earnings limit for an individual or entity. For purposes of consistency, the Department uses FSA's Payment Limitation and Payment Eligibility rule (7 CFR 1400) for definitions of entities and joint ventures. This rule, however, does not contain a definition of individual. *The Department added definitions of entity and joint operation to the final EQIP rule and utilizes the definition of person for individual. NRCS has adjusted usage of these terms throughout the EQIP rule to assure the final rule is consistent with 7 CFR1400 and the statutory earnings limit.*

During the review process the Department recognized a concern that cancellation of EQIP contracts results in a loss of financial assistance and an expenditure of unproductive technical assistance. In an effort to minimize these losses, NRCS will include a *Liquidated Damages* policy in EQIP for producers who cancel contracts without proper cause and include a definition of liquidated damages in the final rule.

Three comments on the Indian trust land definition were considered restrictive and there is a need for more land inclusion. *To be more inclusive a definition for Indian Land, consistent with 25 CFR part 150, has been included in the final rule and the definition for Indian Trust Land was removed from the final rule.*

Section 1466.4 National Priorities

NRCS received 378 comments regarding National priorities; 141 regarding water resources, 60 related to air resources, 45 regarding soil erosion, 56 comments related to at-risk species and wildlife and 71 of a general nature.

Of the 141 comments related to water resource; 52 recommended separating water quality and water quantity into two priorities; 93 respondents recommended removing the focus on Total Maximum Daily Loads (TMDL), 82 because TMDL does not always include drinking water supplies, nine because including TMDL is analogous to targeting, and two for including 305(b) reaches (non-TMDL); and one respondent suggested the Gulf of Mexico hypoxia and contributing factors should be included as a specific National priority.

Forty four respondents recommended adjusting the air quality National priority by adding “atmospheric concentration” before or emissions and 16 recommended that national air quality priorities should not apply to Indian Tribes.

NRCS received 60 comments that the soil erosion National priority limited use of EQIP to land with lower rates of erosion that are of a particular concern. Additionally, NRCS has determined that the reference to highly erodible land could be misleading with regards to providing assistance for compliance with the Highly Erodible Land (HEL) provisions of the 1985 Farm Bill.

The fourth National priority, at-risk species habitat recovery, received 56 comments. Thirty two respondents recommended that this priority be directed to wildlife and wildlife habitat. Six respondents recommended defining at-risk to include Federally listed as well as species of regional concern with one of these misinterpreting the proposed rule to be Federally listed species only. Four respondents supported the priority as presented and 14 respondents

suggested removing at-risk species priority with two suggesting there were other programs to accomplish this objective.

In addition, NRCS received recommendations to emphasize or add National priorities; five suggested EQIP is the implementation vehicle for salinity control measures authorized by the Colorado River Basin Control Act; five recommended adding quail restoration; eight suggested emphasizing grassland, grazing land and rangeland, 13 wanted the National priorities to support private non-industrial forest land, and three wanted the priorities to include promoting agricultural production.

NRCS received five comments that the National priorities appeared to be a compliance assistance program for laws and regulations of other agencies. Fifty comments supported the establishment of state level conservation priority areas at the state's discretion, three respondents suggested that there should not be National priorities but national guidance in support of state and local priority resource concerns, and two suggested that legislative requirement for 60 percent for livestock practices be applied at the state level and not the national level.

The Department believes that the National priorities in the proposed rule meets Congressional intent in providing direction and flexibility to the state and local decision-makers to utilize EQIP resources to address locally identified priorities and optimize environmental benefits. The National priorities in the proposed rule are focused on natural resources and resource issues. These priorities are sufficient to guide local program delivery and only the soil erosion priority will change in the final rule to remove any potential conflict with Highly Erodible Land provisions of the 1985 Farm Bill.

Although the fundamental philosophy of the program, assisting agricultural producers to install conservation practices to provide environmental benefits, has not changed; the 2002

Farm Bill removed the authority of the Department to establish priority areas to which program resources are focused. NRCS eliminated the requirement that a portion of the funds allocated to the states would be focused into Conservation Priority Areas. The Department believes that NRCS methodology to optimize environmental benefits through an approach that integrates consideration of National Priorities in four key program components: 1) the allocation of financial resources to States; 2) the allocation of financial resources within states; 3) the selection of conservation practices and the establishment of cost-share and incentive payment levels; and 4) the application ranking process will provide the same level of environmental conservation as targeting to conservation priority areas. The intent of EQIP is to provide maximum flexibility to local decision-makers to implement the program. The identification of National priorities is the first step to accomplish this and is the basis for the allocation for funds from the National NRCS to state-level NRCS.

Two respondents commented on the need to include the use of EQIP to mitigate the impact of natural disasters in the National priorities. *No changes to the rule were made because EQIP is not intended to be a disaster program.*

Section 1466.5 National Allocation and Management

This section of the proposed rule contains information regarding allocation of funds from the national level to the state level, the establishment of an incentive payment, reviewing progress and accountability, and delegation of authority to the State Conservationists to implement the program to achieve National priorities.

USDA received 37 comments related to the National allocation. Nine respondents suggested including the amount of tribal land in the allocation formula, three suggested adding unmet need based on previous year's number of applications, 4 recommended using regulatory

compliance as a factors, two suggested forest land as a factor, and six suggested directing more funding to crop base agriculture and less to animal agriculture. Several respondents also recommended adjusting the allocation based on the intensity of agriculture in each state. Another five respondents suggested that National Association of Conservation Districts (NACD) and the Forest Service (USFS) should be consulted when making allocation decisions and one respondent supported making National Allocation task force report strategy available to the public. *NRCS is in full support of reviewing and revising, as necessary, the National EQIP allocation formula on a regular basis. NRCS intends to incorporate a wide variety of partners and customers in this process and intends to fully disclose the strategy of the task force to the public.*

NRCS also received 10 comments regarding the use and reuse of EQIP funds, suggesting that funds made available from cancelled contracts should be able to be re-used to fund new contracts. *The Department understands the position of the respondents, however, the re-use of funds is a limitation associated with the authorization language in the 2002 Farm Bill.*

In the proposed rule, NRCS specifically asked for comments regarding implementation of an incentive award; “what approaches NRCS can use to efficiently and effectively implement this award incentive”. NRCS received over 472 comments regarding this item, the majority of which, 415, supported the concept and suggested that the incentive be substantial but did not offer other specifics. Eleven respondents suggested that accomplishments with Indian tribes should be considered as a factor for determining the incentive award; three recommended using only how local conservation needs were addressed; and one suggested using leveraging, use of TSPs, and multiple resource and long-term benefits. Forty one respondents were against the incentive award because they felt it would penalize states for not having National priorities,

penalizing farmers for reasons beyond their control, or establish a bidding competition between states to compete for available funds. One respondent suggested using pervious year performance to allow the award to be made early in the year. *NRCS believes there is a potential confusion between the term “incentive award” used in the proposed rule and the incentive payment level established for a producer to implement a land management practice and therefore will revise the term to “performance incentive”.* NRCS will use the performance incentive as one of its approaches to optimize environmental benefits by supporting the state decision-makers with additional EQIP resources based on performance. The guidelines for administering this award will be developed and made available in EQIP program guidance. NRCS is committed to full disclosure of program implementation policy and will make this information publicly available as it is finalized.

NRCS received 422 comments in response to the request for comments on how best to evaluate the performance of the EQIP program. How should environmental changes be measured, and what methodologies would best identify environmental effects due to contract activities? What kind of output measures and data collection strategies should NRCS consider? What approaches could NRCS use to evaluate cost-effectiveness? Four hundred and one responders commented on NRCS’s intent to move toward actual environmental outcomes and benefits rather than the number of contracts and practices. Seven respondents suggested a national team to develop a framework for monitoring and reporting, 4 respondents wanted assurance that NRCS would include forestry performance measures in any process that is used, 10 respondents recommended encouraging scientific measurement of conservation practices, and seven respondents did not support Technical Service Providers as a measure of performance. One respondent suggested a crucial element of performance evaluation is consideration of the

cumulative impact. NRCS is actively developing approaches to evaluate performance for EQIP as well as all other conservation programs administered by NRCS. NRCS is committed to public disclosure and transparency as evidenced by the posting of data and information on the NRCS website at <http://www.nrcs.usda.gov> and the NRCS Performance and Results Measurement System (PRMS) at <http://prms.nrcs.usda.gov/prms/index.html>. NRCS will continue to refine its accountability system to make performance data available to the public.

In the final rule, NRCS removed those incentive payment factors that are an iteration of the National measures identified in the preamble of the proposed rule. The measures: increasing overall environmental benefits, addressing multiple resource concerns, ensuring more durable environmental benefits and limiting adverse ancillary impacts, encouraging innovation, supporting the statutory mandate to apply nationally 60 percent of available financial assistance to livestock-related conservation practices, and employing appropriate tools to more comprehensively serve EQIP purposes will be reviewed periodically and adjusted as necessary. The National measures will be provided in the program guidance in the EQIP Manual and will be made available to the public.

Section 1466.6 State Allocation and Management

The proposed rule provides that the State Conservationist with advice from the State Technical Committee will determine how EQIP will be implemented in the state, identify the priority resource concerns, and determine how EQIP funds will be utilized. NRCS received 47 comments regarding state level fund allocation and program management. Twelve respondents recommended that tribal land should be a State allocation factor, 4 recommend using regulatory compliance needs, and 18 suggested multi-tribal collaborative efforts. Another 12 respondents wanted assurance that the state and local decision-makers will consider forestry issues and

private non-industrial forest land as eligible for EQIP. NRCS also received one comment raising a concern that if the State Conservationist, in support of locally-led conservation, allocates EQIP funds to counties in smaller amounts the needs of the large animal facilities and large agricultural operations will not be satisfied. *The Department defines row crop, rangeland, specialty crop, animal and agroforestry as agricultural land. The state allocation process, which uses locally led conservation through advice from the State Technical Committee, is based on state identified priority resource concerns and is the second component of NRCS's optimizing environmental benefits process. EQIP has been over subscribed since 1997 and will continue to be so in the future. The economic analysis conducted to evaluate the impact of EQIP has determined that EQIP will treat approximately 10 percent of crop and grazing land. The final rule will provide specific direction to State Conservationist's to prioritize resource concerns and to do so in accordance with the National priorities.*

Four respondents commented that State allocations should consider Indian lands. Two respondents commented that a Tribal Conservation Advisory Council should be at the same level as the State Technical committee in terms of providing advice to the State Conservationist. *No rule change has been made because allocations made by the State Conservationist consider the natural resource concerns identified with advice from the State Technical Committee and Local Work Group. Indian tribes are represented on State Technical Committee under 7 CFR 610.*

Section 1466.7 Outreach Activities

One hundred and eighty seven comments made specific recommendations supporting USDA's outreach efforts to assist limited resource producers/ranchers, beginning farmers or ranchers and under-served populations. These recommendations include: permit flexible schedules for applying practices and systems; offer low-cost conservation practice alternatives;

consider the value of a producer's labor as the producer's share of the cost; utilize local cooperative extension service agencies in the education efforts; conduct a survey of producers who do not normally participate and ask them the reasons for their non-participation; provide flexibility regarding the control of land for American Indians and others. *The Department remains dedicated to increasing program availability to all eligible producers. The recommendations made in the public comments have been incorporated in the final rule where applicable or will be included in program guidance and delivery activities.*

Two respondents asked that NRCS include Tribal level in the description of where NRCS will conduct outreach activities. *The rule has not been amended because the language referred to the NRCS organizational structure and Indian tribes are specifically included as a targeted group for outreach.*

Section 1466.8 Program Requirements

One respondent recommended that the State Conservationist instead of the Chief of NRCS be given the authority to grant waivers for having control of the land allotted by the Bureau of Indian Affairs, Tribal land and other instances. *The rule has not been amended because definition of Chief includes a designee.*

NRCS received one comment expressing concern that a complete comprehensive nutrient management plan (CNMP) was required to be submitted in entirety during the initial planning phase of the EQIP application in response to NRCS's request for comments regarding how incentive payments to develop a CNMP should be implemented. *The proposed rule did not require that a full CNMP needed to be developed during the initial planning process, the proposed rule stated that a participant who receives EQIP assistance for an animal waste storage or treatment facility will provide for the development and implementation of a CNMP.*

This provision will remain unchanged in the final rule in support of the legislative intent for implementation of CNMPs in the 2002 Farm Bill.

The use of EQIP assistance for new and expanding large animal facilities received 520 comments two of which supported using EQIP for all animal facilities regardless of size and 518 respondents suggest that the final EQIP rule that prohibit funding of new and expanding large animal facilities and of large animal facilities in floodplains except to move the facility out of the floodplain. *The Department removed the restriction on providing EQIP assistance to waste storage or treatment facilities for large animal facilities in accordance with the 2002 Farm Bill. The Department supports the concept that the program assistance should be available to all operations and should be awarded to those operations that provide the optimal environmental benefits. Section 1466.20 and program direction will provide state and local decision-makers guidance for ranking of applications and selecting contracts to achieve this objective.*

NRCS received 4 comments to remove the provision to start or complete a conservation practice within the first twelve months of an EQIP contract. *NRCS believes that the purpose of EQIP is to implement conservation activities. Producers who are not ready to implement practices should not apply for assistance. However, NRCS also understands that there often are extraneous circumstances that can delay implementation, therefore, the final EQIP rule will provide an opportunity for the participant to request a waiver from the State Conservationist to delay implementation.*

NRCS received five comments regarding allowing more than one contract on a tract of land at the same time; 4 in support and one against. The proposed EQIP rule removed this eligibility requirement from the previous rule. *NRCS believes that allowing producers to have*

two or more contracts on a parcel supports the concept of “progressive planning” which allows producers to implement practices in accordance with their ability.

NRCS received two comments recommending that marketing facilities be eligible for EQIP contract. *The Department believes that the statutory intent is to direct EQIP assistance to producers for implementation of conservation practices on working agricultural land. NRCS will provide guidance with the EQIP Program Manual that non-production ancillary businesses such as agricultural supply buyers and sellers are not eligible to participate in EQIP. This interpretation also applies to producer organizations and cooperatives that provide support but do not operate working land for the production of food or fiber.*

NRCS received two comments that a producer who prematurely terminates an EQIP contract should be eligible to reapply for a new contract. *NRCS believes that the proposed rule does not prevent a participant from reapplying after prematurely terminating a contract. NRCS’s objectives are to implement cost-effective conservation and optimize environmental benefits and will award contracts to those applications that best achieve these goals. Since funds released by termination of an EQIP contract are not available for reuse on another contract, NRCS has provided, in the final rule, an option for reimbursement of administrative and assistance expenses (liquidated damages) incurred. NRCS will provide guidance in the EQIP Program Manual regarding the nature and extent of liquidated damages.*

Section 1466.9 EQIP Plan of Operations

The EQIP plan of operations identifies the time and place of the conservation practices that the applicant has decided to implement. The Department has received 485 comments requesting NRCS to reinstate the provision for conservation planning that was removed from the 1997 EQIP rule. One additional comment was received in support of the reduced planning

requirements but with a caveat that a level of planning should be maintained to assure that the implementation of one conservation practice that addresses one resource concern will not have a negative impact on another resource concern. *The Department fully supports the comment and feels the policy guidance of NRCS adequately addresses the issue. NRCS planning policy contained in the NRCS General Manual and NRCS National Planning Procedures Handbook require the assessment of positive and negative impacts as part of the technical assistance provided to producers. The objective of NRCS planning policy is a whole farm resource management plan and NRCS policy incorporates the philosophy of “progressive planning” that includes development and analysis of alternatives and documentation of the producer’s decisions. The EQIP final rule supports the “progressive planning” philosophy and allows EQIP assistance to be used to help a producer implement conservation practices as they make resource conservation decisions.*

NRCS received 19 comments related to the definition of net-water savings. *The Department will not create a National definition of “net water savings” due to the complexity of state and local water rights laws, and water programs and policies. In the final rule the responsibility for establishing a definition for “net water savings” is delegated to the State Conservationist.*

Section 1466.10 Conservation Practices

NRCS received 67 comments which did not support the provision in the proposed rule to consider only land irrigated in three out of the last five years as eligible for EQIP assistance for irrigation practices. Sixty one respondents identified that NRCS recommended crop rotations for certain crops only required irrigation two years in a five year rotation. Six comments supported assistance for irrigation on land with no irrigation history to reduce production risk and in

support of farm viability. *The Department believes EQIP resources should be utilized to reduce the environmental impacts of irrigation on water resources. The Department has changed the restriction in the final rule to provide opportunities for irrigation assistance for those crops that are irrigated two out of five years.*

NRCS received eight comments opposing the availability of incentive payments to participants for development of a CNMP especially when they are required to do so by EPA regulation. *The Department supports the statutory intent to encourage the development of comprehensive nutrient management plans and provides the state and local decision-makers the authority to offer incentive payments and to determine incentive payment levels.*

NRCS received 10 comments supporting allowing NRCS to approve interim conservation practices and financial assistance for pilot testing new technologies or innovations. Ten respondents recommended that state-of-the-art technology should not be the only basis for defining innovation and that innovation could also be defined as a particular group of producers who have not adopted a commonly accepted technology. *The Department believes that innovative approaches should be supported. NRCS has agency policy to provide for the development and implementation of innovative technology. NRCS also believes that unproven innovative technology that has not been field tested should be used cautiously until its utility is proven for a specific or wide spread application. NRCS will provide program guidance that innovation is more than state-of-the-art technology; innovation could also mean new techniques to certain groups or could also mean application evaluation approaches that consider the benefits of grouping practices rather than a scattered approach.*

Several general comments were received regarding lack of access to USDA programs and need for special considerations for Indian lands. One respondent commented about the types of

practices to be cost shared. Consideration must be given to those large blocks of land that have basic conservation practice needs or needs differing from those who have had access to programs since inception. Recommend that NRCS: (1) Develop “special project” areas that warrant the prioritization of conservation practices differing from those of the state. (2) Develop “allowable rates” for construction, labor, and material specific to the special project areas. *The final rule has not changed. The process in the proposed rule allows for implementation of EQIP at the local level to adapt program delivery for varying resource issues, costs of implementation and other unique circumstances.*

Section 1466.11 Technical and Other Assistance Provided by Qualified Personnel Not Affiliated with USDA

Four comments were received related to the inclusion of the private sector as qualified personnel who can provide EQIP assistance. *The final rule added individuals who are certified by NRCS as a Technical Service Provider (TSP) to the list of providers an EQIP participant may select from to provide assistance.*

Selection of appropriate TSP by EQIP participants was a concern of two respondents. *The proposed EQIP rule allows participants to select a TSP. Participants may choose any qualified TSP or NRCS to provide EQIP related technical assistance.*

Seven respondents asked to add 1994 Land Grant Colleges to the list of potential TSPs. *The rule has been edited to show the inclusiveness of possible TSP rather than exclusiveness by naming various groups or individuals. “Participants may use technical and other assistance from qualified personnel who are certified as Technical Service Providers by NRCS.”*

A total 46 comments on Technical Service Provider liability, certification, confidentiality and training were received. *At the time the proposed EQIP rule was developed the specifics of*

TSP were not known. The TSP interim final rule was promulgated in 7 CFR part 652 and it addresses the issues of liability, certification, confidentiality, and training.

Section 1466.20 Application for Contracts and Selecting Offers From Producers

NRCS received 58 comments suggesting the objective of cost-effectiveness was to reinstate competitive bidding and 466 respondents suggested rewriting the rule to prohibit competitive bidding. Another 14 responders recommended reinstating competitive bidding. *NRCS does not believe using cost-effectiveness means competitive bidding since the cost refers to the total cost, not just the federal cost-share. Cost-effectiveness can be interpreted two ways. First in terms of greater environmental benefits for the same cost or second, providing EQIP assistance for the least-cost alternative. NRCS believes that the first interpretation will be accomplished by the ranking processes developed by state and local decision-makers. NRCS will provide program direction that in EQIP cost-effectiveness means NRCS will provide assistance to implement the least-cost alternative that would achieve the desired resource benefits. Participants may choose to adopt more costly alternatives but they would have to bear the additional costs. The proposed rule will not be changed.*

Two respondents commented that the ranking factors should include recognition of the need for outreach or targeting of populations and areas with historically low participation rates. Additional comments recommended the insertion of tribal law compliance requirements into this section and include a reference to consulting with Tribal Conservation Advisory Councils. *The EQIP ranking criteria consider the significance of the resource concerns, not the type of land ownership. However, any unique resource concerns identified by underserved populations may be added as a priority natural resource concern through participation in the State Technical*

Committees. NRCS also intends to conduct outreach to increase program accessibility for underserved populations.

The Department received 56 comments that suggest EQIP assistance should not be used for large animal facilities. EQIP should prioritize funding to small and medium size producers and two of which supported using EQIP for all animal facilities regardless of size. Another 94 respondents suggest that EQIP should be targeted to small and medium farms and 560 recommend language to prevent discrimination against small and medium sized farms. *The Department has reviewed the economic benefits of several alternatives and determined that EQIP can treat the waste from the largest number of animal units for the least cost by allowing funding for large facilities. However, the Department also recognizes that small and medium producers may be least able to afford the adoption of conservation practices in their operation, and that EQIP may assist these producers avoid future regulations. NRCS has therefore included a provision in the final rule that the ranking process used to select application for contracts will be size neutral, that is, the process will not give preferential treatment to an application based on the size of the agricultural operation.*

Additionally NRCS received 466 comments that the EQIP application ranking process should explicitly reward sustainable practices and exceptional performance and that will prioritize the best solutions not the biggest problems. *NRCS believes that the state and local decision-makers will develop processes that achieve both cost-effectiveness and optimal environmental benefits. NRCS will provide full public disclosure by providing the EQIP ranking processes used at the state and local level on the NRCS website at <http://www.nrcs.usda.gov/programs/eqip>. NRCS intends to reward exceptional performance through the performance incentive funding.*

NRCS received 162 comments on the approval of EQIP contracts by the Regional Conservationist when the contract totals more than \$100,000. The comments related to the increased administrative burden and delay this requirement will have on the development of EQIP contracts and in producers implementing practices. *The Department feels this is a necessary component of EQIP to assure that the program is implemented to achieve the stated EQIP program objective. Therefore, the requirement is maintained in the final EQIP rule.*

More than 175 comments were received on the requirement that State Conservationist approved EQIP contracts that included practices with cost share rates greater than 50 percent. The concern was the delay this would have on EQIP contract development and practice implementation. *This requirement changed in the final rule (1466.23(d)) to allow the State Conservationist, with concurrence of the Regional Conservationist, to approve state and local EQIP practice cost lists that include any structural practice with a cost share rate greater than 50 percent. This change maintains the program objective of optimizing environmental benefits and improves program delivery compared to the proposed rule.*

Section 1466.21 Contract Requirements

NRCS received 31 comments regarding the amount of an EQIP contract. Eight respondents support a \$50,000 contract cap, 16 support a \$450,000 contract limit and seven respondents support no limit. Another 34 responders suggested the \$450,000 contract limit was an injustice against small farmers since only large farmers can afford 25 percent of \$450,000. *NRCS believes that, due to the large demand for the limited resources which have been made available for EQIP, a contract limit is appropriate at this time. The final rule will establish the maximum amount of financial assistance for an EQIP contract is \$450,000.*

NRCS also received 19 comments regarding statutory language. Three respondents opposed attribution of payments to individuals and support tracking payments to tax identification number of entities. Another 16 supported payments in the first year of a contract. *The Department does not have flexibility to change either of these provisions. The statutory limit for payments to any individual or entity, directly or indirectly, for all EQIP contracts between 2002 and 2007 of \$450,000 requires NRCS to track EQIP payments to an individual. NRCS has removed compliance with the triple entity rule (7 CFR 1400.301(a)) as an EQIP eligibility requirement.*

Section 1466.22 Conservation Practice Operation and Maintenance

The Department received no comments relative to this section of the proposed rule.

Section 1466.23 Cost-Share Rates and Incentive Payment Levels

NRCS received a total of 638 comments related to the setting of cost-share rates and incentive payment levels. The proposed rule's preamble stated that NRCS intends to fund most structural practices at no more than 50 percent cost-share. Over 545 respondents recommended that cost-shares for structural practices should be no less than 75 percent as permitted by the 2002 Farm Bill. They suggested that this provision was analogous to a "buy-down" which was removed from the previous rule; is contrary to locally-led conservation philosophy, and detrimental to the producers who have suffered severe economic hardships over the last few years. Another 177 respondents identified that the requirement in section 1466.20 of the proposed rule that established the State Conservationist as the approving authority for any EQIP contract with a structural practice with a cost-share greater than 50 percent is an administrative burden. Another 10 respondents suggested providing 90 to 100 percent cost-share rates to limited resource producers/ranchers and beginning farmers/ranchers, or 75 percent cost-share for

specific practices such as salinity control, diesel engine emission control, or wildlife plant species pollinators.

Two respondents suggested that a practice cap could be used in place of a reduced cost-share rate, 4 respondents expressed concern that the state and local decision-makers should be allowed to establish differential cost-share rates for practice that offer more environmental benefits, and three respondents suggested that producers required to develop a CNMP under the EPA CAFO/AFO rule should not be eligible for incentive payments for the development of a CNMP.

The setting of cost-share rates and incentive payment levels is the third component of optimizing environmental benefits. The guidance for optimizing environmental benefits in the proposed rule directs state and local decision-makers to identify the priority natural resource concerns and then select the most appropriate practices that will address those concerns and set rates to encourage the implementation of the best suited practices. The Department fully supports using locally-led conservation to identify the practices that will be used and setting the cost-share rates. Except for 100 percent cost-share, the final rule does not prohibit any of the recommendations received and allows for local innovation to structure a cost-effective program delivery. The Department feels the proposed rule provides the flexibility necessary for the state and local decision-makers to optimize program delivery. However, the final rule will require that the State Conservationist, with the Regional Conservationist's concurrence, must approve the EQIP cost-share lists used in the state.

NRCS received 11 comments opposing the guidance provided in the preamble of the proposed rule that “no payments will be made for land management practices that are currently accepted and practiced in the agricultural community”. *The Department believes that EQIP*

should provide cost-effective conservation. Producers who have not adopted commonly accepted techniques for their operation are in the minority and therefore the funds would most likely have a greater benefit when used for other practices. If, however, the particular circumstances warrant the implementation of these practices, the proposed rule does not prohibit the State Conservationist from offering assistance for them. The guidance will continue to be provided in the EQIP Program Manual.

An additional six respondents wanted assurance that the provision in the proposed rule to adjust EQIP cost-share to ensure that the combined financial contributions (all public and private sources) for a structural conservation practice will not exceed 100 percent and would not restrict additional cost-shares from non-USDA sources. *It is not the intent of the Department to restrict additional cost-shares that a participant may receive from non-USDA sources but to achieve cost-effectiveness, USDA will reduce EQIP assistance when non-USDA assistance together with USDA assistance for a practice exceeds 100 percent. The Department does not support providing maximum cost-share to a participant when other source of assistance bring the total to more than 100 percent of the cost of installing a structural conservation practice.*

Six respondents commented that State Tribal Conservation Advisory Council (TCAC) should be included in the setting of cost-share rates and determination of cost-share rates and incentive payment levels. Five commented that cost-share should remain at 75 percent for structural practices on Indian Nations because of the economic hardships for Indian Nations. *The rule has not been amended. Under existing rules, TCAC can be a part of the State Technical Committee that provides advice to the State Conservationist for setting cost-share rates incentive payments.*

Section 1466.24 EQIP Payments

Ten respondents commented that a social security number should not be the only number used to keep track of EQIP payments to individuals because it would create a burden for many Indians who do not have them. Additional comments expressed concern for the requirement to collect all Tribal member names and numbers within the entity because Indian Tribes entering into EQIP contracts frequently have thousands of members who actually will not receive any portion of the EQIP payment. *The rule has been amended to allow the use of individual Tribal enrollment numbers or other unique identification numbers in lieu of a social security number and only for those members who will receive a pro rata share of the EQIP payment. Tribal enrollment numbers (TEN) are unique to each individual tribal member. If the Tribal member does not have a TEN, then a social security number or other unique identifier will be used. Tribal member using the TEN identifier for payments received on tribal land will also use the TEN identified for all other EQIP contracts.*

Six respondents did not want to be classified as an entity because of the perception that the Adjusted Gross Income (AGI) limitation would apply to Indian Tribes. *Under 7 CFR 1400, Indian Tribes are exempt from the AGI qualifications.*

Section 1466.25 Contract Modifications and Transfers of Land

The Department received no comments relative to this section of the proposed rule.

Section 1466.26 Contract Violations and Termination

The Department received no comments relative to this section of the proposed rule.

Section 1466.27 Conservation Innovation Grants

This section is reserved for future regulations that address implementation of Conservation Innovation Grants.

Section 1466.30 Appeals

The Department received no comments relative to this section of the proposed rule.

Section 1466.31 Compliance with Regulatory Measures

NRCS received 15 comments supporting using EQIP funds to assist private non-industrial forest land owners develop and prepare Habitat Conservation Plans (HCP). *NRCS policy requires that all NRCS assistance must be compliant with all federal, state and local laws. EQIP does not provide any authority to do otherwise. Therefore private landowners, corporations, state or local governments, or other non-Federal landowners who wish to conduct activities on their land that might incidentally harm (or "take") a species listed as endangered or threatened must first obtain an incidental take permit from the U.S. Fish and Wildlife Service. To obtain a permit, the applicant must develop a HCP, designed to offset any harmful effects the proposed activity might have on the species. The HCP process allows development to proceed while promoting listed species conservation. NRCS will provide guidance that will allow technical assistance to be used for the development of a HCP for EQIP assisted activities that adversely affect listed species but costs or fees associated with the permit acquisition will not be an eligible cost. This concept applies to all laws, rules, and regulations that may require remedial actions; the planning can be provided through EQIP assistance but permit fees and costs cannot.*

Section 1466.32 Access to Operating Unit

NRCS received 4 comments recommending that an authorized agent of NRCS must first obtain permission before accessing a participant's property. *NRCS believes there are numerous cases where a participant may be absent from the property for a lengthy period of time, or the participant is an absentee landowner or tenant who may not be easily contacted. In order to conduct its business in a timely manner in these cases, USDA believes a reasonable effort should*

be made to contact the participant prior to accessing the property to enable the participant to attend at the same time. The program guidance documents will stipulate that the NRCS must document in the participant's file the efforts made to notify the participant before accessing the operating unit. No change was made in the final rule concerning these comments.

Section 1466.33 Performance Based upon Advice or Action of Representatives of NRCS

The Department received no comments relative to this section of the proposed rule.

Section 1466.34 Offsets and Assignments

The Department received no comments relative to this section of the proposed rule.

Section 1466.35 Misrepresentation and Scheme or Device

The Department received no comments relative to this section of the proposed rule.

List of Subjects in 7 CFR Part 1466

Administrative practices and procedures, Conservation, Natural Resources, Water Resources, Wetlands, Cost-Shares, Payment Rates.

Accordingly, part 1466 of Title 7 of the Code of Federal Regulations is amended to read as follows:

PART 1466—ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

Subpart A - General Provisions

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.

1466.10 Conservation practices.

1466.11 Technical and other assistance provided by qualified personnel not affiliated with USDA.

Subpart B – Contracts and Payments

1466.20 Application for contracts and selecting offers from producers.

1466.21 Contract requirements.

1466.22 Conservation practice operation and maintenance.

1466.23 Cost-share rates and incentive payment levels.

1466.24 EQIP payments.

1466.25 Contract modifications and transfers of land.

1466.26 Contract violations and termination.

1466.27 Conservation innovation grants.

[Reserved]

Subpart C - General Administration

1466.30 Appeals.

1466.31 Compliance with regulatory measures.

1466.32 Access to operating unit.

1466.33 Performance based upon advice or action of representatives of NRCS.

1466.34 Offsets and assignments.

1466.35 Misrepresentation and scheme or device.

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

Subpart A--General Provisions

§ 1466.1 Applicability.

Through the Environmental Quality Incentives Program (EQIP), the Natural Resources Conservation Service (NRCS) provides assistance to eligible farmers and ranchers to address soil, water, air, and related natural resources concerns, and to encourage enhancements on their lands in an environmentally beneficial and cost-effective manner and to assist producers in complying with environmental regulations. The purposes of the program are achieved by implementing structural and land management conservation practices on eligible land.

§ 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 and the Farm Service Agency (FSA) will consult, at the National level, in establishing policies, priorities, and guidelines related to the implementation of this Part. FSA may continue to participate in EQIP through participation on State Technical Committees and Local Work Groups.

(c) NRCS supports "locally-led conservation" by using State Technical Committees at the state level and Local Work Groups at the county/parish level to advise NRCS on technical issues relating to the implementation of EQIP such as:

- (1) Identification of priority natural resource concerns;
- (2) Identification of which conservation practices should be eligible for financial assistance; and

(3) Establishment of cost-share rates and incentive payment levels.

(d) No delegation in this part to lower organizational levels shall preclude the Chief of NRCS from determining any issues arising under this Part or from reversing or modifying any determination made under this Part.

(e) 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, rangeland, pasture, private non-industrial forest land, and other land on which crops or livestock are produced.

Agricultural operation means a parcel or parcels of land whether contiguous or noncontiguous, constituting a cohesive management unit for agricultural purposes. An agricultural operation shall be regarded as located in the county in which the principle dwelling is situated, or if there is no dwelling thereon, it shall be regarded to be in the county in which the major portion of the land is located.

Animal waste management facility means a structural conservation practice used for storing or treating animal waste.

Applicant means an individual, entity or joint operation who has an interest in a farming operation, as defined in 7 CFR 1400.3, who has requested in writing to participate in EQIP.

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

Beginning Farmer or Rancher means an individual or 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, and

(2) Will materially and substantially participate in the operation of the farm or ranch.

(i) 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

(ii) 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, 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 by-products 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,” or similar name.

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

Conservation practice means a specified treatment, such as a structural or land management practice, that is planned and applied according to NRCS standards and specifications.

Contract means a legal document that specifies the rights and obligations of any individual or entity who has been accepted to participate in 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 as opposed to procurement contract.

Cost-share payment means the financial assistance from NRCS to the participant to share the cost of installing a structural conservation practice.

Cost-effectiveness refers to the least-cost practices or system that achieves the stated conservation objectives.

Entity means those organizations as defined in 7 CFR 1400.3.

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

EQIP plan of operations means the identification, location and timing of conservation practices, both structural and land management, that the producer proposes to implement on eligible land in order to address the priority natural resource concerns and optimize environmental benefits.

Field office technical guide means the official local NRCS source of resource information and interpretations of guidelines, criteria, and standards for planning and applying conservation treatments 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.

Incentive payment means the financial assistance from NRCS to the participant in an amount and at a rate determined appropriate to encourage the participant to perform a land management practice that would not otherwise be initiated without program assistance.

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.) that is Federally recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

Indian land is an inclusive term describing all lands held in trust by the United State for individual Indians or tribes, or all lands, titles to which are held by individual Indians or tribes, subject to Federal restrictions against alienation or encumbrance, or all lands which are subject to the rights of use, occupancy and/or benefit of certain tribes. For purposes of this part, the term Indian land also includes land for which the title is held in fee status by Indian tribes, and the U.S. Government-owned land under Bureau of Indian Affairs jurisdiction.

Joint operation means a general partnership, joint venture, or other similar business arrangement as defined in 7 CFR 1400.3.

Land management practice means conservation practices that primarily use site-specific management techniques and methods to conserve, protect from degradation, or improve soil, water, air, or related natural resources in the most cost-effective manner. Land management practices include, but are not limited to, nutrient management, manure management, integrated pest management, integrated crop management, irrigation water management, tillage or residue management, stripcropping, contour farming, grazing management, and wildlife habitat management.

Lifespan means the period of time during which a conservation practice is to 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 \$100,000 in each of the previous two years (to be increased starting in FY 2004 to adjust for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS), 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 which the participant agrees to pay NRCS if the participant fails to adequately complete the contract. The sum represents an estimate of the anticipated or actual harm caused by the failure, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

Livestock means animals produced for food or fiber such as dairy cattle, beef cattle, buffalo, poultry, turkeys, swine, sheep, horses, goats, fish or other animals raised by aquaculture, or animals the State Conservationist identifies with the advice of the State Technical Committee.

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

Local Work Group means representatives of local offices of FSA, the Cooperative State Research, Education, and Extension Service, the conservation district, and other Federal, State, and local government agencies, including Tribes, with expertise in natural resources who advise NRCS on decisions related to EQIP implementation.

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

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

Operation and maintenance means work performed by the participant to keep the applied conservation practice functioning for the intended purpose during its life span. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and 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.

Participant means a producer who is a party to an EQIP contract.

Person has the same meaning as set out in 7 CFR 1400.3.

Priority natural resource concern(s) means an existing or pending degradation of natural resource condition(s) as identified locally by the State Conservationist or Designee with advice from the State Technical Committee and Local Work Groups.

Producer means an individual or entity who is engaged in livestock or agricultural production.

Regional Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a NRCS region.

Related natural resources means natural resources that are associated with soil and water, including air, plants, and animals and the land or water on which they may occur, including grazing land, wetland, forest land, and wildlife habitat.

Secretary means the Secretary of the U. S. Department of Agriculture.

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 Basin 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 vegetative practices, that involves establishing, constructing, or installing a site-specific measure to conserve, protect 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 planting, wildlife habitat, and capping of abandoned wells.

Technical assistance means the personnel and support resources needed to: (1) conduct conservation planning; conservation practice survey, layout, design, installation, and certification; (2) training, certification, and quality assurance of professional conservationists; and (3) evaluation and assessment of the producer's operation and maintenance needs.

Technical Service Provider means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants or to NRCS.

Wildlife means birds, fishes, reptiles, amphibians, invertebrates, and mammals along with all other non-domesticated animals.

§ 1466.4 National Priorities.

(a) The following National priorities will be used in the implementation of EQIP:

(1) Reductions of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds consistent with TMDLs where available as well as the reduction of groundwater contamination and the conservation of ground and surface water resources;

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

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

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

(b) With the advice of other Federal agencies, NRCS will undertake periodic reviews of the National priorities and the effects of program delivery at the state and local level. The Chief intends to annually review the National priorities 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 State NRCS 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 national resource needs.

§ 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 duration of the program, the Chief of NRCS will:

(a) Use an EQIP fund allocation formula that reflects National priorities and measures 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 it becomes available.

(b) Provide a performance incentive to NRCS in States that demonstrate a high level of program performance in implementing EQIP. Performance incentives shall consider factors such as strategically planning EQIP implementation, effectively addressing National priorities and measures and state and local resource concerns, the effectiveness of program delivery, the use of Technical Service Providers, and the number of contracts with Limited Resource Producers and Beginning Farmers. These funds will be made available annually from a reserve established at the National level when funds become available.

(c) Use NRCS's accountability system to establish state level EQIP performance goals and treatment objectives.

(d) Ensure that National, state and local level information regarding program implementation such as resource priorities, eligible practices, ranking processes, allocation of base and reserve funds, and program achievements is made available to the public.

(e) Consult with State Conservationists and 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 Work Groups, to determine how funds will be used and how the program will be administered to achieve National priorities and measures in each state.

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

§ 1466.6 State Allocation and Management.

The State Conservationist will:

(a) Identify State priority natural resource concerns with the advice of the State Technical Committee that directly contribute towards meeting National priorities and measures

and will use NRCS's accountability system to establish local level EQIP performance 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 the EQIP program and how to allocate funds within a state:

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

(2) The availability of human resources, incentive programs, education programs, and on-farm research programs from Federal, State, Indian Tribe, and local levels, both public and private, to assist with the activities related to the priority natural resource concerns;

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

(4) Ways and means to measure performance and success; and

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

§ 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 natural resource concerns are aware, informed, and know 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 producers, small-scale producers, Indian Tribes, Alaska Natives, and Pacific Islanders.

§ 1466.8 Program requirements.

(a) Program participation is voluntary. The applicant develops an EQIP plan of operations for the agricultural land to be treated that serves as the basis for the EQIP contract. NRCS provides participants with technical assistance, cost-share and/or incentive payments to apply needed conservation practices and land-use adjustments.

(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 7 CFR Part 12 of this title;

(2) Have an interest in the farming operation as defined in 7 CFR 1400.3.

(3) Have control of the land for the life of the proposed contract period.

(i) An exception may be made by the Chief of NRCS in the case of land allotted by the Bureau of Indian Affairs (BIA), Tribal land, or other instances in which the Chief determines that there is sufficient assurance of control;

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

(4) Submit an EQIP plan of operations that is acceptable to NRCS as being in compliance with the terms and conditions of the program; and

(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 farmer or rancher or beginning farmer or rancher and eligibility as per Adjusted Gross Income, 7 CFR 1400 Subpart G.

(c) Land used as cropland, rangeland, pasture, private non-industrial forest land, and other land on which crops or livestock are produced, including agricultural land that NRCS

determines poses a threat to soil, water, air, or related natural resources, may be eligible for enrollment in EQIP. 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 under private control for the contract period and is included in the participant's operating unit; and
 - (ii) The conservation practices will contribute to an improvement in the identified natural resource concern; or
- (3) Tribal, allotted, or Indian trust 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.

§ 1466.9 EQIP plan of operations.

- (a) All conservation practices in the EQIP plan of operations must be carried out in accordance with the applicable NRCS field office technical guide.
- (b) 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 and environmental objectives;
 - (3) A description of one or more conservation practices in the conservation management system to be implemented to achieve the conservation and environmental objectives;

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

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

(c) If an EQIP plan of operations includes an animal waste storage or treatment facility, the participant must provide for the development and implementation of a comprehensive nutrient management plan.

(d) Participants are responsible for implementing the EQIP plan of operations.

(e) A participant may receive assistance to implement an EQIP plan of operations for water conservation with funds authorized by section 1240I of the 1985 Act, 16 U.S.C. 3839aa-9, only if the assistance will facilitate a net savings in ground or surface water resources in the agricultural operation of the producer.

§ 1466.10 Conservation practices.

(a) NRCS will determine which structural and land management practices are eligible for program payments. A list of eligible practices will be available to the public.

(b) Cost-share and incentive payments will not be made to a participant for a conservation practice that the applicant has applied prior to application for the program.

(c) Cost-share and incentive payments will not be made to a participant who has implemented or initiated the implementation of a conservation practice prior to approval of the contract unless a waiver was granted by the State Conservationist or Designated Conservationist prior to the installation of the practice.

(d) A participant will be eligible for cost-share or incentive payments for irrigation related structural and land management practices only on land that has been irrigated for two of the last five years prior to application for assistance.

(e) Where new technologies or conservation practices that provide a high potential for optimizing environmental benefits have been developed, NRCS may approve interim conservation practice standards and financial assistance for pilot work to evaluate and assess the performance, efficacy, and effectiveness of the technology or conservation practices.

§ 1466.11 Technical and other assistance provided by qualified personnel not affiliated with USDA.

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

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

(c) Technical and other assistance provided by qualified personnel not affiliated with USDA may include, but is not limited to; conservation planning; conservation practice survey, layout, design, installation, and certification; information, education, and training for producers; and training, certification, and quality assurance for professional conservationists. Payments to certified Technical Service Providers will be made only for an application that has been approved for payments.

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

Subpart B—Contracts and Payments

§ 1466.20 Application for contracts and selecting offers from producers.

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

(b) The State Conservationist or Designated Conservationist with advice from the State Technical Committee or Local Work Groups will develop a ranking process to prioritize applications for funding which address priority natural resource concerns. The State Conservationist or Designated Conservationist will periodically select for funding the highest ranked applications based on applicant eligibility and the NRCS ranking process. The State Conservationist or Designated Conservationist will rank all applications according to the following factors:

- (1) The degree of cost-effectiveness of the proposed conservation practices,
- (2) The magnitude of the environmental benefits resulting from the treatment of National priorities and the priority natural resource concerns reflecting the level of performance of a conservation practice,
- (3) Treatment of multiple resource concerns,
- (4) Use of conservation practices that provide environmental enhancements for a longer period of time,
- (5) Compliance with Federal, state, local or tribal regulatory requirements concerning soil, water and air quality; wildlife habitat; and ground and surface water conservation, and
- (6) 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.

(c) If the State Conservationist determines that the environmental values of two or more applications for cost-share payments or incentive 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.

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

(e) The ranking will determine which applications will be awarded contracts. The approving authority for EQIP contracts will be the State Conservationist or designee except the approving authority for any EQIP contract greater than \$100,000 is the NRCS Regional Conservationist.

(f) The State Conservationist will make all information regarding priority resources concerns, how the EQIP program is implemented in the state, and the cost-list of eligible practices available to the public.

§ 1466.21 Contract requirements.

(a) In order for a participant to receive cost-share or incentive payments, the participant must enter into a contract agreeing to implement one or more conservation practices. Cost-share payments and incentive payments as well as reimbursement for Technical Service Provider technical assistance may be included in a 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 cost-shares and incentive 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 on the farm or ranch unit under the contract, or agricultural operation of the producer for ground and surface water conservation contracts, that would tend to defeat the purposes of the program;

(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 of the contract, consistent with the provisions of §1466.25;

(iv) Implement a comprehensive nutrient management plan when the EQIP contract includes a waste storage or waste treatment facility; and

(v) Supply information as may be required by NRCS to determine compliance with the contract and requirements of the program.

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

(5) 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

a practice within the first year of the contract, they can request a waiver from the State Conservationist.

(d) Each contract will be limited to no more than \$450,000.

§ 1466.22 Conservation practice operation and maintenance.

The contract will incorporate the operation and maintenance of conservation practices applied under the contract. The participant must operate and maintain each conservation practice installed under the contract for its intended purpose for the life span of the conservation practice as determined by NRCS.

Conservation practices installed before the execution of a contract, but needed in the contract to obtain the environmental benefits agreed upon must be operated and maintained as specified in the contract. NRCS may periodically inspect a conservation practice during the lifespan of the practice as specified in the contract to ensure that operation and maintenance are occurring.

When NRCS finds that a participant is not operating and maintaining practices in an appropriate manner, NRCS will request a refund of cost-share or incentive payments made for that practice under the contract.

§ 1466.23 Cost-share rates and incentive payment levels.

(a) Determining Cost-share payment rates.

(1) The maximum cost-share payments made to a participant under the program will not be more than 75 percent of the actual cost of a structural practice, as determined by the State Conservationist or Designated Conservationist, except that for a Limited Resource Farmer or Rancher or Beginning Farmer and Rancher cost-share payments may be up to 90 percent, as determined by the State Conservationist or Designated Conservationist.

(2) The cost-share payments to a participant under the program will be reduced proportionately below the rate established by the State Conservationist or Designated Conservationist, or the cost-share limit as set in paragraph (c) of this section, to the extent that total financial contributions for a structural practice from all public and private sources exceed 100 percent of the actual cost of the practice.

(b) Determining Incentive Payment levels. NRCS may provide incentive payments to participants for performing a land management practice or to develop a comprehensive nutrient management plan in an amount and at a rate necessary to encourage a participant to perform the practice that would not otherwise be initiated without government assistance. The State Conservationist or Designated Conservationist, with the advice of the State Technical Committee or Local Work Groups, may consider establishing limits on the extent of land management practices that may be included in a contract.

(c) Cost-share rates and incentive payment levels for conservation practices will be established by the State Conservationist or Designated Conservationist with advice from the State Technical Committee and Local Work Groups. The State Conservationist or Designated Conservationist will develop a list of eligible conservation practices with varied cost-share rates and incentive payment levels that considers:

- (1) The conservation practice cost-effectiveness and innovation,
- (2) The degree of treatment of priority natural resource concerns,
- (3) The number of resource concerns the practice will address,
- (4) The longevity of the practice's environmental benefits, and
- (5) Other pertinent local considerations.

(d) Practice cost lists that include any structural practice with greater than 50 percent cost share rate are to be approved by the State Conservationist with concurrence of the Regional Conservationist.

§ 1466.24 EQIP payments.

(a) Except as provided in paragraph (b) of this section, the total amount of cost-share and incentive payments paid to an individual or entity under this part may not exceed an aggregate of \$450,000, directly or indirectly, for all contracts entered into during FYs 2002 through 2007.

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

(1) The provisions in 7 CFR Part 1400, Payment Limitation and Payment Eligibility, subparts A and G.

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

(3) To be eligible to participate in EQIP, all individuals applying, either alone or as part of a joint operation, must provide a social security number. Where applicable; American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment.

(4) To be eligible to participate in EQIP, any entity, as identified in 7 CFR Part 1400, must provide a list of all members of the entity and embedded entities along with the members' social security numbers and percentage interest in the entity.

(5) With regard to contracts on Indian Land, payments exceeding the payment limitation may be made to the Tribal venture 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. The Tribal entity must also provide, annually, listing of individuals and payments made, by social security

number or other unique identification number, during the previous year for calculation of overall payment limitations. The Tribal entity must also produce, at the request of NRCS, proof of payments made to the individuals that incurred the costs for installation of the practices.

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

(7) Eligibility for payments in accordance with Section 7 CFR Part 1400 Subpart (G), average adjusted gross income limitation, will be determined at the time of contract approval.

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

(9) Any participant that utilizes a unique identification number as an alternative to a social security number will utilize only that identifier for any and all other EQIP contracts that the participant is party to. Violators will be considered to have provided fraudulent representation and be subject to full penalties of Section 1466.35.

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

(11) Before NRCS will approve and issue any cost-share or incentive payment, the participant must certify that the conservation practice has been completed in accordance with the contract, and NRCS or other approved Technical Service Provider certifies that the practice has been carried out in accordance with the conservation practice standards of the applicable NRCS field office technical guide.

(12) The provisions of 7 CFR 1412.505 except that refunds will be determined by the State Conservationist.

§ 1466.25 Contract modifications and transfers of land.

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

(b) The participant and NRCS may agree to transfer a contract to another producer. The transferee must be determined by NRCS to be eligible to participate in EQIP and must assume full responsibility under the contract, including operation and maintenance of those conservation practices already installed and to be installed as a condition of the contract.

(c) 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 under 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.

§ 1466.26 Contract violations and termination.

(a) (1) If NRCS determines that a participant is in violation of the terms of a contract or documents incorporated by reference into the contract, NRCS shall give the participant a reasonable 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.

(2) Notwithstanding the provisions of paragraph (a)(1) 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.

(b) (1) If NRCS terminates a contract, the participant will forfeit all rights for future payments under the contract and shall refund all or part of the payments received, plus interest determined in accordance with 7 CFR Part 1403 of this chapter. NRCS may exercise the option of requiring only 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, and the participant agrees to operate and maintain the installed conservation practice for the lifespan of the practice.

(2) If NRCS terminates a contract due to breach of contract or the participant voluntarily terminates the contract, the participant will forfeit all rights for further payments under the contract and shall pay such liquidated damages as are prescribed in the contract. NRCS will have the option to waive the liquidated damages, depending upon the circumstances of the case.

(3) When making contract termination decisions, 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 hardships beyond the participant's control that have prevented compliance with the contract.

(4) The participant may voluntarily terminate a contract if NRCS determines that termination is in the public interest.

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

§ 1466.27 Conservation Innovation Grants.

[Reserved]

Subpart C – General Administration

§ 1466.30 Appeals.

A participant may obtain administrative review of an adverse decision under EQIP in accordance with 7 CFR Parts 11 and 614. Determination in matters of general applicability, such as payment rates, payment limits, and cost-share percentages, the designation of identified priority natural 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, 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 operating unit or tract for the purpose of ascertaining the accuracy of any representations made in a contract or in anticipation of entering a contract, as to the performance of the terms and conditions of the contract. Access shall include the right to provide technical assistance, inspect any work undertaken under the contract, and collect information necessary to evaluate the performance of conservation practices in the contract. The NRCS representative shall make a reasonable effort to contact the participant prior to the exercise of this provision.

§ 1466.33 Performance based upon advice or action of representatives of NRCS.

If a participant relied upon the advice or action of any authorized representative of NRCS 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 the requirements of the program 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 Technical Service Provider will remain with the certified Technical Service Provider and will not be assumed by NRCS when NRCS authorizes payment.

§ 1466.34 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person 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 7 CFR Part 1403 of this chapter shall be applicable to contract payments.

(b) Any producer entitled to any payment may assign any payments in accordance with regulations governing assignment of payment found at 7 CFR Part 1404 of this chapter.

§ 1466.35 Misrepresentation and scheme or device.

(a) A producer who 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 7 CFR Part 1403.

(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; or

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

Signed in Washington, DC on _____, 2003.

Bruce I. Knight

Vice President

Commodity Credit Corporation

Chief

Natural Resources Conservation Service