

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

#### **§ 1466.33 Equitable relief.**

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

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

#### **§ 1466.34 Offsets and assignments.**

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

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

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

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

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

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

(2) Made any fraudulent representation;

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

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

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

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

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

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

**Arlen L. Lancaster,**

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

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

**BILLING CODE 3410-16-P**

## **DEPARTMENT OF AGRICULTURE**

### **Commodity Credit Corporation**

#### **7 CFR Part 1467**

**RIN 0578-AA47**

#### **Wetlands Reserve Program**

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

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

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

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

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

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

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

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

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

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

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

alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

**FOR FURTHER INFORMATION CONTACT:**

Robin Heard, Director, Easement Programs Division, U.S. Department of Agriculture, Natural Resources Conservation Service, Room 6819, P.O. Box 2890, Washington, DC 20013-2890; Phone: (202) 720-1854; Fax: (202) 720-9689; or e-mail: [WRP2008@wdc.usda.gov](mailto:WRP2008@wdc.usda.gov).

**SUPPLEMENTARY INFORMATION:**

**Regulatory Certifications**

*Executive Order 12866*

The Office of Management and Budget (OMB) reviewed this interim final rule and determined that this interim final rule is an economically significant regulatory action since it results in an annual effect on the economy of \$100 million or more. Pursuant to Executive Order 12866, NRCS conducted a cost-benefit analysis of the Wetlands Reserve Program. The administrative record is available for public inspection in Room 5831 South Building, USDA, 14th and Independence Avenue, SW., Washington, DC. A summary of the economic analysis can be found at the end of this preamble and a copy of the analysis is available upon request from the Director, Easement Programs Division, Natural Resources Conservation Service, Room 6819, Washington, DC 20250-2890 or electronically at: <http://www.nrcs.usda.gov/programs/wrp/> under the *Program Information* title.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act is not applicable to this interim final rule because the Commodity Credit Corporation (CCC) is not required by 5 U.S.C. 553, or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

*Environmental Analysis*

A programmatic environmental assessment has been prepared in association with this rulemaking. The analysis has determined that there will not be a significant impact to the human environment and as a result an Environmental Impact Statement is not required to be prepared (40 CFR part 1508.13). The Environmental (EA) Analysis and Finding of No Significant Impact (FONSI) are available for review and comment for 60 days from the date of publication of this interim final rule in the **Federal Register**. A copy of the

EA and FONSI may be obtained from the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/](http://www.nrcs.usda.gov/programs/Env_Assess/). A hard copy may also be requested from the following address and contact: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington DC 20250. Comments from the public should be specific and reference that comments provided are on the EA and FONSI. Public comment may be submitted by any of the following means: (1) e-mail comments to [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), (2) e-mail to e-gov Web site [www.regulations.gov](http://www.regulations.gov), or (3) written comments to: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington DC 20250.

*Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that the issuance of this rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. Copies of the Civil Rights Impact Analysis are available, and may be obtained from the Director, Easement Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890, or electronically at <http://www.nrcs.usda.gov/programs/WRP>.

*Paperwork Reduction Act*

Section 2904 of the Food, Conservation and Energy Act of 2008 requires that the implementation of this provision be carried out without regard to the Paperwork Reduction Act, Chapter 35 of title 44, United States Code. Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this interim final rule.

*Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork Elimination Act and 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.

*Executive Order 12988*

This interim final rule has been reviewed in accordance with Executive Order 12988, Civil Justice Reform. The provisions of this interim final rule are not retroactive and preempt State and local laws to the extent that such laws

are inconsistent with this interim final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 11, 614, and 780 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 Act of 1994 (Pub. L. 103-354), NRCS classified this rule as non-major. Therefore, a risk analysis was not conducted.

*Unfunded Mandates Reform Act of 1995*

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531-1538), USDA assessed the effects of this interim final rule on State, local, and Tribal governments, and the public. This rule 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 is not required.

*Small Business Regulatory Enforcement Fairness Act of 1996*

This interim final rule is a major rule as defined by Section 804 of the Small Business Regulatory Enforcement Fairness Act of 1996. This interim final rule will not result in an annual effect on the economy of \$100 million or more, a major increase in costs or prices, or significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based companies to compete in domestic and export markets. However, Section 2904(b) and (c) of the Food, Conservation, and Energy Act of 2008 requires that the Secretary use the authority in section 808(2) of title 5, United States Code, which allows an agency to forego SBREFA's usual 60-day Congressional Review delay of the effective date of a major regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to implement this regulation as an interim final rule and have the rule effective immediately in order to meet the Congressional intent to have the conservation programs authorized or amended by Title II in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the Federal Register.

*Executive Order 13132*

E.O. 13132 requires NRCS to develop an accountable process to ensure "meaningful and timely input by State

and local officials in the development of regulatory policies that have federalism implications." E.O. 13132 defines the term "Policies that have federalism implications" to include regulations that have "substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government." Under E.O. 13132, NRCS may not issue a regulation that has federalism implication, that imposes substantial direct compliance costs, and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments, or NRCS consults with State and local officials early in the process of developing the proposed regulation. NRCS shows sensitivity to Federalism concerns by requiring the State Conservationist to meet with and provide opportunities for involvement of State and local governments through the State Technical Committee. This interim final rule will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government as specified in E.O. 13132. Thus, the Executive Order does not apply to this rule.

#### *Executive Order 13175*

This interim final rule has been reviewed in accordance with Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this interim final rule on Indian Tribal Governments and has concluded that this rule will not negatively affect communities of Indian Tribal governments. The rule will neither impose substantial direct compliance costs on Indian Tribal governments, nor preempt Tribal law.

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

This interim final rule with request for comment amends the existing Wetlands Reserve Program (WRP) regulations. The Commodity Credit Corporation and the Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), publishes this interim final rule with request for comment to incorporate programmatic changes as authorized by amendments in the Food, Conservation, and Energy Act of 2008 (2008 Act). The Commodity Credit Corporation (CCC) and the Natural Resources Conservation Service

(NRCS) are not required by 5 U.S.C. 553 or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule. Section 2904 of the 2008 Act requires regulations to be published within 90 days after the date of enactment and authorizes CCC and NRCS to promulgate an interim final rule effective upon publication with an opportunity for notice and comment. CCC and NRCS have determined that an interim final rule is necessary to expedite the effective date of rulemaking in order to meet the intent of Section 2904 of the 2008 Act.

#### *Economic Analysis—Executive Summary*

Pursuant to Executive Order 12866, Regulatory Planning and Review, the Natural Resources Conservation Service (NRCS) has conducted a benefit-cost analysis of the Wetlands Reserve Program (WRP) as formulated for the Interim Final Rule. This requirement provides decision makers with the opportunity to develop and implement a program that is beneficial, cost effective, and that minimizes negative impacts to health, human safety, and the environment. Congress passed amendments to the program that requires the Secretary of Agriculture, within 90 days after the enactment of the WRP amendments, to promulgate regulations necessary to carry out the program.

In considering alternatives for implementing WRP, the United States Department of Agriculture (USDA) followed the legislative intent to optimize environmental benefits, address natural resource concerns and problems, establish an open participatory process, and provide flexible assistance to producers who apply appropriate conservation measures that enable the satisfaction of Federal and State environmental requirements. Because WRP is a voluntary program, the program will not impose any obligation or burden upon agricultural producers who choose not to participate. The program has been authorized by the Congress with an acreage target for program participation. Funding for WRP comes from the Commodity Credit Corporation.

The WRP provides technical and financial assistance to eligible landowners to address wetland, wildlife habitat, soil, water, and related natural resource concerns on private lands in an environmentally beneficial and cost-effective manner. As will be discussed later, WRP program costs are the main costs to consider in this analysis. The WRP is an important tool in restoring

and protecting wetlands along with the efforts of other governmental agencies, non-profit organizations, and landowners. Land enrolled in WRP can produce substantial improvements in on-site resource conditions and at the same time substantial off-site environmental benefits for the public-at-large can also accrue. These on site and off-site benefits could include: Creation of high value wetlands, control of sheet and rill erosion as lands are converted from cropland to wetlands, creation and protection of habitat for fish and wildlife, including threatened and endangered species and migrating birds; improving water quality by filtering sediments and chemicals; reducing flooding; recharging groundwater; protecting biological diversity; controlling invasive species with planting of natural vegetation; as well as providing opportunities for educational, scientific, and recreational activities. To some extent, air quality could be improved by reduced wind erosion and by an increase in carbon stored in the soil and reestablished vegetation, leading to reduced atmospheric amounts of carbon. Many of these benefits are difficult to quantify, although several studies have attempted to do so. One such study, published in 2008, found that the "public willingness to pay to enroll an additional acre of typical fresh water marsh in the WRP is about \$425 annually." Capitalizing this benefit flow at a seven percent rate produced a per acre value of over \$5,800 for permanent easement agreements; a value of over \$5,200 for 30-year easement agreements; and a value of almost \$3,000 on 10-year restoration agreements. Using a three percent discount rate, these values become \$10,935, \$8,330, and \$3,625, for the three types of agreements discussed above, respectively. These values take into consideration private benefits that may be derived, such as income from any fishing, hunting fees, and other recreational activities that may be realized by WRP landowners.

The main program costs include the purchase of easements and wetland restoration expenses with the program. Although agricultural production ceases from lands enrolled in WRP, this output effect is expected to be small given that WRP parcels are usually marginal agricultural lands poorly suited for efficient agricultural production. Agricultural production from lands better suited to agricultural use can easily compensate for reduced production from newly enrolled WRP land. Approximately 89.8 percent of the WRP funding has been used for

permanent easement projects; about 7.9 percent for 30-year easement projects and about 2.4 percent for restoration cost-share agreement projects. The associated FY 2007 average per acre program costs for these projects were estimated at \$3,000 for permanent easements, almost \$1,100 for 30-year easements, and nearly \$670 for restoration cost-share agreements.

A comparison of total economic benefits and costs related to restoring and protecting wetlands on a “typical acre” suggests that WRP can produce substantial economic net benefits.

### Method of Analysis and Key Results

The method of analysis for this study relied heavily on program managers’ experience and assumptions. For example, the analysis team relied on program managers to identify important variables to consider when developing plausible scenarios. The analysis team took this information and constructed a small spreadsheet model. The current policy scenario for this analysis is program performance similar to those in FY 2007 persisting throughout FY 2009–FY 2012. A key variable in this scenario was the FY 2007 easement acquisition valuation methodology: Primarily by an appraisal of the fair market value of a parcel before the easement was in place minus the fair market value of the parcel after the easement was in place—an approach adopted by NRCS on recommendations from the USDA Inspector General’s Office. Program managers felt that the post-FY 2007 valuation methodology was the main driver that caused the appraised value of parcels in many states to fall below the state’s geographic cap and in turn causing a shift in program acres across states as compared to past years. These changes shifted WRP acreage from states with relatively low acquisition costs to those with relatively high acquisition costs which increased average national per acre WRP costs significantly. The switch in methodology did not result in NRCS paying more for the same easement than it would have paid under the old methodology, but rather significantly reduced the amount the agency could offer to landowners for an easement in some states, causing landowners to lose interest in the program. The current policy scenario assumes that the FY 2007 valuation method will be employed and drives model results that suggest total national WRP acreage would only increase by 294,200 acres over the FY 2009–FY 2012 period.

The changes in the 2008 Act return the valuation methodology to the valuation practices used before FY 2007.

As a result, program managers expect the distribution of acres enrolled in the program to revert back to its previous pattern. This geographic re-positioning is expected to be associated with lower average easement costs (assumed to be the fair market value of land using the Uniform Standards of Professional Appraisal Practices or an area-wide market analysis) and for geographic caps to be the primary means used to determine compensation rates. With the lower geographic per acre project costs becoming more relevant (assumed to be 25 percent lower than FY 2007 levels and those assumed in the baseline scenario), WRP acreage is expected to increase by 600,000 acres over the FY 2009–FY 2012 period—a substantial increase over the continuation of the existing valuation method.

Because per acre benefits exceed costs regardless of policy scenario assumed, all model results suggest that net benefits from WRP are positive.

### Conclusions

This WRP benefit-cost analysis assumes that the major driver in program costs over the FY 2009–FY 2012 period will be the method of easement evaluation. The single discretionary policy item available to NRCS does not alter this result. This item pertains to the creation of the Wetland Reserve Enhancement Program (WREP) that would allow States, non-governmental organizations, or Indian tribes to partner with USDA in the selection and funding of contracts, as long as selected contracts meet the purposes of WRP.

Data on past WRP enrollment suggests that the 2008 Act changes related to easement compensation could lead to lower national average per-acre offer prices paid for easements when compared to pre-fiscal year (FY) 2007. This prediction is dependent upon where acreage is predominantly enrolled. NRCS anticipates that the new compensation methodology will encourage re-establishment of historic enrollment patterns. The assumptions in this analysis suggest the per-acre average costs on WRP could be reduced by about 25 percent. Although costs are expected to be reduced, there are no environmental studies to suggest that environmental benefits from such a change will be altered. Additional technical information from such sources as the Conservation Effects Assessment Project, plus empirical data on the nature of the types of environmental benefits being generated on WRP land across the United States would be necessary.

Although benefits of wetlands have been estimated on specific sites in a generalized fashion, researchers of many of these past studies caution in transferring benefits to other areas or to be interpreted as “average” values of a typical wetland type. That caveat notwithstanding, the conclusions of this analysis suggests that the monetary and non-monetary benefits from WRP in restoring and placing easements on wetlands can exceed total program costs.

### Discussion of Program

#### Background

Wetlands have long been recognized as critical to the environment and ecosystem health. They provide a protective buffer for our towns and cities against floods and storm surges; they are the habitat for hundreds of species; and they connect aquatic and terrestrial ecosystems. The Nation’s wetlands provide an array of benefits to society and affect the Nation’s economic, ecological, and cultural heritage.

The WRP is a voluntary program providing technical and financial assistance to eligible landowners to restore and protect wetlands. Protecting wetlands provides wildlife habitat, as well as enhancement of soil, water, plants, and related natural resource concerns. Floodplain forests, prairie potholes, and coastal marshes are among the wetlands restored through WRP. More than 2 million acres have been enrolled in WRP since the program’s inception.

Title XIV of the Food Agriculture, Conservation, and Trade Act of 1990 (the 1990 Farm Bill), amended the Food Security Act of 1985 to provide for the establishment of the Wetlands Reserve Program. The Secretary of Agriculture delegated responsibility for the WRP to the Agricultural Stabilization and Conservation Service (ASCS), and ASCS published a proposed rule followed by a final rule in 1992. Thereafter, ASCS implemented a pilot program effort in 9 States.

In 1994, ASCS expanded the pilot program implementation of WRP to 20 States and published an interim final rule for the program. Also in 1994, the Department of Agriculture Reorganization Act of 1994 (the Reorganization Act) authorized the establishment of NRCS as the successor agency to the Soil Conservation Service. The Reorganization Act also transferred responsibility for the WRP to NRCS, and NRCS published an interim final rule in June 1995.

Under the NRCS interim final rule, NRCS expanded the program to all 50 States, and made other program adjustments to align WRP with real property acquisition policies. These changes included providing participants with a single payment at easement closing, and the holding of the easement deed by the United States of America in accordance with the Department of Justice Title Standards.

The Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Farm Bill), Public Law 104–387, modified several aspects of WRP, including offering enrollment through a non-easement option, placing equal enrollment priority among the three enrollment methods, and requiring that eligible lands maximize wildlife benefits.

In the August 1996 final rule, NRCS incorporated the changes mandated by the 1996 Farm Bill and responded to comments received to the 1995 interim final rule. The Farm Security and Rural Investment Act of 2002 (the 2002 Farm Bill), Public Law 107–171, expanded the ability of the Secretary to grant a waiver for ownership changes due to foreclosure on the land when the owner of the land exercises a right of redemption from the mortgage holder, in accordance with State law, immediately before the foreclosure. NRCS incorporated this non-discretionary change in a direct final rule published in the **Federal Register** in June 2002.

The 2008 Act made a number of changes to WRP, including raising the enrollment cap to 3,041,200 acres through 2012; limiting program eligibility to private lands and acreage owned by Indian Tribes; determining the rate of compensation for easements or 30-year contracts enrolled in the program; requiring ownership of the land for 7 years under the easement enrollment option; expanding the ranking criteria; and adding a 30-year contract enrollment option on acreage owned by Indian Tribes. In addition, the 2008 Act revises the authority for the Wetlands Reserve Enhancement Program and a grazing rights pilot within that revised program, and makes agricultural lands flooded from the natural overflow of a closed basin lake or pothole within the Prairie Pothole Region eligible for enrollment without requiring that the land be a farmed wetland or converted wetland.

The 2008 Act incorporated two specific changes limiting the participation of public agencies in the implementation of WRP after September 30, 2008. First, the 2008 Act limited enrollment of eligible land to private

land and acreage owned by Indian Tribes. In this manner, lands owned by a State Department of Natural Resources could not be enrolled in the program, even if the operator of those lands was a private individual. Previously, such lands were eligible for enrollment.

Second, Section 1603(f)(6) of the 1985 Act, as amended by Title I of the 2008 Act, provides that a State or local government is not eligible to receive any payment, benefit, or loan under Title XII of the 1985 Act. This prohibition includes WRP easement and restoration payments. Therefore, NRCS identifies how it will address these limitations upon public agency participation dependent upon which stage of the process a project was as of October 1, 2008.

For land that was enrolled in WRP and was owned by a public entity prior to October 1, 2008, NRCS will complete the acquisition and restoration of the project and make appropriate payment to the public entity. The rationale for completing the acquisition and restoration is that a recent change in the NRCS business process, which separates the dates of obligation of acquisition and restoration and thereby results in the obligation for restoration to occur several months later than the obligation for acquisition, has delayed obligation of restoration funds beyond the control of state and local governments. Although restoration funds for the project will not be obligated to such projects until after October 1, 2008, NRCS has determined that restoration payments are appropriate because government entities were eligible to receive restoration payments when the land was enrolled or purchased because the restrictions on public lands eligibility in the WRP statute and on payments to government entities in Section 1603(f)(6) of the 1985 Act, as amended by the 2008 Act, did not go into effect until October 1, 2008. The WRP statute authorizes NRCS to cost-share to the extent the Agency determines that cost-share is appropriate and in the public interest.

For land that was enrolled in WRP and was owned by a private person or legal entity or Indian Tribe prior to October 1, 2008, but on or after October 1, 2008, the private landowner or Tribe transfers ownership of the land to a public entity, NRCS will cancel the enrollment if the easement acquisition has not been completed.

For land that was enrolled in WRP and was owned by a private person or legal entity or Indian Tribe prior to October 1, 2008, but on or after October 1, 2008, the private landowner or Tribe transfers ownership of the land to a

public entity, and NRCS has completed the easement acquisition and made payment to the private landowner, NRCS will not cancel the enrollment. The easement will remain in place; and no refund will be sought from the private landowner. However, NRCS will not obligate funds to restore the land encumbered by the easement because NRCS has determined that it is not authorized to make payment to the public entity owner because of the restrictions in Section 1603(f)(6) of the 1985 Act, as amended by the 2008 Act. NRCS will work with the new public entity landowner to encourage the public entity to implement the provisions of the NRCS-approved WRPO at its own expense.

If the private land or acreage owned by an Indian tribe is enrolled after September 30, 2008, and prior to completion of the restoration activities the land is acquired by a public entity, NRCS will not obligate funds for restoring the land encumbered by the easement because NRCS has determined that it is not authorized to make payment to the public entity owner because of the restrictions in Section 1603(f)(6) of the 1985 Act, as amended by the 2008 Act. Further, NRCS will consider failure to complete restoration of the wetlands a violation of the terms of enrollment. As a violation, under the WRP statute, NRCS has the right to have the easement remain in force and to seek a refund of payments made in furtherance of the enrollment. A violation may be avoided if the new public entity landowner implements all provisions of the NRCS-approved WRPO at its own expense.

#### Summary of 2008 Act Changes

The 2008 Act amended the Wetlands Reserve Program to:

- Add a new enrollment method for Tribal lands through 30-year contracts;
- Expand land eligibility under WRP to cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of a closed basin lake or pothole, as determined by the Secretary, together (where practicable) with the adjacent land that is functionally dependent on the cropland or grassland;
- Require that an easement cannot be created on land that changed ownership within the previous 7-year period. Previously, the ownership requirement was for 12 months;
- Limit eligible land to private or tribal land;
- Add restoration, protection and enhancement of wetlands as WRP purposes;

- Revise the authority for the Wetlands Reserve Enhancement Program;
- Require NRCS to conduct a survey of the prairie pothole regions to inform the allocation process of WRP funds to that region;
- Base easement compensation on the lowest of three values: The fair market value of the land determined through either an appraisal or market analysis; a geographic cap; or the landowner offer;
- Establish an easement compensation payment schedule depending upon the value of the easement;
- Require a yearly payment limitation for restoration cost-share agreements of \$50,000 per year and to clarify that the \$50,000 yearly restoration cost-share payment limitation applies to any person or legal entity;
- Extend the existing waiver of the \$50,000 yearly payment limitation to 30-year contracts;
- Identify that maintenance is an activity eligible for cost-share assistance;
- Add ranking criteria regarding maximizing environmental benefits; and
- Allow the spraying or mowing of land enrolled in the program if necessary to meet habitat needs of specific wildlife species.

### Section by Section Analysis

#### Section 1467.1 Applicability

The term “Department” is changed to “NRCS” where it occurs in § 1467.1 and throughout the regulation to clarify that NRCS implements the program and disburses payments to participants. Prior to 2002, the Farm Service Agency (FSA) disbursed WRP payments on behalf of CCC. In 2002, NRCS assumed responsibility for disbursing WRP payments.

The reference to processing outstanding and new applications for enrollment during calendar year 1995 has been removed as moot. There are no longer any outstanding applications from prior to 1995. The reference to the Trust Territories of the Pacific Islands has been removed to reflect more accurately the geographic scope of the program.

#### Section 1467.2 Administration

Section 1467.2(c) that required concurrence between NRCS and FSA related to WRP policies, priorities and guidelines is removed, reflecting that the program has been delegated to NRCS. NRCS and FSA concurrence remains a program requirement under Section 246 of the Department of Agriculture Reorganization Act (Pub. L.

103–354; 7 U.S.C. 6962(c)). NRCS and FSA will continue its working relationship regarding coordination of WRP policies with FSA activities, especially in the case where CRP and WRP enrollment are impacted by the county acreage cap limitations.

Section 1467.2(d) is re-designated as § 1467.2(c) and revised to clarify that the role of the State Technical Committee is to advise rather than consult with NRCS in program implementation. Given the regulatory connotation associated with consultation requirements under the Endangered Species Act, NRCS determined that the term “advice” better reflects the relationship between NRCS and the State Technical Committees. Additionally, this paragraph is revised to clarify that the advice of the State Technical Committee will be sought in the development of the geographic area rate caps of compensation which is addressed more fully in § 1467.8.

Section 1467.2(e) is re-designated as § 1467.2(d) and revised to clarify that other Federal and State agencies to which NRCS may delegate easement management responsibilities must have the needed authority, expertise, and resources to carry out the responsibilities. This clarification will ensure that this authority is implemented as intended by statute. Throughout WRP program implementation, NRCS has worked in close partnership with other Federal and State agencies regarding management of adjacent and contiguous conservation areas, and will continue to do so.

Section 1467.2(f) is re-designated as § 1467.2(e) and incorporates the term “technical assistance” in the language regarding the use of cooperative agreements to obtain services from other agencies and organizations. “Technical assistance” is defined in section 2001 of the 2008 Act, and is used in this regulation to cover the various forms of assistance that other parties may provide rather than listing specific types of assistance.

Section 1467.2(g) is re-designated as § 1467.2(f) and clarifies that the role of the U.S. Department of the Interior’s Fish and Wildlife Service (FWS) is in consultation regarding land eligibility. The additional references to FWS and the Forest Service are removed, because the authority to consult with other Federal or State agencies on issues related to WRP implementation is covered in other parts of the regulation and is redundant here. References to the U.S. Department of the Interior’s Fish and Wildlife Service have been changed

to “FWS” where it occurs throughout the regulation to streamline terminology.

Section 1467.2 (h) is re-designated as § 1467.2(g) and expands authority for the Chief of NRCS to allocate funding pools to encourage program participation among historically underserved producers as authorized by Section 1244 of the Food Security Act of 1985, as amended (16 U.S.C. 3844).

#### Section 1467.3 Definitions

Definitions of the terms used in this regulation are set forth in § 1467.3 to provide consistent interpretations for the public and for NRCS personnel. These definitions are consistent with statutory changes and with the revisions to 7 CFR part 1467 contained herein.

The term “*Acreage owned by Indian Tribes*” is added to define the term as used by the amendment made by the 2008 Act. The term is defined broadly to include lands held in trust for Indian Tribes, and to increase program accessibility and to allow for the greatest opportunity for Indian Tribal participation in the program through the use of 30-year contracts, which may be more conducive to requirements on trust lands, which are owned by the Tribe, but held in trust by another agency or entity.

The term “*Activity*” is added to define the meaning of the term used in the regulation and refer to maintenance and management activities that are essential parts of a restoration agreement. The statute specifies that cost-share payments may be provided for management and maintenance activities, which does not always involve a full conservation practice.

The term “*Agreement*” is added to specify that it is a legal document that describes the rights and obligations of NRCS and program participants.

The term “*Agricultural commodity*” is revised to reflect the definition provided in § 1201(a)(1) of the Food Security Act of 1985, as amended, providing consistency with other Title XII programs.

The term “*Beginning farmer or rancher*” is added to clarify who is eligible to be enrolled under provisions specific to historically underserved producers, which is referenced under § 1467.2(g).

The term “*Conservation district*” is revised to reflect the definition provided in § 1201(a)(5) of the Food Security Act of 1985, providing consistency with other Title XII programs.

The term “*Conservation practice*” replaces the term “*practice*,” and clarifies that conservation practices implemented in WRP meet NRCS

standards and specifications, and provides a consistent definition across all easement programs.

The term “*Contract*” is revised to clarify that it is a legal document that specifies the rights and obligations of NRCS and program participants.

The term “*30-year Contract*” is added to reflect the statutory addition of the 30-year contract enrollment option for acreage owned by Indian Tribes.

The term “*Converted wetland*” is revised to reflect the definition in § 1201(a)(7) of the Food Security Act of 1985, as amended, providing consistency with other Title XII programs.

The term “*Cost-share payment*” is revised to clarify that payments are made to carry out conservation practices and activities on enrolled lands.

The term “*Department*” is removed. References to “*Department*” throughout 7 CFR part 1467 are replaced with “*NRCS*,” the Natural Resources Conservation Service, an agency of the U.S. Department of Agriculture responsible for carrying out the program.

The term “*Easement payment*” is revised to include the consideration paid to an Indian Tribe or to tribal members participating through the 30-year contract option, because the managers expressed that the 30-year contract option would provide the same payment as a 30-year easement, but would not be a real property transaction.

The term “*Easement Restoration Agreement*” is added to specify that an easement restoration agreement will be the agreement used to implement the Wetland Restoration Plan of Operations (WRPO) for easements and 30-year contracts and mechanism for providing cost-share assistance to participants to carry out restoration and maintenance as planned in the WRPO under such enrollments.

The term “*Forest Service*” is removed as it is duplicative to all-inclusive references to “other Federal and State agencies” throughout the regulation.

The term “*Fish and Wildlife Service (FWS)*” replaces the term “*U.S. Fish and Wildlife Service*” and such term refers to the same agency within the United States Department of the Interior.

The term “*Historically underserved producer*” is added to refer to the specific groups of producers to which the Chief may direct funding through funding pools specifically to encourage participation, and to provide consistency with related conservation programs administered by NRCS.

The term “*Indian Tribe*” is added and adopts the definition in § 4(e) of the

Indian Self-Determination and Education Assistance Act (25 U.S.C. 450b(e)).

The term “*Landowner*” is revised to reflect that such term includes legal entities and refines the applicability of the term from the overly broad term “*farmland*” to eligible land since the 2008 Act amended the WRP statute to limit eligibility to private and Tribal lands, including lands held in trust for Indian tribes. “*Remaindermen in a farm property*” is removed because remaindermen in a property do not have a current legal ownership of the land.

The term “*Legal entity*” is added to respond to statutory changes, which limit eligible land to private and Tribal land and place a payment limitation to a person or a legal entity. The term “*limited resource farmer or rancher*” is added to clarify who is eligible to be enrolled under provisions specific to historically underserved producers at § 1467.2(g).

The term “*Maintenance*” is added to reflect statutory changes that incorporate maintenance as a cost-shareable activity.

The term “*Natural Resources Conservation Service*” is revised to clarify that NRCS carries out program implementation using the funds, facilities, or authorities of the Commodity Credit Corporation (CCC). In the definition “*Department*” is replaced with “*NRCS*” and reference to the Soil Conservation Service is removed.

The term “*Option agreement to purchase*” is added to describe the legal document used to authorize NRCS to proceed with the easement acquisition process and which binds the landowner to sell a conservation easement upon exercise of the option by NRCS.

The term “*Participant*” is added to simplify reference throughout the regulations to persons or legal entities who have been accepted to participate in the program.

The term “*Person*” is revised in response to statutory changes that eliminated governmental entity eligibility under the program. The term “*person*” now refers only to a natural person, a legal entity, or an Indian Tribe, but does not include governments or their political subdivisions.

The term “*Prairie Pothole Region*” is added to reflect statutory changes requiring an assessment of program demand in the “*Prairie Pothole Region*” and consideration of those needs in allocation formulas. The definition establishes the geographic scope of the prairie pothole region, as it existed on June 18, 2008.

The term “*Private land*” is added to reflect statutory changes that excluded land owned by State and local governments from being eligible to enroll in the program.

The term “*Restoration Cost-Share Agreement*” is added to clarify that the restoration agreement is the contract used to describe the rights and obligations of participants who have been accepted to participate in the WRP restoration cost-share enrollment option. This agreement is used to carry out the WRPO and to identify the cost-share assistance NRCS will provide to the participant for implementing the conservation practices and activities in the Wetland Restoration Plan of Operations.

The term “*Riparian areas*” is revised to correct the spelling of the word “*vegetative*.”

The term “*Socially disadvantaged farmer or rancher*” is added to clarify who is eligible to be enrolled under provisions specific to historically underserved producers at § 1467.2(g).

The term “*State technical committee*” is revised to remove unnecessary reference to the State Conservationist as the chair of the committee; this role is established through regulations found at 7 CFR 610.22(a).

The term “*United States Department of Agriculture (USDA)*” replaces the use of the term “*U.S. Department of Agriculture*.”

The term “*Wetland*” is amended to remove adjacent lands from the definition of wetland for consistency with the statute. Adjacent uplands, while they may be eligible for the program, are technically not wetlands.

The term “*WRP*” has been removed as unnecessary since the term is adequately described in § 1467.1.

The term “*Wetlands Reserve Plan of Operations (WRPO)*” is revised to add the definition of the WRPO and describe the purpose of this conservation plan. In particular, the WRPO is the conservation plan that identifies how the wetland functions and values will be restored, improved, and protected and which is approved by NRCS.

#### Section 1467.4 Program Requirements

Section 1467.4(a) is revised to incorporate the statutory addition of the 30-year contract enrollment option available only on acreage owned by Indian Tribes. Additionally, § 1467.4(a) is revised to clarify that cost-share assistance under the easement or 30-year enrollment option will be provided through the easement restoration agreement and that cost-share assistance under the restoration cost-share enrollment option will be provided



through the restoration cost-share agreement.

Section 1467.4(b) is revised to remove reference to CRP easements with respect to a county cap limitation since this enrollment option is not provided through the existing CRP. Additionally, the 2008 Act removed the ability to waive the 10% limitation of cropland that can be enrolled through an easement option under WRP. Therefore, this paragraph has been revised to reflect the 2008 Act amendments.

Section 1467.4(c) is revised to clarify that eligible program participants are persons or legal entities or Indian Tribes and are subject to the adjusted gross income (AGI) limitation and highly erodible land and wetland compliance provisions of the Food Security Act of 1985, as amended. Indian Tribes are exempted from the AGI and payment limitations by 7 CFR Part 1400.600(g).

Section 1467.4(c)(2) is revised to reflect the statutory change in required ownership period from 12 months to 7 years. NRCS will determine the 7-year ownership requirement at the time NRCS determines the eligibility of the land offered for enrollment. Previously, NRCS measured ownership duration at the time of application. However, NRCS determined that as an eligibility criterion, ownership duration should be determined as part of the eligibility review of a project.

A new § 1467.4(d)) is added to specify that land that is accepted for enrollment in an easement, but is sold or transferred prior to the easement being perfected will be removed from enrollment. The new landowner may file a new application so that all landowner eligibility criteria may be examined and documented appropriately. However, the land eligibility, ranking, and other administrative determinations that relate to the land will remain valid for the remainder of the funding cycle.

Section 1467.4(d) is redesignated as § 1467.4(e) and is revised to reflect the requirement made by the 2008 Act amendments that land must be private land or acreage owned by Indian Tribes to be eligible for WRP.

Section 1467.4(e)(3), formerly § 1467.4(d)(2), is revised to provide the new eligible land category for flooded lands within a closed basin lake or pothole as established by the amendments in the 2008 Act. This change authorizes the enrollment of lands that are currently inundated.

Section 1467.4(e)(4) is revised to add clarity related to lands that may be considered farmed wetland or converted wetland, and conform to revisions made in § 1467.4(e)(3). The lands identified

were previously identified in regulation but the revision ties their identification more clearly to statutory criteria.

Section 1467.4(e)(5) Prairie Pothole Region adds new language to provide eligibility criteria for land being enrolled under the new eligibility category of flooded lands in a closed basin located in the Prairie Pothole Region as defined in § 1467.3. The Prairie Pothole Region is defined as the counties designated as part of the Prairie Pothole National Priority Area for CRP as of June 18, 2008. This designation is chosen because it is clearly delineated and is already an established and well-known designation. The 2008 Act amendments require that lands under this section maximize wildlife benefits and wetland values and functions and be restorable. In order for a wetland to be restorable, the soils must be hydric, and the depth of the water cannot exceed 6.5 feet because water over this level is considered open water, not a wetland. The minimum size requirement of 20 contiguous acres is included to focus enrollment on lands that are not eligible under the Conservation Reserve Program Flooded Farmland program, which allows enrollment of parcels under 20 contiguous acres in size.

Section 1467.4(e)(6) restructures language previously under § 1467.4(d)(3)(iii) through (vi) regarding eligibility of lands adjacent to land eligible under § 1467.4(e)(3). The change results in increased cohesiveness in the description of eligible lands and more clearly comports with statutory intent by rewording the existing language. Land identified in this paragraph may include types of land that could be considered eligible under § 1467.4(e)(3). For example, paragraph (e)(6) identifies restored wetlands as eligible adjacent lands. However, some restored wetlands that are not adjacent to eligible land may be identified as farmed wetlands and thus eligible under § 1467.4(e)(3), while other restored wetlands may not have an agricultural history, and thus would only be eligible as adjacent eligible land under paragraph (e)(6). The identification of restored wetlands under paragraph (e)(6) is not intended to preclude the enrollment of restored agricultural wetlands under § 1467.4(e)(3), but to facilitate the enrollment of restored adjacent non-agricultural wetlands if their enrollment furthers the functions and values of eligible agricultural wetlands.

Section 1467.4(e)(7) is revised to clarify that eligible land must be configured with boundaries that allow for efficient management for the program purposes, as determined by

NRCS, by changing the term “easement” to “program.”

Section 1467.4(g)(3) is revised by clarifying that land held in trust for Indian Tribes, though owned by an agency of the United States, is not ineligible. Section 1467.4(g)(4) adds language incorporating the statutory change that lands owned by State and local units of government are not eligible for WRP. Section 1467.4(g)(5) also revises the language describing when an existing deed restriction causes land to be ineligible for participation to provide more administrative flexibility to determine whether wetland functions and values are adequately protected by such restrictions. When existing restrictions provide adequate wetland protection benefits, WRP enrollment is superfluous and unnecessary. In Section 1467.4(g)(6) NRCS provides examples of the types of lands where implementation of restoration practices would be undermined due to on-site or off-site conditions.

#### *Section 1467.5 Application Procedures*

The requirement that applications must be submitted during an announced period for such submissions is removed from § 1467.5(a), because NRCS provides for continuous enrollment in WRP.

In § 1467.5(b) the term “Department” is replaced with “NRCS.”

NRCS has removed paragraph (c) since the criteria about reduced easement cost as a ranking factor is addressed in revisions made to § 1467.6.

#### *Section 1467.6 Establishing Priority for Enrollment of Properties in WRP*

Section 1467.6(a) is removed to eliminate duplicative language related to enrollment priorities from this regulation. Section 1467.6(b) is redesignated as § 1467.6(a) and clarifies that the same ranking considerations apply to all enrollment options. Language is added to reflect additional ranking considerations added to the WRP statute by the 2008 Act. Section 1467.6 now reflects the priorities identified in the WRP statute, including: The conservation benefits of obtaining an easement, or other interest in the land; the cost effectiveness of each easement or other interest in eligible land, so as to maximize the environmental benefits per dollar expended; whether the landowner or another person is offering to contribute financially to the cost of the easement or other interest in the land to leverage Federal funds; the extent to which the purposes of the easement program would be achieved on the land; the productivity of the land; and the on-



farm and off-farm environmental threats if the land is used for the production of agricultural commodities.

Section 1467.6(b) is added to reflect existing statutory language that, in consideration of the costs and future agricultural food needs, gives priority to permanent easements over shorter-term easements, and acquiring easements based on habitat value for migratory birds and other wildlife, to the extent practicable. The language was added because it had not been previously clearly addressed in the regulation.

Section 1467.6(c) is revised to include consultation with the State Technical Committee when placing higher priority on specific geographic areas. This change is intended to incorporate State, local, and non-governmental organization input when designating a priority area.

Section 1467.6(d) is revised to remove reference to enrolling eligible lands at any time to achieve the program objectives. WRP operates on a continuous enrollment basis so this language is unnecessary. This paragraph is also revised to clarify that eligible land may be excluded from enrollment if the adjacent land is needed for successful restoration of the property and the adjacent landowner, though willing to participate, is ineligible to participate.

Section 1467.6(e) is added to provide guidelines for the Prairie Pothole Region Assessment and Reallocation as required by the statute. These guidelines and the rationale for the changes are included in the description of the changes to § 1467.4(e)(5).

#### *Section 1467.7 Enrollment Process*

Section 1467.7 is revised to include changes to the NRCS business process as a result of experience gained in operating the WRP. These revisions require steps related to land valuation, preliminary title work, and all appropriate inquiries and record searches to be completed prior to the offer to the landowner. These steps had previously been performed after the obligation of NRCS funds and resulted in de-obligation of funds when issues related to these steps could not be resolved. These revisions streamline program implementation and are intended to help reduce the number of applicants having to exit the enrollment process due to irresolvable issues, such as title issues and hazardous substance problems.

In addition, § 1467.7 is revised to confirm that land is enrolled in the program when the landowner and NRCS enter into an option agreement to purchase an easement, a 30-year

contract, or a restoration cost-share agreement. Previously, when acreage enrollment goals were by calendar year and funding availability by fiscal year, land was enrolled in WRP when the landowner executed a notice of intent to continue in response to the NRCS offer of tentative acceptance into the program. The 2008 Act modified the acreage enrollment goals to be by fiscal year, and thus NRCS determined that it improved administrative consistency to have the time of enrollment to coincide when funds were obligated to a project through the execution of a program agreement.

Section 1467.7(c) is revised to clarify that the option agreement to purchase, which becomes the contract for sale when signed by NRCS, stipulates the NRCS and landowner obligations and responsibilities, particularly regarding restoration and future sales. This is necessary, in part, to describe NRCS and landowner responsibilities if the land is sold to a party who is unwilling to assume restoration or is ineligible for NRCS cost-share assistance for restoration. The option agreement to purchase may also include payment schedules for easements valued at more than \$500,000, consistent with the payment schedule for such easements authorized by the 2008 Act.

Additionally, this section is expanded to incorporate additional material regarding enrollment through a 30-year contract or a restoration cost-share agreement. In particular, a participant accepts enrollment in the program by signing the 30-year contract or the restoration cost-share agreement.

The existing § 467.7(d) is revised and incorporated into the new § 1467.7(c) described above.

The existing § 1467.7(e) is redesignated as § 1467.7(d) and is revised to clarify under what conditions NRCS may withdraw an offer of enrollment. Sale of the land enrolled prior to easement closing or risk of hazardous substances are added as examples of such conditions.

#### *Section 1467.8 Compensation for Easements and 30-Year Contracts*

The caption for § 1467.8 is changed from "Compensation for easements" to "Compensation for easements and 30-year contracts" to reflect the addition by the 2008 Act of the 30-year contract enrollment option for acreage owned by Indian Tribes. The statute requires that compensation for 30-year contracts and 30-year easements be equivalent.

Section 1467.8 is also revised to reflect the statutory easement compensation language in the 2008 Act, which became effective immediately

upon enactment. In particular, the 2008 Act provided that NRCS shall pay as compensation the lowest of the following: (i) The fair market value of the land using the Uniform Standards for Professional Appraisal Practices, or based on an area-wide market analysis or survey; (ii) the geographic area rate cap determined under paragraph (a)(4) of this section; or (iii) the landowner offer. The revisions to § 1467.8 implement the new compensation methods, including the equivalence of 30-year contracts and 30-year easements, as required by statute. This section is also revised to clarify the process for setting and approving the geographic area rate cap. The actual method and data sources for determining a geographic rate cap have not changed from the existing regulation. The changes were made to require that the State Technical Committee provide advice on establishment of the caps, and that the caps for each state must be approved by the Chief. In this manner, NRCS may ensure nationwide consistency and equitable treatment of participants across State boundaries. Advice on establishment of the geographic rate cap is limited to the State Technical Committee to ensure consistency among states in developing fair compensation rates which will encourage participation while ensuring prudent investment of the public dollar. Payment schedule and payment limitations are revised to reflect the 2008 Act. This section is also revised to address when a waiver to installment payments is allowed for easements that cost in excess of \$500,000. NRCS will make a single payment when such payment will result in the restoration, protection, or enhancement of wetlands on eligible land, unless installment payments are requested by the landowner. Single payments facilitate the administrative efficiency of the program, especially in situations where the landowner must negotiate subordination of mortgages or other liens in order to provide clear title to the easement area.

Section 1467.8(b) contains language related to the acceptance of easement compensation that previously existed at § 1467.8(e). Additionally, this section is revised to incorporate the payment timing and method prescribed by statute.

Section 1467.8(c), previously § 1467.8(f), includes minor changes to provide clarity that reimbursement for surveys are for legal boundary surveys.

Language in the existing regulation at § 1467.8(h) regarding payment limitations is deleted and incorporated in new § 1467.10(a)(3).

Remaining sections have been re-designated to accommodate the above section re-designations.

#### *Section 1467.9 Wetlands Reserve Enhancement Program*

Section 1467.9, Cost-share Payments, is re-designated as § 1467.10. A new § 1467.9 is added to incorporate provisions for implementing the new Wetlands Reserve Enhancement Program (WREP) created by the statute. WREP provides the authority to enter into agreements with States (or subdivisions), nongovernmental organizations, and Indian Tribes to advance the purposes of WRP. WREP will operate through an announcement of funding in the **Federal Register**. Proposals will be submitted to the appropriate State Conservationist for initial review, and recommended proposals will be provided to the Chief by the State Conservationists for nationwide ranking and final selection. NRCS believes that WREP will facilitate the identification of unique enrollment opportunities that are of regional or National significance, and thus beyond the normal purview of State-level selection processes. However, selected proposals and associated funding will be provided through the applicable State Conservationists in order to enter into the WREP agreement with the eligible partner.

Section 1467.9(b) includes language for implementing a reserved rights pilot authorized by the statute. Participants in the reserved rights pilot are subject to the general eligibility and program administration requirements established for this part. Under the reserved rights pilot, landowners who wish to reserve grazing rights in the grazing rights pilot deed or 30-year contract must comply with a WRPO which includes the location, timing, intensity, frequency, and duration of grazing. The Managers Report language states that activities occurring under a reserved rights easement or 30-year contract shall be covered by a conservation plan that is developed and approved by NRCS. NRCS intends to compile, evaluate, and make available information acquired through its monitoring of projects enrolled through WREP in general, and the reserved rights pilot specifically, to ascertain the benefits gained through these programmatic options.

The Managers Report also states that NRCS should explore different types of warranty easement deeds consistent with the purposes of the program, which will allow landowners to retain the right to use the land for grazing purposes. The reserved rights pilot will use template deeds and 30-year

contracts, which will be made public concurrent with the announcement of availability of the pilot.

Section 1467.9(b)(4) on compensation describes that the value of retained grazing rights will be considered in establishing compensation. The value of the retained grazing rights, set by either a Uniform Standards for Professional Appraisal Practices (USPAP) appraisal or a market survey, is subtracted from the fair market value of the land; in setting geographic area rate caps, a value for grazing rights must be subtracted from the established geographic rate cap for the area.

#### *Section 1467.10 Cost-Share Payments*

As mentioned above, § 1467.9 "Cost-share payments" is re-designated as § 1467.10 and revised to incorporate 30-year contracts and to improve readability.

Language is included throughout this section to accommodate the inclusion of maintenance as an activity that is eligible for cost-share. Changes throughout this section clarify that conservation practices and activities, as defined in § 1467.3, are eligible for cost-share. Maintenance is included in the definition of activity under § 1467.3.

Section 1467.10(a)(3) is added to provide language for implementing the \$50,000 annual payment limitation for restoration cost-share agreements, consistent with the statutory requirements of the 2008 Act amendments.

Sections 1467.10(b), (c), and (d) are revised to more fully describe the items for which cost-share is available within the WRPO. These items include measures, activities, and components of conservation practices which may be necessary for alleviating problems or improving a conservation treatment, including as a maintenance activity.

Section 1467.10(e) is added to clarify that the participant with the contractual obligation with NRCS will be responsible for completing restoration if land enrolled in WRP is sold to a new landowner who is unwilling, ineligible, or unable to complete the restoration. Eligible new landowners who agree to the transfer of the responsibilities under the easement restoration agreement or restoration cost-share agreement, as applicable, may receive cost-share assistance for restoration if all requirements for payment are met. NRCS will seek refund of payments if the participant with the contractual obligation or the new landowner fail to implement the required restoration as specified in the WRPO.

#### *Section 1467.11 Easement and 30-Year Contract Participation Requirements*

Section 1467.10, Easement participation requirements, is re-designated as § 1467.11. This section is revised by adding a new § 1467.11(b) to make the requirements also applicable to 30-year contracts. The requirements for participation under the 30-year contract option mirror the easement participation requirements, except where necessary to reflect that the 30-year easement is not a real property right such as an easement but a contractual arrangement between NRCS and an Indian Tribe or tribal member. Additional minor revisions are made to § 1467.11 for administrative clarity and streamlining. This section is also modified to clarify that the restoration of lands enrolled in WRP is the responsibility of the participant.

Section 1467.11(e) is added to include the requirement that for all lands enrolled in WRP, NRCS shall develop a WRPO, which will be implemented by the participant. This WRPO will be signed by both NRCS and the participant. This language is added to further clarify the participant responsibilities when enrolled in the WRP.

#### *Section 1467.12 The WRPO Development*

Section 1467.11 is re-designated as § 1467.12. This section contains only minor changes to clarify that NRCS is the USDA agency with responsibility for developing the WRPO.

#### *Section 1467.13 Modifications*

Section 1467.12 is re-designated as § 1467.13, Modifications.

Section 1467.13(a)(4) clarifies that the Chief will approve modifications and under what circumstances modifications may be approved; this language was previously included in the WRP Manual and is now being incorporated in the rule to provide clarification for the level of approval for modifications. The Chief reserves the authority to approve modifications to ensure the long-term integrity of NRCS easements.

Section 1467.13(b) is revised to require agreement and signatures from the participant and NRCS for a modification to the WRPO. These changes will ensure protection of the Federal investment.

#### *Section 1467.14 Transfer of Land*

Section 1467.13 is re-designated as § 1467.14. Section 1467.14(a) clarifies what constitutes a transfer of land and the impact of the transfer. In cases

where the transfer of land meets conditions described under § 1467.4(c)(2), the State Conservationist must cancel the application; however, the new landowner may re-apply so that a determination of landowner eligibility may be made and properly documented. The land eligibility, ranking, and other administrative determinations that relate to the land will remain valid for the remainder of the funding cycle. This revision is made to comply with the 7-year ownership language added by the 2008 Act amendments. Language previously included in the existing regulation under payments to landowners is revised and moved to § 1467.10(e).

#### *Section 1467.15 Violations and Remedies*

Section 1467.14 is re-designated as § 1467.15 and is re-structured to provide separate language for violations of easements, 30-year contracts, and restoration cost-share agreements consistent with the statutory language. New language is also added to provide for cost recovery of payments, plus interest, when agreements or contracts are terminated.

#### *Section 1467.16 Payments Not Subject to Claims*

Section 1467.15 is re-designated as § 1467.16 and the term “contract” is added to the list of payment types to reflect the statutory change to include a 30-year contract option for acreage owned by Indian Tribes.

#### *Section 1467.17 Assignments*

Section 1467.16 is re-designated as § 1467.17.

#### *Section 1467.18 Appeals*

Section 1467.17 is re-designated as § 1467.18. Section 1467.18(b) is revised to clarify that appeals procedures apply to administrative actions such as determination of eligibility.

Section 1467.18(d) is added to further clarify that enforcement actions taken by NRCS are not subject to review under administrative appeal regulations because a landowner's activities related to easement deed restrictions are subject to rights held by the United States, and thus a landowner cannot be adversely affected in an administrative sense by the enforcement of these Federal rights. This language is consistent with the appeal regulations at 7 CFR part 614 and federal real property law.

#### *Section 1467.19 Scheme and Device*

Section 1467.18 is re-designated as § 1467.19 and revised at § 1467.19(b) to include 30-year contracts in the list of

payment types to reflect the statutory addition of the 30-year contract option for acreage owned by Indian Tribes.

#### *Section 1467.20 Market-Based Conservation Initiatives*

Section 1467.20 is a new section. Section 1467.20(a) is added to address the Secretary's new authority to accept and use contributions. Section 2702 of the 2008 Act authorizes the Secretary to accept and use contributions of non-Federal funds to support the purposes of the program. The statutory language provides that these funds are available to the Secretary without further appropriation and until expended, to carry out the program.

Section 1467.20(b) is added to clarify that the NRCS does not assert any interest in the generation of environmental credits such as carbon, water quality, biodiversity, or wetlands preservation on land enrolled in the program other than to ensure that activities performed by the participant to obtain these credits are not contradictory to the purposes of the program.

Section 2708, “Compliance and Performance”, of the 2008 Act added a paragraph to Section 1244(g) of the 1985 Act entitled, “Administrative Requirements for Conservation Programs,” which states the following: “(g) Compliance and performance.— For each conservation program under Subtitle D, the Secretary shall develop procedures—

- (1) To monitor compliance with program requirements;
- (2) To measure program performance;
- (3) To demonstrate whether long-term conservation benefits of the program are being achieved;
- (4) To track participation by crop and livestock type; and
- (5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004).”

This new provision presents in one place the accountability requirements placed on the Agency as it implements conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve program, the Conservation Security Program, the Conservation Stewardship Program, the Farm and Ranch Lands Protection Program, the Grassland Reserve Program, the Environmental Quality Incentives Program (including the Agricultural Water Enhancement Program), the Wildlife Habitat Incentive Program, and the Chesapeake Bay

Watershed initiative. These requirements are not directly incorporated into these regulations, which set out requirements for program participants. However, certain provisions within these regulations relate to elements of Section 1244(g) of the 1985 Act and the Agency's accountability responsibilities regarding program performance. NRCS is taking this opportunity to describe existing procedures that relate to meeting the requirements of Section 1244(g) of the 1985 Act, and Agency expectations for improving its ability to report on each program's performance and achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program participants and that relate to the Agency accountability requirements as outlined in Section 1244(g) of the 1985 Act.

Monitor compliance with program requirements. NRCS has established application procedures to ensure that participants meet eligibility requirements, and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in Agency guidance (440 CPM 519) (<http://directives.sc.egov.usda.gov/>).

The program requirements applicable to participants that relate to compliance are set forth in these regulations in § 1467.4, “Program Requirements,” § 1467.10, “Cost-Share payments,” and § 1467.11 “Easement and 30-year contract participation requirements.” These sections make clear the general program eligibility requirements, participant obligations for implementing a WRPO, and participant program obligations.

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

measurement and reporting policies are set forth in Agency guidance (GM\_340\_401 and GM\_340\_403) (<http://directives.sc.egov.usda.gov/>). The conservation actions undertaken by participants are the basis for measuring program performance-specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 1467.4, "Program Requirements," § 1467.10, "Cost-Share payments," and § 1467.11 "Easement and 30-year contract participation requirements." These sections make clear participant obligations for implementing, operating, and maintaining WRP-funded conservation improvements, which in aggregate result in the program performance that is reflected in Agency performance reports.

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

NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related natural resource data. However, lacking has been a connection between these data and specific conservation programs. In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through Agency field-level business tools to help produce estimates of environmental effects accomplished through Agency programs, such as WRP. In 2006 a Blue Ribbon panel evaluation of CEAP

strongly endorsed the project's purpose, but concluded "CEAP must change direction" to achieve its purposes. In response, CEAP has focused on priorities identified by the Panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status is available at <http://www.nrcs.usda.gov/technical/NRI/ceap/>. Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. Natural resource inventory and assessment, and performance measurement and reporting policies set forth in Agency guidance (GM\_290\_400; GM\_340\_401; GM\_340\_403) (<http://directives.sc.egov.usda.gov/>).

*Demonstrating the long-term conservation benefits of conservation programs is an Agency responsibility.* Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation practices and systems applied by participants under the program. The program requirements applicable to participants that relate to producing long-term conservation benefits are described previously under "measuring program performance," i.e., § 1467.4, "Program Requirements," § 1467.10, "Cost-Share payments," and § 1467.11 "Easement and 30-year contract participation requirements."

*Track participation by crop and livestock type.* NRCS' automated field-level business tools capture participant, land, and operation information. This information is aggregated in the National Conservation Planning database and is used in a variety of program reports. Additional reports will be developed to provide more detailed information on program participation to meet congressional needs. These and related program management procedures supporting program implementation are set forth in Agency guidance (440 CPM 519).

The program requirements applicable to participants that relate to tracking participation by crop and livestock type are put forth in these regulations in § 1467.4, "Program Requirements," which makes clear program eligibility requirements, including the requirement to provide NRCS the information necessary to implement WRP.

*Coordinate these actions with the national conservation program authorized under the Soil and Water Resources Conservation Act (RCA).* The 2008 Act reauthorized and expanded on a number of elements of the RCA related

to evaluating program performance and conservation benefits. Specifically, the 2008 Farm Bill added a provision stating,

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

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

The coordination of the previously described components with the RCA is an Agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. Thus, as the Secretary proceeds to implement the RCA in accordance with the statute, the approaches and processes developed will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of Section 1244(g) of the 1985 Act.

#### List of Subjects in 7 CFR Part 1467

Administrative practice and procedure, Agriculture, Soil conservation, Wetlands, Wetland protection.

■ For the reasons stated in the preamble, the Commodity Credit Corporation revises Part 1467 of Title 7 of the Code of Federal Regulations to read as follows:

#### PART 1467—WETLANDS RESERVE PROGRAM

##### Sec.

- 1467.1 Applicability.
- 1467.2 Administration.
- 1467.3 Definitions.
- 1467.4 Program requirements.
- 1467.5 Application procedures.
- 1467.6 Establishing priority for enrollment of properties in WRP.
- 1467.7 Enrollment process.
- 1467.8 Compensation for easements and 30-year contracts.
- 1467.9 Wetlands Reserve Enhancement Program.

- 1467.10 Cost-share payments.
- 1467.11 Easement participation requirements.
- 1467.12 The WRPO development.
- 1467.13 Modifications.
- 1467.14 Transfer of land.
- 1467.15 Violations and remedies.
- 1467.16 Payments not subject to claims.
- 1467.17 Assignments.
- 1467.18 Appeals.
- 1467.19 Scheme and device.
- 1467.20 Market-based conservation initiatives.

**Authority:** 16 U.S.C. 3837 *et seq.*

#### **§ 1467.1 Applicability.**

(a) The regulations in this part set forth the policies, procedures, and requirements for the Wetlands Reserve Program (WRP) as administered by the Natural Resources Conservation Service (NRCS) for program implementation.

(b) The Chief, NRCS, may implement WRP in any of the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

#### **§ 1467.2 Administration.**

(a) The regulations in this part will be administered under the general supervision and direction of the Chief.

(b) The Chief is authorized to modify or waive a provision of this part if the Chief deems the application of that provision to a particular limited situation to be inappropriate and inconsistent with the environmental and cost-efficiency goals of the WRP. This authority cannot be further delegated. The Chief may not modify or waive any provision of this part that is required by applicable law.

(c) The State Conservationist will seek advice from the State Technical Committee on the development of the geographic area rate caps of compensation for an easement, a priority ranking process, and related policy matters.

(d) NRCS may delegate at any time easement management, monitoring, and enforcement responsibilities to other Federal or State agencies that have the appropriate authority, expertise, and technical and financial resources, as determined by NRCS to carry out such delegated responsibilities.

(e) NRCS may enter into cooperative agreements with Federal or State agencies, conservation districts, and private conservation organizations to assist NRCS with program implementation, including the provision of technical assistance.

(f) NRCS shall consult with the U.S. Department of the Interior's Fish and Wildlife Service (FWS) at the local level

in determinations of land eligibility and as appropriate throughout the program implementation process. NRCS may consult Federal or State agencies, conservation districts, or other organizations in program administration. No determination by these agencies or organizations shall compel NRCS to take any action which NRCS determines will not serve the purposes of the program established by this part.

(g) The Chief may allocate funds for purposes related to: Encouraging enrollment by historically underserved producers as authorized by 16 U.S.C. 3844; special pilot programs for wetland management and monitoring; acquisition of wetland easements with emergency funding; cooperative agreements with other Federal or State agencies for program implementation; coordination of easement enrollment across State boundaries; coordination of the development of conservation plans; or, for other goals of the WRP found in this part. NRCS may designate areas as conservation priority areas where environmental concerns are especially pronounced and to assist landowners in meeting nonpoint source pollution requirements and other conservation needs.

#### **§ 1467.3 Definitions.**

The following definitions are applicable to this part:

*30-year Contract* means a contract that is for a duration of 30 years and is limited to acreage owned by Indian Tribes.

*Acreage Owned by Indian Tribes* means lands held in private ownership by an Indian Tribe or individual Tribal member and lands held in trust by a native corporation, Tribe or the Bureau of Indian Affairs (BIA).

*Activity* means an action other than a conservation practice that is included in the WRPO or restoration cost-share agreement, as applicable, and that has the effect of alleviating problems or improving treatment of the resources, including ensuring proper management or maintenance of the wetland functions and values restored, protected, or enhanced through an easement, contract, or restoration cost-share agreement.

*Agreement* means the document that specifies the obligations and rights of NRCS and any person or legal entity who is participating in the program.

*Agricultural commodity* means any agricultural commodity planted and produced in a State by annual tilling of the soil, including tilling by one-trip planters; or sugarcane planted and produced in a State.

*Beginning Farmer or Rancher* means an individual or legal entity who 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 a legal entity, and who will materially and substantially participate in the operation of the farm or ranch. In the case of 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. In the case of a legal entity or joint operation, 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 the Natural Resources Conservation Service or the person delegated authority to act for the Chief.

*Commenced conversion wetland* means a wetland or converted wetland for which the Farm Service Agency has determined that the wetland manipulation was contracted for, started, or for which financial obligation was incurred before December 23, 1985.

*Conservation district* means any district or unit of State or local government formed under State 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," "natural resource district," "land conservation committee," or a similar name.

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

*Conservation Reserve Program (CRP)* means the program administered by the Commodity Credit Corporation pursuant to 16 U.S.C. 3831–3836.

*Contract* means the legal document that specifies the obligations and rights of NRCS and any person or legal entity accepted to participate in the program. A WRP contract is an agreement for the transfer of assistance from NRCS to the participant for conducting the prescribed program implementation actions.

*Converted wetland* means a wetland that has been drained, dredged, filled, leveled, or otherwise manipulated (including any activity that results in impairing or reducing the flow, circulation, or reach of water) for the purpose, or to have the effect of, making the production of an agricultural commodity possible if such production would not have been possible but for such action; and before such action such land was wetland; and such land was neither highly erodible land nor highly erodible cropland.

*Cost-share payment* means the payment made by NRCS to a participant to carry out conservation practices and to achieve the protection of wetland functions and values, including necessary activities, as set forth in the Wetlands Reserve Plan of Operations (WRPO).

*Easement* means a reserved interest easement, which is an interest in land defined and delineated in a deed whereby the landowner conveys all rights, title, and interests in a property to the grantee, but the landowner retains those rights, title, and interests in the property which are specifically reserved to the landowner in the easement deed.

*Easement area* means the land encumbered by an easement.

*Easement payment* means the consideration paid to a landowner for an easement conveyed to the United States under the WRP, or the consideration paid to an Indian Tribe or tribal members for entering into 30-year contracts.

*Easement Restoration Agreement* means the agreement used to implement the Wetland Restoration Plan of Operations for projects enrolled through the permanent easement, 30-year easement, or 30-year contract enrollment options.

*Farm Service Agency (FSA)* is an agency of the United States Department of Agriculture.

*Fish and Wildlife Service (FWS)* is an agency of the United States Department of the Interior.

*Historically Underserved Producer* means a beginning, limited resource, or socially disadvantaged farmer or rancher.

*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 (85 Stat. 688, 43 U.S.C. 1601 *et seq.*), which is recognized as eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Landowner* means a person or legal entity having legal ownership of eligible land. Landowner may include all forms of collective ownership including joint tenants, tenants in common, and life tenants. The term landowner includes trust holders of acreage owned by Indian Tribes.

*Lands substantially altered by flooding* means areas where flooding has created wetland hydrologic conditions which, with a high degree of certainty, will develop wetland soil and vegetation characteristics over time.

*Legal entity* means an entity that is created under Federal or State law and that owns land or an agricultural commodity; or produces an agricultural commodity.

*Limited Resource Farmer or Rancher* means a person with direct or indirect gross farm sales not more than \$100,000 in each of the previous two years (to be increased to adjust for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service (NASS)), and who 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 U.S. Department of Commerce data).

*Maintenance* means work performed to keep the enrolled area functioning for program purposes for the duration of the enrollment period. Maintenance includes actions and work to manage, prevent deterioration, repair damage, or replace conservation practices on enrolled lands, as approved by NRCS.

*Natural Resources Conservation Service (NRCS)* is an agency of the United States Department of Agriculture, including when NRCS carries out program implementation using the funds, facilities, or authorities of the Commodity Credit Corporation (CCC).

*Option agreement to purchase* means the legal document that is the equivalent of a real estate option contract for purchasing land. The landowner signs the option agreement to purchase, which is authorization for NRCS to proceed with the easement acquisition process, and to incur costs for surveys, where applicable, title clearance and closing procedures on the easement. The option becomes a contract for sale and obligates CCC funding after it is executed by NRCS and transmitted to the landowner.

*Participant* means a person or legal entity who has been accepted into the program and who is receiving payment or who is responsible for implementing the terms and conditions of an option to

purchase agreement, 30-year contract, or restoration cost-share agreement, and the associated WRPO.

*Permanent easement* means an easement that lasts in perpetuity.

*Person* means a natural person, a legal entity, or an Indian Tribe, but does not include governments or their political subdivisions.

*Prairie Pothole Region* means the counties designated as part of the Prairie Pothole National Priority Area for the Conservation Reserve Program (CRP) as of June 18, 2008.

*Private land* means land that is not owned by a governmental entity, and includes acreage owned by Indian Tribes, as defined in this Part.

*Restoration Cost-Share Agreement* means the legal document that describes the rights and obligations of participants who have been accepted to participate in WRP restoration cost-share enrollment option that is used to implement conservation practices and activities to protect, restore, or enhance wetlands values and functions to achieve the purposes of the program. The restoration cost-share agreement is an agreement between NRCS and the participant to share in the costs of implementing the Wetland Restoration Plan of Operations.

*Riparian areas* means areas of land that occur along streams, channels, rivers, and other water bodies. These areas are normally distinctly different from the surrounding lands because of unique soil and vegetation characteristics, may be identified by distinctive vegetative communities that are reflective of soil conditions normally wetter than adjacent soils, and generally provide a corridor for the movement of wildlife.

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

*State Technical Committee* means a committee established by the Secretary of the United States Department of Agriculture (USDA) in a State pursuant to 16 U.S.C. 3861.

*Wetland* means land that:

- (1) Has a predominance of hydric soils;
  - (2) Is inundated or saturated by surface or groundwater at a frequency and duration sufficient to support a prevalence of hydrophytic vegetation typically adapted for life in saturated soil conditions; and
  - (3) Supports a prevalence of such vegetation under normal circumstances.
- Wetland functions and values* means the hydrological and biological

characteristics of wetlands and the socioeconomic value placed upon these characteristics, including:

- (1) Habitat for migratory birds and other wildlife, in particular at risk species;
- (2) Protection and improvement of water quality;
- (3) Attenuation of water flows due to flood;
- (4) The recharge of ground water;
- (5) Protection and enhancement of open space and aesthetic quality;
- (6) Protection of flora and fauna which contributes to the Nation's natural heritage; and
- (7) Contribution to educational and scientific scholarship.

*Wetland restoration* means the rehabilitation of degraded or lost habitat in a manner such that:

- (1) The original vegetation community and hydrology are, to the extent practical, re-established; or
- (2) A community different from what likely existed prior to degradation of the site is established. The hydrology and native self-sustaining vegetation being established will substantially replace original habitat functions and values and does not involve more than 30 percent of the wetland restoration area.

*Wetlands Reserve Plan of Operations (WRPO)* means the conservation plan that identifies how the wetland functions and values will be restored, improved, and protected and which is approved by NRCS.

#### **§ 1467.4 Program requirements.**

(a) *General.* (1) Under the WRP, NRCS may purchase conservation easements from, or enter into 30-year contracts or restoration cost-share agreements with, eligible landowners who voluntarily cooperate to restore, protect, or enhance wetlands on eligible private and Tribal lands. The 30-year contract enrollment option is only available to acreage owned by Indian Tribes.

(2) To participate in WRP, a landowner must agree to the implementation of a WRPO, the effect of which is to restore, protect, enhance, maintain, and manage the hydrologic conditions of inundation or saturation of the soil, native vegetation, and natural topography of eligible lands. NRCS may provide cost-share assistance through a restoration cost-share agreement or an easement restoration agreement for the conservation practices and activities that promote the restoration, protection, enhancement, maintenance, and management of wetland functions and values. Specific restoration, protection, enhancement, maintenance, and management actions may be undertaken by the landowner, NRCS, or other designee.

(b) *Acreage limitations.* (1) Except for areas devoted to windbreaks or shelterbelts after November 28, 1990, no more than 25 percent of the total cropland in any county, as determined by the FSA, may be enrolled in the CRP and the WRP, and no more than 10 percent of the total cropland in the county may be subject to an easement acquired through the WRP.

(2) NRCS and FSA shall concur before a waiver of the 25 percent limit of this paragraph can be approved for an easement proposed for enrollment in the WRP. Such a waiver will only be approved if the waiver will not adversely affect the local economy, and operators in the county are having difficulties complying with the conservation plans implemented under 16 U.S.C. 3812.

(c) *Landowner eligibility.* To be eligible to enroll in the WRP, a person, legal entity, or Indian Tribe must be in compliance with the highly erodible land and wetland conservation provisions in 7 CFR part 12. Persons or legal entities must be in compliance with the Adjusted Gross Income Limitation provisions at Subpart G of 7 CFR part 1400, and:

- (1) Be the landowner of eligible land for which enrollment is sought;
- (2) For easement applications, have been the landowner of such land for the 7-year period prior to the time the land is determined eligible for enrollment unless it is determined by the State Conservationist that:

(i) The land was acquired by will or succession as a result of the death of the previous landowner;

(ii) The ownership change occurred due to foreclosure on the land and the owner of the land immediately before the foreclosure exercises a right of redemption from the mortgage holder in accordance with State law; or

(iii) The land was acquired under circumstances that give adequate assurances, as determined by NRCS, that such land was not acquired for the purposes of placing it in the program, such as demonstration of status as a beginning farmer or rancher.

(3) Agree to provide such information to NRCS as the agency deems necessary or desirable to assist in its determination of eligibility for program benefits and for other program implementation purposes.

(d) When a parcel of land that has been accepted for enrollment into the WRP is sold or transferred prior to the easement being perfected, the application or option agreement to purchase will be cancelled and acres will be removed from enrollment. If the new landowner wishes to continue

enrollment, a new application must be filed so that all eligibility criteria may be examined and documented.

(e) *Land eligibility.* (1) Only private land or land owned by Indian Tribes may be considered for enrollment into WRP.

(2) NRCS shall determine whether land is eligible for enrollment and whether, once found eligible, the lands may be included in the program based on the likelihood of successful restoration of wetland functions and values when considering the cost of acquiring the easement and the cost of the restoration, protection, enhancement, maintenance, and management.

(3) Land shall only be considered eligible for enrollment in the WRP if NRCS determines, in consultation with the FWS, that:

(i) The enrollment of such land maximizes wildlife benefits and wetland values and functions;

(ii) Such land is—

(A) Farmed wetland or converted wetland, together with adjacent lands that are functionally dependent on the wetlands; or

(B) Cropland or grassland that was used for agricultural production prior to flooding from the natural overflow of a closed basin lake or pothole, together with the adjacent land, where practicable, that is functionally dependent on the cropland or grassland; and

(iii) The likelihood of the successful restoration of such land and the resultant wetland values merit inclusion of such land in the program, taking into consideration the cost of such restoration.

(4) Land may be considered farmed wetland or converted wetland under paragraph (3)(ii)(A) of this section if such land is identified by NRCS as:

(i) Wetlands farmed under natural conditions, farmed wetlands, prior converted cropland, commenced conversion wetlands, farmed wetland pastures, and lands substantially altered by flooding so as to develop wetland functions and values; or

(ii) Former or degraded wetlands that occur on lands that have been used or are currently being used for the production of food and fiber, including rangeland and forest production lands, where the hydrology has been significantly degraded or modified and will be substantially restored.

(5) Land under paragraph (e)(3)(ii)(B) of this section may be considered for enrollment into 30-year easements if it meets the criteria under paragraph (e)(3) of this section, it is located in the Prairie Pothole Region as defined under



§ 1467.3 of this part, and the size of the parcel offered for enrollment is a minimum of 20 contiguous acres. Such land meets the requirement of likelihood of successful restoration only if the soils are hydric and the depth of water is 6.5 feet or less at the time of enrollment.

(6) If land offered for enrollment is determined eligible under paragraph (e)(3) and (e)(5) of this section, then NRCS may also enroll land adjacent or contiguous to such eligible land together with the eligible land, if such land maximizes wildlife benefits and:

(i) Is farmed wetland and adjoining lands enrolled in CRP, with the highest wetland functions and values, and is likely to return to production after it leaves CRP;

(ii) Is a riparian area along streams or other waterways that links or, after restoring the riparian area, will link wetlands which are protected by an easement or other device or circumstance that achieves the same objectives as an easement; or

(iii) Land adjacent to the eligible land that would contribute significantly to wetland functions and values, such as buffer areas, wetland creations, non-cropped natural wetlands, and restored wetlands, but not more than the State Conservationist, in consultation with the State Technical Committee, determines is necessary for such contribution.

(7) To be enrolled in the program, eligible land must be configured in a size and with boundaries that allow for the efficient management of the area for program purposes and otherwise promote and enhance program objectives, as determined by NRCS.

(f) *Enrollment of CRP lands.* Land subject to an existing CRP contract may be enrolled in the WRP only if the land and landowner meet the requirements of this part, and the enrollment is requested by the landowner and agreed to by NRCS. To enroll in WRP, the CRP contract for the property must be terminated or otherwise modified subject to such terms and conditions as are mutually agreed upon by FSA and the landowner.

(g) *Ineligible land.* The following land is not eligible for enrollment in the WRP:

(1) Converted wetlands if the conversion was commenced after December 23, 1985;

(2) Land that contains timber stands established under a CRP contract or pastureland established to trees under a CRP contract;

(3) Lands owned by an agency of the United States, other than held in trust for Indian Tribes;

(4) Lands owned in fee title by a State, including an agency or a subdivision of a State, or a unit of local government;

(5) Land subject to an easement or deed restriction which, as determined by NRCS, provides similar restoration and protection of wetland functions and values as would be provided by enrollment in WRP; and

(6) Lands where implementation of restoration practices would be undermined due to on-site or off-site conditions, such as risk of hazardous substances either on-site or off-site, proposed or existing rights of way, either on-site or off-site, for infrastructure development, or adjacent land uses, such as airports, that would either impede complete restoration or prevent wetland functions and values from being fully restored.

#### § 1467.5 Application procedures.

(a) *Application for participation.* To apply for enrollment, a landowner must submit an Application for Participation in the WRP.

(b) *Preliminary agency actions.* By filing an Application for Participation, the landowner consents to an NRCS representative entering upon the land for purposes of assessing the wetland functions and values, and for other activities, such as the development of the preliminary WRPO, that are necessary or desirable for NRCS to evaluate applications. The landowner is entitled to accompany an NRCS representative on any site visits.

(c) *Voluntary reduction in compensation.* In order to enhance the probability of enrollment in WRP, a landowner may voluntarily offer to accept a lesser payment than is being offered by NRCS.

#### § 1467.6 Establishing priority for enrollment of properties in WRP.

(a) When evaluating easement, 30-year contract, or restoration cost-share agreement offers from landowners, the NRCS, with advice from the State Technical Committee, may consider:

(1) The conservation benefits of obtaining an easement, or other interest in the land;

(2) The cost effectiveness of each easement or other interest in eligible land, so as to maximize the environmental benefits per dollar expended;

(3) Whether the landowner or another person is offering to contribute financially to the cost of the easement or other interest in the land to leverage Federal funds;

(4) The extent to which the purposes of the easement program would be achieved on the land;

(5) The productivity of the land; and

(6) The on-farm and off-farm environmental threats if the land is used for the production of agricultural commodities.

(b) To the extent practicable, taking into consideration costs and future agricultural and food needs, NRCS shall give priority to:

(1) Obtaining permanent easements over shorter term easements; and

(2) Acquiring easements based on the value of the easement for protecting and enhancing habitat for migratory birds and other wildlife, in consultation with FWS.

(c) NRCS, in consultation with the State Technical Committee, may place higher priority on certain geographic regions of the State where restoration of wetlands may better achieve State and regional goals and objectives.

(d) Notwithstanding any limitation of this part, the State Conservationist may, at any time, exclude enrollment of otherwise eligible lands if the participation of the adjacent landowners is essential to the successful restoration of the wetlands and those adjacent landowners are unwilling or ineligible to participate. The State Conservationist may coordinate with other Federal, State, and nonprofit organizations to encourage the restoration of wetlands on adjacent ineligible lands, especially in priority geographic areas.

(e)(1) The Chief will conduct an assessment during fiscal year 2008 and each subsequent fiscal year for the purpose of determining the interest and allocations for the Prairie Pothole Region to enroll land determined eligible under § 1467.4(d)(5) of this part into 30-year easements. Annually, the Chief will provide specific instructions for the assessment in writing to the applicable State Conservationists.

(2) The Chief will make an adjustment to the allocation for an applicable State for a fiscal year, based on the results of the assessment conducted under paragraph (e)(1) of this section for the State during the previous fiscal year.

#### § 1467.7 Enrollment process.

(a) *Tentative Selection.* Based on the priority ranking, NRCS will notify an affected landowner of tentative acceptance into the program.

(b) *Effect of notice of tentative selection.* The notice of tentative acceptance into the program does not bind NRCS or the United States to enroll the proposed project in WRP, nor does it bind the landowner to continue with enrollment in the program. The notice informs the landowner of NRCS' intent to continue the enrollment process on

their land unless otherwise notified by the landowner.

(c) *Acceptance and effect of offer of enrollment.*

(1) *Easement.* For applications requesting enrollment through an easement, an option agreement to purchase will be presented by NRCS to the landowner, which will describe the easement area; the easement compensation amount; the easement terms and conditions; the landowner's obligations if the land is sold before restoration to an ineligible landowner; and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the option agreement to purchase. NRCS will continue with easement acquisition activities after the property has been enrolled.

(2) *Restoration cost-share agreement.* For applications requesting enrollment through the restoration cost-share agreement option, a restoration cost-share agreement shall be presented by NRCS to the landowner, which will describe the enrolled area, the agreement terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the restoration cost-share agreement. NRCS will proceed with implementation of the WRPO after the property has been enrolled.

(3) *30-year contract.* For applications requesting enrollment through the 30-year contract option, a 30-year contract shall be presented by NRCS to the landowner, which will describe the contract area, the contract terms and conditions, and other terms and conditions for participation that may be required by NRCS as appropriate. The landowner accepts enrollment in the WRP by signing the 30-year contract. NRCS will proceed with implementation of the WRPO after the property has been enrolled.

(d) *Withdrawal of offer of enrollment.* Prior to execution of the easement deed by the United States and the landowner, NRCS may withdraw the land from enrollment at any time due to lack of availability of funds, inability to clear title, sale of the land, risk of hazardous substance contamination, or other reasons. The offer of enrollment to the landowner shall be void if not executed by the landowner within the time specified.

#### **§ 1467.8 Compensation for easements and 30-year contracts.**

(a) *Determination of easement payment rates.* (1) Compensation for an

easement under this part shall be made in cash in such amount as is agreed to and specified in the option agreement to purchase or 30-year contract.

(2) Payments for non-permanent easements or 30-year contracts shall be not more than 75 percent of that which would have been paid for a permanent easement as determined by the methods listed in paragraph (a)(3) of this section.

(3) NRCS shall pay as compensation the lowest of the following:

(i) The fair market value of the land using the Uniform Standards for Professional Appraisal Practices, or based on an area-wide market analysis or survey;

(ii) The geographic area rate cap determined under paragraph (a)(4) of this section; or

(iii) The landowner offer.

(4) The State Conservationist, in consultation with the State Technical Committee, shall establish one or more geographic area rate caps within a state. The State Conservationist shall submit geographic area rate caps and supporting documentation to the Chief for approval. Each State Conservationist will determine the geographic area rate cap using the best information which is readily available in that State. Such information may include: Soil types, type(s) of crops capable of being grown, production history, location, real estate market values, and tax rates and assessments.

(b) *Acceptance of offered easement compensation.* (1) NRCS will not acquire any easement unless the landowner accepts the amount of the easement payment offered by NRCS. The easement payment may or may not equal the fair market value of the interests and rights to be conveyed by the landowner under the easement. By voluntarily participating in the program, a landowner waives any claim to additional compensation based on fair market value.

(2)(i) For easements or 30-year contracts valued at \$500,000 or less, NRCS will provide compensation in up to 30 annual payments, as requested by the participant, as specified in the option agreement to purchase or 30-year contract between NRCS and the participant.

(ii) For easements or 30-year contracts valued at more than \$500,000, the Secretary may provide compensation in at least 5, but not more than 30 annual payments. NRCS may provide compensation in a single payment for such easements or 30-year contracts when, as determined by the Chief, it would further the purposes of the program. The applicable payment schedule will be specified in the option

agreement to purchase, warranty easement deed, or 30-year contract between NRCS and the participant.

(c) *Reimbursement of a landowner's expenses.* For completed easement conveyances, NRCS will reimburse participants for their fair and reasonable expenses, if any, incurred for legal boundary surveys and other related costs, as determined by NRCS. The State Conservationist, in consultation with the State Technical Committee, may establish maximum payments to reimburse participants for reasonable expenses, if incurred.

(d) *Tax implications of easement conveyances.* Subject to applicable regulations of the Internal Revenue Service, a participant may be eligible for a bargain sale tax deduction which is the difference between the fair market value of the easement conveyed to the United States and the easement payment made to the participant. NRCS disclaims any representations concerning the tax implications of any easement or cost-share transaction.

(e) *Per acre basis calculations.* If easement payments are calculated on a per acre basis, adjustment to stated easement payment will be made based on final determination of acreage.

#### **§ 1467.9 Wetlands Reserve Enhancement Program.**

(a) *Wetlands Reserve Enhancement Program (WREP).* (1) The purpose of WREP is to target and leverage resources to address high priority wetlands protection, restoration, and enhancement objectives through agreements with States (including a political subdivision or agency of a State), nongovernmental organizations, and Indian Tribes.

(2) Funding for WREP agreements will be announced in the **Federal Register**.

(i) The announcement will provide details on the priorities for funding, required level of partner matching funds, ranking criteria, level of available funding, and additional criteria as determined by the Chief.

(ii) The Chief will determine the funding level for WREP on an annual basis. Funds for WREP are derived from funds available for WRP.

(3) Proposals will be submitted to the State Conservationist of the State in which the majority of the project area resides.

(i) State Conservationists will evaluate proposals based on the ranking criteria established in the announcement and provide proposals recommended for funding to the Chief.

(ii) The Chief will evaluate proposals recommended for funding and make final funding selections, in accordance

with ranking factors identified in the announcement.

(4) Selected proposals and associated funding will be provided to the State Conservationist to enter into WREP agreements with the eligible partner to carry out the project.

(b) *Reserved Rights Pilot.* (1) The Chief shall carry out a reserved rights pilot subject to the requirements established in this part.

(2) Under the reserved rights pilot, a landowner may reserve grazing rights in the warranty easement deed or 30-year contract, if the State Conservationist determines that the reservation and use of the grazing rights:

(i) Is compatible with the land subject to the easement or 30-year contract; and

(ii) Is consistent with the long-term wetland protection and enhancement goals for which the easement or 30-year contract was established; and

(iii) Complies with a WRPO developed with NRCS.

(3) The State Conservationist will provide public notice of the availability of the reserved rights pilot and the reserved rights template deed or 30-year contract, approved by the Chief, to be used in the pilot.

(4) Compensation for easements or 30-year contracts entered into under the reserved rights pilot will be based on the method described in § 1467.8 with the following exceptions:

(i) Section 1467.8(a)(3)(i) is adjusted to reduce the fair market value of the land by an amount equal to the value of the retained grazing rights as determined by a Uniform Standards for Professional Appraisal Practices appraisal or a market survey; and

(ii) Section 1467.8(a)(3)(ii) is adjusted to reduce the geographic area rate cap determined as described in § 1467.8(a)(4) by an amount equal to the value of the retained grazing rights.

#### **§ 1467.10 Cost-share payments.**

(a) NRCS may share the cost with participants of implementing the WRPO on the enrolled land. The amount and terms and conditions of the cost-share assistance shall be subject to the following restrictions on the costs of establishing or installing conservation practices or activities specified in the WRPO:

(1) On enrolled land subject to a permanent easement, NRCS will offer to pay at least 75 percent but not more than 100 percent of such costs; and

(2) On enrolled land subject to a non-permanent easement, 30-year contract, or restoration cost-share agreement, NRCS will offer to pay at least 50 percent but not more than 75 percent of such costs.

(3) The total amount of payments that a person or legal entity may receive, directly or indirectly, for one or more restoration cost-share agreements, for any year, may not exceed \$50,000.

(b) Cost-share payments may be made only upon a determination by NRCS that an eligible conservation practice or component of the conservation practice has been implemented in compliance with appropriate NRCS standards and specifications; or an eligible activity has been implemented in compliance with the appropriate requirements detailed in the WRPO. Identified conservation practices or activities may be implemented by the participant, NRCS, or other NRCS designee.

(c) Cost-share payments may be made for replacement of an eligible conservation practice, if NRCS determines that the practice is still needed and that the failure of the original conservation practice was due to reasons beyond the control of the participant.

(d) A participant may seek additional cost-share assistance from other public or private organizations as long as the conservation practices or activities funded are in compliance with this part. In no event shall the participant receive an amount that exceeds 100 percent of the total actual cost of the restoration.

(e)(1) If land subject to an easement or 30-year contract is sold, the participant with the contractual obligation with NRCS will be responsible for implementation of any remaining items identified in the WRPO, unless the new landowner is an eligible participant, agrees to a transfer of the WRPO, and the voluntary transfer is approved in advance by NRCS. Cost-share payments will be made to the new eligible landowner upon presentation of an assignment of rights or other evidence that title has passed, proof of eligibility, and the new owner completes implementation of the WRPO.

(2) If the new landowner is not eligible for participation in WRP, the participant with the contractual obligation with NRCS will be responsible for implementation of any remaining items identified in the WRPO unless the new landowner agrees to implement the WRPO without NRCS assistance. The new landowner will be responsible for the implementation of conservation practices or activities necessary for maintenance of the easement functions and values as determined by NRCS. The contract between NRCS and the participant with the contractual obligation with NRCS will specify that NRCS will seek a refund of easement or 30-year contract compensation and restoration payments

from the participant with the contractual obligation with NRCS, unless the new landowner agrees to the transfer and completion of the WRPO with no NRCS assistance or a transfer of the restoration contract occurs as set forth above. In cases where payment recoupment occurs, the WRP easement remains in full force and effect.

(3) If land subject to a restoration cost-share agreement is sold prior to the completion of the restoration cost-share agreement and the new landowner is not eligible for participation in WRP or unwilling to complete implementation of the restoration cost-share agreement without NRCS assistance, the agreement will be cancelled, and the acres will be removed from enrollment. NRCS will seek refund of the restoration payments from the participant with the contractual obligation with NRCS.

(4) If land subject to a restoration cost-share agreement is sold prior to the expiration of the agreement and the new landowner is an eligible participant, the new landowner may agree to the transfer of the agreement and to completion of the agreement with NRCS assistance. If the new eligible landowner refuses to accept the transfer, the participant with the contractual obligation with NRCS must complete the implementation of the WRPO without NRCS assistance or the agreement will be cancelled and the acres removed from enrollment. NRCS will seek refund of the restoration payments from the participant with the contractual obligation with NRCS.

#### **§ 1467.11 Easement and 30-year contract participation requirements.**

(a) *Easement requirements.* (1) To enroll land in WRP through the permanent or non-permanent easement option, a landowner shall grant an easement to the United States. The easement shall require that the easement area be maintained in accordance with WRP goals and objectives for the duration of the term of the easement, including the restoration, protection, enhancement, maintenance, and management of wetland and other land functions and values.

(2) For the duration of its term, the easement shall require, at a minimum, that the participant, and the participant's heirs, successors and assigns, shall, consistent with the terms of this part, cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the warranty easement deed and with the terms of the WRPO. In addition, the easement shall grant to the United States, through NRCS:

(i) A right of access to the easement area;

(ii) The right to permit compatible uses of the easement area, including such activities as hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the wetland resources for which the easement was established;

(iii) All rights, title and interest in the easement area; and

(iv) The right to ensure restoration, protection, enhancement, maintenance, and management activities on the easement area.

(3) The participant shall convey title to the easement in a manner that is acceptable to NRCS. The participant shall warrant that the easement granted to the United States is superior to the rights of all others, except for exceptions to the title that are deemed acceptable by NRCS.

(4) The participant shall:

(i) Comply with the terms of the easement;

(ii) Comply with all terms and conditions of any associated contract or agreement;

(iii) Agree to the permanent retirement of any existing cropland base and allotment history for the easement area under any program administered by the Secretary, as determined by the FSA;

(iv) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the easement in accordance with the terms of the easement and related agreements;

(v) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any participant responsibilities on the easement area; and

(vi) Agree that each person or legal entity that is subject to the easement shall be jointly and severally responsible for compliance with the easement and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the easement or the provisions of this part.

(5) For all lands enrolled in the WRP, NRCS shall develop a WRPO. The WRPO and any subsequent revisions will be signed by the NRCS and the participant to acknowledge discussion and receipt of the WRPO.

(b) *30-year contract requirements.* (1) To enroll land in WRP through the 30-year contract option, a landowner shall enter into a contract with NRCS. The contract shall require that the enrolled area be maintained in accordance with

WRP goals and objectives for the duration of the contract, including the restoration, protection, enhancement, maintenance, and management of wetland and other land functions and values.

(2) For the 30-year duration, the contract shall require, at a minimum, that the participant, and the participant's heirs, successors and assigns, shall, consistent with the terms of this part, cooperate in the restoration, protection, enhancement, maintenance, and management of the land in accordance with the contract and with the terms of the WRPO. In addition, the contract shall grant to NRCS:

(i) A right of access to the contract area;

(ii) The right to permit compatible uses of the contract area, including such activities as a traditional Tribal use of the land, hunting and fishing, managed timber harvest, or periodic haying or grazing, if such use is consistent with the long-term protection and enhancement of the wetland resources for which the contract was established; and

(iii) The right to ensure restoration, protection, enhancement, maintenance, and management activities on the enrolled area.

(3) The participant shall:

(i) Comply with the terms of the contract;

(ii) Comply with all terms and conditions of any associated agreement;

(iii) Agree to the long-term restoration, protection, enhancement, maintenance, and management of the enrolled area in accordance with the terms of the contract and related agreements;

(iv) Have the option to enter into an agreement with governmental or private organizations to assist in carrying out any participant responsibilities on the enrolled area;

(v) Agree that each person or legal entity that is subject to the contract shall be jointly and severally responsible for compliance with the contract and the provisions of this part and for any refunds or payment adjustment which may be required for violation of any terms or conditions of the contract or the provisions of this part.

(4) For all lands enrolled in the WRP, NRCS shall develop a WRPO. The WRPO and any subsequent revisions will be signed by the NRCS and the participant to acknowledge discussion and receipt of the WRPO.

#### **§ 1467.12 The WRPO development.**

(a) The development of the WRPO will be made through the local NRCS representative, in consultation with the

State Technical Committee, with consideration of site-specific technical input from FWS and the Conservation District.

(b) The WRPO will specify the manner in which the enrolled land shall be restored, protected, enhanced, maintained, and managed to accomplish the goals of the program. The WRPO will be developed to ensure that cost-effective restoration and maximization of wildlife benefits and wetland functions and values will result. Specifically, the WRPO will consider and address, to the extent practicable, the on-site alternations and the off-site watershed conditions that adversely impact the hydrology and associated wildlife and wetland functions and values.

#### **§ 1467.13 Modifications.**

(a) *Easements.* (1) After an easement has been recorded, no modification will be made in the easement except by mutual agreement with the Chief and the participant. The Chief will consult with FWS and the Conservation District prior to making any modifications to easements.

(2) Approved modifications will be made only in an amended easement, which is duly prepared and recorded in conformity with standard real estate practices, including requirements for title approval, subordination of liens, and recordation.

(3) The Chief may approve modifications to facilitate the practical administration and management of the easement area or the program so long as the modification will not adversely affect the wetland functions and values for which the easement was acquired or when adverse impacts will be mitigated by enrollment and restoration of other lands that provide greater wetland functions and values at no additional cost to the government.

(4) Modifications must result in equal or greater environmental and economic values to the United States and address a compelling public need, as determined by the Chief.

(b) *WRPO.* Insofar as is consistent with the easement and applicable law, the State Conservationist may approve modifications to the WRPO that do not affect provisions of the easement in consultation with the participant and with consideration of site specific technical input from the FWS and the Conservation District. Any WRPO modification must meet WRP regulations and program objectives, comply with the definition of wetland restoration as defined in § 1467.3, must result in equal or greater wildlife benefits, wetland functions and values,

and ecological and economic values to the United States.

#### **§ 1467.14 Transfer of land.**

(a) *Offers voided.* Any transfer of the property prior to the enrollment of the easement, 30-year contract, or restoration cost-share agreement contract, including the landowner entering into a contract or purchase agreement to sell the land subject to offer, shall void the offer of enrollment.

(b) *Payments to landowners.* For easements with multiple annual payments, any remaining easement payments will be made to the original participant unless NRCS receives an assignment of proceeds.

(c) *Claims to payments.* With respect to any and all payments owed to participants, NRCS shall bear no responsibility for any full payments or partial distributions of funds between the original participant and the participant's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending an agreement or adjudication on the rights to the funds.

#### **§ 1467.15 Violations and remedies.**

(a) *Easement violations.* (1) In the event of a violation of the easement, 30-year contract, or any restoration cost-share agreement involving the participant, the participant shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation at the landowner's expense.

(2) Notwithstanding paragraph (a)(1) of this section, NRCS reserves the right to enter upon the easement area at any time to remedy deficiencies or easement violations. Such entry may be made at the discretion of NRCS when such actions are deemed necessary to protect important wetland functions and values or other rights of the United States under the easement. The participant shall be liable for any costs incurred by the United States as a result of the participant's negligence or failure to comply with easement or contractual obligations.

(3) At any time there is a material breach of the easement covenants or any associated agreement, the easement shall remain in force and NRCS may withhold or require the refund of any easement and cost-share payments owed or paid to participants. Such withheld or refunded funds may be used to offset costs incurred by the United States in any remedial actions or retained as

damages pursuant to court order or settlement agreement. This remedy is in addition to any and all legal or equitable remedies available to the United States under applicable Federal or State law.

(4) The United States shall be entitled to recover any and all administrative and legal costs, including attorney's fees or expenses, associated with any enforcement or remedial action.

(b) *30-year Contract and Restoration Cost-Share Agreement violations.* (1) If the NRCS determines that a participant is in violation of the terms of a 30-year contract, or restoration cost-share agreement, or documents incorporated by reference into the 30-year contract or restoration cost-share agreement, the participant shall be given reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as the State Conservationist determines is necessary to correct the violation. If the violation continues, the State Conservationist may terminate the 30-year contract or restoration cost-share agreement.

(2) Notwithstanding the provisions of paragraph (b)(1) of this section, a restoration cost-share agreement or 30-year contract termination is effective immediately upon a determination by the State Conservationist that the participant has:

- (i) Submitted false information;
- (ii) Filed a false claim;
- (iii) Engaged in any act for which a finding of ineligibility for payments is permitted under this part; or
- (iv) Taken actions NRCS deems to be sufficiently purposeful or negligent to warrant a termination without delay.

(3) If NRCS terminates a restoration cost-share agreement or 30-year contract, the participant will forfeit all rights for future payments under the restoration cost-share agreement or 30-year contract, and must refund all or part, as determined by NRCS, of the payments received, plus interest.

#### **§ 1467.16 Payments not subject to claims.**

Any cost-share, contract, or easement payment or portion thereof due any person under this part shall be allowed without regard to any claim or lien in favor of any creditor, except agencies of the United States Government.

#### **§ 1467.17 Assignments.**

Any person entitled to any cash payment under this program may assign the right to receive such cash payments, in whole or in part.

#### **§ 1467.18 Appeals.**

(a) A person participating in the WRP may obtain a review of any

administrative determination concerning eligibility for participation utilizing the administrative appeal regulations provided in 7 CFR part 614.

(b) Before a person may seek judicial review of any administrative action taken under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section, and for purposes of judicial review, no decision shall be a final Agency action except a decision of the Chief of the NRCS under these procedures.

(c) Any appraisals, market analysis, or supporting documentation that may be used by the NRCS in determining property value are considered confidential information, and shall only be disclosed as determined at the sole discretion of the NRCS in accordance with applicable law.

(d) Enforcement actions undertaken by the NRCS in furtherance of its federally held property rights are under the jurisdiction of the federal courts and not subject to review under administrative appeal regulations.

#### **§ 1467.19 Scheme and device.**

(a) If it is determined by the NRCS that a participant has employed a scheme or device to defeat the purposes of this part, any part of any program payment otherwise due or paid such participant during the applicable period may be withheld or be required to be refunded with interest thereon, as determined appropriate by NRCS.

(b) A scheme or device includes, but is not limited to, coercion, fraud, misrepresentation, depriving any other person of payments for cost-share practices, contracts, or easements for the purpose of obtaining a payment to which a person would otherwise not be entitled.

(c) A participant who succeeds to the responsibilities under this part shall report in writing to the NRCS any interest of any kind in enrolled land that is held by a predecessor or any lender. A failure of full disclosure will be considered a scheme or device under this section.

#### **§ 1467.20 Market-based conservation initiatives.**

(a) *Acceptance and use of contributions.* Section 1241(e) of the Food Security Act of 1985, as amended, (16 U.S.C. 3841(e)), allows the Chief to accept and use contributions of non-Federal funds to support the purposes of the program. These funds shall be available without further appropriation and until expended, to carry out the program.

(b) *Ecosystem Services Credits for Conservation Improvements.* (1) USDA recognizes that environmental benefits will be achieved by implementing conservation practices and activities funded through WRP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a WRP easement, 30-year contract, or restoration cost-share agreement. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure that the requirements of the WRPO, contract, and easement deed are met. Where activities required under an environmental credit agreement may affect land covered under a WRP easement, 30-year contract, or restoration cost-share agreement, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such agreements.

(2) Section 1222(f)(2) of the Food Security Act of 1985 as amended, does not allow wetlands restored with Federal funds to be utilized for Food Security Act wetland mitigation purposes.

Signed this 9th day of January 2009, in Washington, DC.

**Arlen L. Lancaster,**

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

[FR Doc. E9-735 Filed 1-14-09; 8:45 am]

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## DEPARTMENT OF JUSTICE

### Executive Office for Immigration Review

#### 8 CFR Part 1274a

[EOIR No. 166I; AG Order No. 3031-2009]

RIN 1125-AA64

### Reorganization of Regulations on Control of Employment of Aliens

**AGENCY:** Executive Office for Immigration Review, Department of Justice.

**ACTION:** Interim rule with request for comments.

**SUMMARY:** The Homeland Security Act of 2002, as amended, transferred the functions of the former Immigration and Naturalization Service (INS) from the Department of Justice to the Department of Homeland Security (DHS); however, it retained within the Department of Justice the functions of the Executive Office for Immigration Review (EOIR), a

separate agency within the Department of Justice. Because the existing regulations often intermingled the responsibilities of the former INS and EOIR, this transfer required a reorganization of title 8 of the Code of Federal Regulations (CFR) in February 2003, including the establishment of a new chapter V in 8 CFR pertaining to EOIR. As part of this reorganization, a number of regulations pertaining to the responsibilities of DHS intentionally were duplicated in the new chapter V because of shared responsibilities. The Department of Justice now has determined that most of the duplicated regulations in part 1274a pertain to functions that are DHS's responsibility and do not need to be reproduced in EOIR's regulations in chapter V. This interim rule, therefore, deletes unnecessary regulations in part 1274a and makes appropriate reference to the applicable DHS regulations.

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

*Comments:* Comments on this rule must be received by March 16, 2009.

**ADDRESSES:** Comments may be mailed to John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041. To ensure proper handling, please reference EOIR Docket No. 166I on your correspondence. You may submit comments electronically or view an electronic version of this interim rule at [www.regulations.gov](http://www.regulations.gov).

**FOR FURTHER INFORMATION CONTACT:** John N. Blum, Acting General Counsel, Executive Office for Immigration Review, 5107 Leesburg Pike, Suite 2600, Falls Church, Virginia 22041, telephone (703) 305-0470.

#### SUPPLEMENTARY INFORMATION:

##### I. Posting of Public Comments

Please note that all comments received are considered part of the public record and made available for public inspection online at <http://www.regulations.gov>. Such information includes personal identifying information (such as your name, address, etc.) voluntarily submitted by the commenter.

If you want to submit personal identifying information (such as your name, address, etc.) as part of your comment, but do not want it to be posted online, you must include the phrase "PERSONAL IDENTIFYING INFORMATION" in the first paragraph of your comment. You also must locate all the personal identifying information you do not want posted online in the first paragraph of your comment and

identify what information you want redacted.

If you want to submit confidential business information as part of your comment, but do not want it to be posted online, you must include the phrase "CONFIDENTIAL BUSINESS INFORMATION" in the first paragraph of your comment. You also must prominently identify confidential business information to be redacted within the comment. If a comment has so much confidential business information that it cannot be effectively redacted, all or part of that comment may not be posted on <http://www.regulations.gov>.

Personal identifying information and confidential business information identified and located as set forth above will be placed in the agency's public docket file, but not posted online. To inspect the agency's public docket file in person, you must make an appointment with agency counsel. Please see the "For Further Information Contact" paragraph below for agency counsel's contact information.

## II. Background

The Homeland Security Act of 2002, as amended (HSA), transferred the functions of the former Immigration and Naturalization Service (INS or the Service) to the Department of Homeland Security (DHS). Public Law 107-296, tit. IV, subtit. D, E, F, 116 Stat. 2135, 2192 (Nov. 25, 2002), as amended. The HSA, however, retained the functions of the Executive Office for Immigration Review (EOIR) within the Department of Justice, under the direction of the Attorney General. 6 U.S.C. 521; 8 U.S.C. 1103(g); see generally *Matter of D-J-*, 23 I&N Dec. 572 (A.G. 2003).

EOIR was created by the Attorney General in 1983 to combine the functions performed by INS special inquiry officers (now immigration judges) and the Board of Immigration Appeals (Board) into a single administrative agency within the Department of Justice, separate from the former INS. 48 FR 8038 (Feb. 25, 1983). This administrative structure separated the administrative adjudication functions from the enforcement and service functions of the former INS, both for administrative efficiency and to foster independent judgment in adjudication. The Office of the Chief Administrative Hearing Officer (OCAHO) and its administrative law judges (ALJs) were added to EOIR in 1987, following enactment of section 274A of the Immigration and Nationality Act (INA), 8 U.S.C. 1324a. See 52 FR 44971 (Nov. 24, 1987).