



American Farmland Trust
SAVING THE LAND THAT SUSTAINS US

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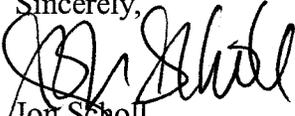
Program Allocations and Management Support Team
Room 5212-S
Natural Resources Conservation Service
U.S. Department of Agriculture
P.O. Box 2890
Washington, DC 20013-2890

RE: Regional Equity Comments

Enclosed are comments from the American Farmland Trust concerning the regional equity Interim Final Rule as published on January 13, 2009. We request that our comments be considered and adopted as NRCS revises the rule and implements the regional equity allocation process.

We appreciate the opportunity to provide these comments and encourage you to contact us should you have any questions.

Sincerely,



Jon Scholl
President

American Farmland Trust Comments
On the Interim Final Rule for
REGIONAL EQUITY

Purpose: Ensure that the Regional Equity Process Meets the Conservation Needs of Regional Equity States

Issue: Identification of contribution programs

In Section 662.2, the interim final rule defines *Regional Equity programs* as the twelve programs that fall within Subtitle D of the Food Security Act of 1985 excluding the Conservation Reserve Program (CRP), the Wetlands Reserve Program (WRP) and the Conservation Security Program (CSP) established in the 2002 Farm Bill. However, Section 662.2 states that not all regional equity programs will contribute funding to regional equity states, and creates a definition for *Contribution programs*, which will be some subset of the regional equity programs as determined by the Chief each fiscal year.

Under what conditions a program will be determined by the Chief to be a contribution program is unclear. The amount of discretion left to the Chief in this regard seems inconsistent with the statutory revisions to the provision.

As amended in the 2008 Farm Bill, the regional equity statute states that “[i]n determining the specific funding allocations for States under paragraph (1), the Secretary shall consider the respective demand in each State for each program covered by such paragraph.” Accordingly, AFT believes the interim rule should be revised to clarify that the Chief’s annual determination of programs that shall be considered contribution programs be made on the basis of the respective demand for each program in regional equity states. For instance, if in any single year there were no demand among regional equity states for additional Great Lakes Basin Program funds, that program would not be considered a contribution program. Conversely, if at least one regional equity state had unmet demand in a year for the Grasslands Reserve Program, that program would be deemed a contribution program that year. Aligning contribution program funding with the demand in regional equity states will maximize the environmental benefit from regional equity funding.

Issue: Drawing Accounts

Section 662.4(d) and (e) of the interim final rule provide the mechanism by which regional equity states will be allowed to access additional program funding. While a statutory change to the regional equity provision directs the Secretary to consider the respective demand in each state in determining specific regional equity funding

allocations, the drawing account established in 662.4(d) seems to limit the ability of State Conservationists to determine the mix of regional equity program funds they need to best meet program demand each year.

Section 662.4(d) states that NRCS will establish a drawing account *for each contribution program*, and will give priority before April 1st of each fiscal year for such funds to be used to fund applications in regional equity states. Section 662.4(e) states that State Conservationists in regional equity states may request access to “that *State’s assigned portion of [each contribution program’s] drawing account*” once it has obligated 90% of its initial allocations. In doing so, Section 662.4 appears to envision a process by which drawing accounts are set up not by state, but by program, with states able to request only up to their “assigned portion” of funds from each program.

In prior years, regional equity states often received additional regional equity allocations in programs for which there was little demand, prompting Congress to revise the statute to specifically require the Secretary to take into account respective program demand in regional equity states. To more accurately reflect Congressional intent, AFT believes the interim rule should be revised to modify the way in which drawing accounts are established. Rather than have program-specific drawing accounts, state NRCS offices should have access to a single regional equity “drawing account” that allows each State Conservationist, with input from the State Technical Committee, to choose the mix of program funding to best meet the state’s needs.

Issue: Flexibility in allocations

In prior years, regional equity states have sometimes received program allocations that exceeded the demand for the program in the state. These allocations have counted toward the state’s \$12 million “regional equity” calculation even though the funds have been reallocated later in the year to other states. AFT believes this issue should be addressed in the interim rule, especially in light of the number of new programs that are included in the definition of *Regional Equity program*.

AFT recommends that the rule include a mechanism by which, in each fiscal year, a State Conservationist is given an opportunity by a date in advance of April 1st to indicate that the state is unlikely to use its full initial allocation for any given regional equity program. The amount of any initial allocation thus “turned back” by the State Conservationist should then be credited to the state’s drawing account. This would help ensure that regional equity states are not disadvantaged by initial program allocations that are not likely to be obligated, and are given the flexibility to access the program and regional equity funds that can best address the conservation needs and demands in the state.

Issue: April 1st Deadline and Obligation Threshold Requirements

The regional equity statute requires the Secretary to give priority funding before April 1st for approved applications for specific programs within states that have not received a \$15 million aggregate level of funding. Section 662.4(e) and (f) clarify this process, allowing states to “request access to that State’s assigned portion of the drawing account once that State has obligated at least 90 percent of its initial allocation for that same program,” and stating that these “program-specific drawing accounts...will be available until April 1st of each fiscal year, after which date the remaining funds may be re-allocated at the discretion of the Chief.”

While AFT understands the rationale for having an obligation threshold in order to gain access to a regional equity drawing account, AFT believes that the stated threshold of 90% is high, especially given the April 1st deadline. In effect, the rule requires each regional equity state to complete 90 percent of its workload within the first six months of the fiscal year, even though no such requirement appears in the statute. This threshold seems especially high in light of the new land and entity eligibility requirements that have been proposed for the Farm and Ranchlands Protection Program under the interim final rule—eligibility determinations that will add to the time demands on state NRCS offices, and that must be completed before cooperative agreements can be signed and FRPP funds obligated.

Additionally, the interim rule does not appear to provide the Chief with the authority to waive the April 1st deadline under certain circumstances. Given the inherent uncertainty of the Congressional budget process, there may be years in which NRCS cannot provide states with their initial allocations until the first few months of a calendar year, leaving states unable to obligate 90% of initial allocations under such a tight deadline.

For these reasons, AFT recommends that the interim rule be revised to:

- i. Reduce the 90% obligation threshold to 75%;
- ii. Include language that gives the Chief discretion to waive or further reduce the Section 662.4(e) obligation threshold, allowing the Chief flexibility to modify the obligation requirement when, due to either the timing of state allocations or to additional programmatic requirements that need to be met, states cannot reach the threshold by April 1st despite good faith efforts to do so;
- iii. Revise the language of Section 662.4(f) to clarify that the Chief may provide access to the drawing accounts beyond April 1st at his discretion.

Issue: Farm and Ranchlands Protection Program (FRPP) rules

As noted above, new program requirements for FRPP could significantly hamper the ability of regional equity states to obligate 90% of their initial FRPP allocations by April 1st of each year. The interim rule for the FRPP indicates that state NRCS offices will be required to determine the land and landowner eligibility of all parcels to be included in a

cooperative agreement before NRCS will sign the agreement. As explained during the recent NRCS web conference on the subject, these eligibility determinations will include a hazardous materials records search and field review and may entail additional forestland eligibility documentation. As further explained, state NRCS office staff will also be required to interview landowners prior to inclusion of the parcel in the cooperative agreement to insure their understanding of their proceeds from the easement acquisition. While the IFR envisions a rolling application process that allows these determinations and interviews to be made at any time during the fiscal year, these new requirements will tax current staff capacity of state NRCS offices, and are likely to impact the ability of states to sign cooperative agreements prior to April 1st.

AFT believes that many of these new FRPP requirements are unnecessary and flow from the agency's incorrect interpretation of the contingent right of enforcement as a real property interest. As AFT indicates in its comments on the program's interim rule, Congress did not intend for the contingent right of enforcement to be considered the acquisition of a federal property interest, and the rule should be revised to reflect Congressional intent. This revision is especially important to regional equity states, many of whom have demand for FRPP funding that exceeds their initial program allocations, as their capacity to sign cooperative agreements prior to April 1st of each fiscal year and thus meet the threshold needed to access additional FRPP funds will otherwise be severely challenged.