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March 12, 2009

Mr. Robin Heard
Director, Easement Programs Division
U.S. Department of Agriculture, Natural Resources Conservation Service
P O Box 2890, Room 6819
Washington, D C. 20013-2890

Dear Mr. Heard:

On behalf of the Western Regional Office of Ducks Unlimited, Inc., I am pleased to submit these comments on the Wetlands Reserve Program Interim Final Rule (Docket Number NRCS-IFR-08013).

The Wetlands Reserve Program has been an important program for conservation of wetland habitats in the west. The 2008 Farm Bill provides an even greater opportunity to broaden our partnership with NRCS and continue to preserve and restore waterfowl habitats. We are particularly interested in working with NRCS on the new WREP pilot program as we believe it provides an outstanding opportunity to develop partnerships between ranchers and the wildlife community.

Thank you for consideration of our comments.

Sincerely,

Rudolph Rosen, Ph.D
Director

attachments

- cc: David L. McKay, Arizona State Conservationist
- Lincoln E. Burton, California State Conservationist
- Jeff Burwell, Idaho State Conservationist
- Bruce Petersen, Nevada State Conservationist
- Ron Alvarado, Oregon State Conservationist
- Sylvia Gillen, Utah State Conservationist
- Roylene Rides at the Door, Washington State Conservationist

**COMMENTS FROM DUCKS UNLIMITED'S WESTERN REGIONAL OFFICE
ON WETLANDS RESERVE PROGRAM**
Docket Number NRCS-IFR-08013

GENERAL COMMENTS

- The Wetlands Reserve Program is a very important program for the conservation of fish and wildlife resources. The 2 million acres presently enrolled in the program are providing significant environmental benefits and have positively affected populations of wetland dependent wildlife. The program's reauthorization in the 2008 Farm Bill will continue to serve fish and wildlife resources throughout the Nation. Therefore, flexibility in implementation should be stressed to ensure that opportunities to further wetland conservation are not missed.
- The 2008 Farm Bill limits participation to landowners who have owned the land for 7 years or longer. This will significantly reduce important opportunities to enroll critical wetlands into the program. However, Congress provided for NRCS to allow waivers to this time period. Therefore we recommend that waivers be granted where landowners purchased the land for other purposes but that some of the land would be eligible for enrollment into WRP. For example, if a landowner purchases a large tract of land and learns that a portion of it is eligible for WRP there should be no waiting period. NRCS has already issued Draft policy indicating a 4 year wait would be required. We do not believe this is the intent of Congress or in the best interest of wetland resources. In addition, waivers should be granted for areas that contain at-risk species or where restoration would benefit these species. Declining species need special attention to ensure they are not listed through the Endangered Species Act.
- The 2008 Farm Bill statute continues to allow riparian areas to be included within WRP when they link protected wetlands. This is an important tool since riparian areas are critical to many species of wildlife. In addition, these areas are corridors that provide for the movement of plants and animals through often otherwise uninhabitable landscapes. However, the WRP Interim Rule has placed greater restriction on the enrollment of riparian areas than either the law or past NRCS policy. Specifically, Section 1467.4 relegates riparian area enrollment to only be included when other lands as specified in Section 1467.4 are included (e.g., farmed wetland or converted wetlands, farmed under natural conditions). This discretionary change by NRCS will make it extremely difficult to enroll important riparian areas into WRP. Therefore, we request that riparian areas be eligible for enrollment as a stand-alone land eligibility that only has to meet the statutory criteria of linking protected *wetlands*. In addition, latitude should be

provided to the State Conservationist to waive this requirement when special circumstances support doing otherwise.

- The Interim Final Rule indicates that if a new landowner acquires the property and if they do not meet landowner eligibility, or if the land is transferred to a public agency or other ineligible person/entity prior to restoration completion, then NRCS funds can no longer be provided to the project. This is counterproductive to the public's interest and does not ensure the restoration or maintenance of the wetland functions and values for which the easement was originally acquired. We understand that NRCS must use eligibility requirements as identified in Statute, but once the easement is perfected it becomes the responsibility of the Federal Government to ensure the original investment is secured and maintained. Therefore, landowner eligibility should no longer be a consideration. We recommend that Section 1467.10(e)(1, 2, 3, and 4) of the Interim Rule be eliminated.
- The Wetland Reserve Plan of Operation (WRPO) is a living document. NRCS and partners need to constantly work with the landowner and other conservation professionals to make sure that work done is functioning correctly. Further, needed conservation improvements that have been missed should be identified in routine monitoring efforts and should be added to revise and update the WRPO over time.
- The statute added enhancement as a program purpose. We applaud this addition since many wetland systems have been dramatically altered by water development and drainage systems. Therefore, wetland restoration, protection and enhancement projects are needed to make up for values lost within the larger wetland landscape. This is particularly important in intensively cropped landscapes with significantly modified wetland hydrology.
- Section 1467.11(a)(2)(ii) includes hunting and fishing as a compatible use. Compatible uses are activities that NRCS allows through a process that furthers the conservation of wetland functions and values. However, hunting and fishing should be a reserved right that is regulated by the state fish and wildlife agency and the U.S. Fish and Wildlife Service (FWS). We request that hunting and fishing be removed from this paragraph and that the Interim Final Rule indicate that hunting and fishing is a reserved right.

WREP RESERVED RIGHTS PILOT PROGRAM. Section 1467.9(b)

The following section includes two important general comments on Section 1467.9(b) and additional suggestions for rulemaking and delivery of the subject Wetlands Reserve Enhancement Program (WREP) Reserved Rights Pilot Program. We believe that the additional information is relevant to the rulemaking

process because it highlights the importance of this provision in achieving WRP's objectives in key waterfowl areas in the Intermountain West.

The level of future WRP enrollment in the Intermountain West will likely hinge on the ability of NRCS to craft a WREP Reserved Rights Pilot Program that is supported by the wildlife community and meets the objectives of working ranchers. The traditional WRP has only been marginally successful in this region, to date, and that situation is likely to worsen due to the statutory tightening of eligibility requirements (e.g., 7-year ownership, AGI provision, etc). As such, we believe the WREP Reserved Rights provision represents an outstanding opportunity to achieve wetland conservation through partnerships between ranchers and the wildlife community.

- The statute and Interim Rule provides for the pilot of a WREP that allows grazing rights to be reserved to the landowner with a reduction in easement payment. This will be an important tool in the West to protect and restore areas critical to wetland dependent wildlife. The existing program only allows for grazing to be provided as a compatible use at the discretion of NRCS. This has deterred many traditional ranching operations from participating in the program. Therefore, many important wetland landscapes are unprotected and opportunities for wetland restoration and enhancement have been missed. Reserved grazing rights have the potential to greatly extend the opportunities for program enrollment in the West. We recommend that NRCS work to make this a successful tool for the conservation of wetlands and important wildlife habitat in the western United States.
- The WREP pilot program with reserved grazing rights is a long needed tool to further the conservation of wetlands in the western U.S. To minimize workload for NRCS we recommend that instead of preparing individual grazing plans for the easements, that an ecological condition be integrated into the easement document. This would be an agreed-to condition between NRCS and the landowner. The landowner would be responsible for managing the ecosystem to the predetermined level of rangeland health. This condition would target the wetland functions through easement acquisition. In some landscapes (e.g., those with wetlands important to waterfowl during spring migration) moderate to heavy grazing pressure may be the most important tool for ensuring the value and functions of the easement. This has been the case for bog turtle management in the Northeastern U.S. and for migratory birds in the Rainwater Basin of Nebraska and the Klamath and Closed Basins in southern Oregon. NRCS or a partner would periodically determine whether the landscape goals are being met. If not, the landowner would be notified and given a date to implement a management strategy that would achieve the landscape objectives.

Additional Comments Relevant to Section 1467.9(b). The WREP Reserved Rights Pilot Program allows NRCS to enroll eligible lands to achieve the purposes of the program: "...to protect, restore, or enhance wetlands on private or tribal lands that are eligible..." while allowing the landowner to retain the right to use the land for grazing purposes. We believe that this flexibility can achieve two fundamental objectives of the wildlife community relative to wetland conservation:

Maintain Productive Early Successional Wetland Habitats: WRP has been the Nation's most effective and substantial wetland restoration program over the last two decades, perhaps in history. However, the requirement that all agricultural rights are purchased and secured by NRCS in the Warranty Easement Deed has, in certain situations, limited the effectiveness of NRCS, its wildlife conservation partners, and landowners in managing wetland plant communities to provide early successional habitat. In some landscapes, grazing and/or haying are needed annually to provide optimal habitat for waterfowl, shorebirds, and other species dependent on shallow, open-water conditions.

Compatible Use Authorizations (CUA) have been implemented by NRCS to deal with these issues, sometimes with good success. However, there are some fundamental shortcomings to the CUA process and it has often resulted in frustration by landowners, agricultural operators, NRCS field staff, and partners. The CUA process does not provide agricultural operators with assurances that grazing or haying will be allowed from year to year, hence constraining their planning and/or installation of necessary infrastructure. Further, routine authorization of CUAs, when it has been done, results in NRCS paying for a right that is then routinely granted back to the landowner, thereby unnecessarily consuming WRP financial and technical assistance. Most importantly, landowners not utilizing their properties extensively for hunting often feel detached from their WRP enrollments, simply feeling that NRCS has bought the land and should be responsible for managing it. NRCS has the right to implement management on WRP lands, but it is logistically challenging to do so, at best. Physical management (e.g., burning, disking) of cattails that have choked out a wetland on private land would be difficult for even a land management agency such as the FWS, which has access to the necessary tools (e.g., equipment, operators); it is simply not in the make-up of NRCS as an agency. All of this begged for the flexibility to address regional issues with regional solutions, which was provided in the WREP Reserved Rights Pilot Program.

Vegetation management on WRP lands is clearly a regional problem – i.e. it may not be a problem with bottomland hardwood restoration in the Mississippi Alluvial Valley – but it is needed in critical landscapes for spring migrating waterfowl such as the Rainwater Basin of Nebraska, Southern Oregon/Northeastern California and productive waterfowl areas in eastern Washington such as the Channeled Scablands, where grazing is simply the most cost-efficient and effective means of maintaining high-quality waterfowl, shorebird, and waterbird foraging habitats.

Encourage Enrollment in Intact Wetland Landscapes with High Ecological Values: WRP has facilitated tremendous wetland restoration in the Mississippi Alluvial Valley, Central Valley of California, and throughout the Upper Midwest. However, WRP enrollment has often been driven by a demand by landowners for waterfowl hunting. This demand does not exist in some of the nation's most ecologically important wetland landscapes (e.g., Prairie Pothole Region (PPR) of South Dakota, North Dakota, and Montana; portions of the Intermountain West) at least at levels in which landowners will sell their grazing rights. As a result, WRP has not been a powerful force in the protection and restoration of wetlands on grazing lands in the northern Great Plains and Intermountain West. Yet most wildlife professionals in these regions view ranching as far more compatible with wildlife conservation than the primary alternatives for a rancher – subdivision or conversion to cropland – and work hard to help maintain the agricultural viability of ranching as a principal means of achieving desired populations of wetland-dependent wildlife.

These landscapes are some of the most important wetlands in the U.S. precisely because they are not fragmented by cropland. Waterfowl research in the PPR has consistently shown higher recruitment rates in grass-dominated landscapes – thus the “thunderstorm maps” for waterfowl conservation prioritize areas with high wetland densities and intact grasslands. The FWS administers a well-received “working lands” wetlands conservation easement program in the PPR to achieve North American Waterfowl Management Plan objectives. Likewise, the North American Wetlands Conservation Act (NAWCA) has awarded over \$48 million in grants for wetland protection and restoration in the Intermountain West; much of the land protected through NAWCA has been maintained as working cattle ranches. WRP has simply not been an attractive option for ranchers in the Intermountain West to date. Some wildlife professionals have even been reluctant to encourage WRP out of concern that partial-ranch WRP enrollments involving the most productive sub-irrigated wet meadows could reduce the agricultural viability of the ranch such that it took the heart out of the ranching operation and made the landowner more susceptible to selling to out of state real estate development interests. The fragmentation of intact landscapes through ranchette subdivision in the Northern Rockies, for example, has devastating effects on everything from breeding waterfowl to moose to grizzly bears.

Recreation-minded “new” landowners have been viewed by some environmental and wildlife advocates as a positive addition to the pattern of land ownership in the West. However, even these landowners have not readily participated in WRP in most of the Intermountain West. Further, the shrinking AGI cap and the new 7-year eligibility requirement will likely diminish their role as WRP constituents at least for the duration 2008 Farm Bill. Either way, the new WREP provision could clearly help establish a new WRP clientele in portions of the Intermountain West, PPR, and in locations such as the Rainwater Basin of Nebraska, southern Oregon and northern California and in eastern Washington. The development of successful partnerships between NRCS, ranchers, and wildlife conservation

agencies and organizations is inherently a win-win for wetlands and communities in the West.

Given the inherent differences in the regional scenarios described above, we suggest implementing WREP with the maximum level of flexibility possible.

The Manager's Report states: "The Managers intend for the Secretary to explore different warranty easement deeds consistent with the purposes of the program, while allowing a landowner to retain the right to use the land for grazing purposes. The Managers intend that any activities occurring under a reserved right easement be covered by a conservation plan developed and approved by the Secretary."

We support the approach of implementing an RFP and using template deeds and 30-year contracts, as stated in the Interim Rule. The following specific ideas are submitted for NRCS consideration in rulemaking and subsequent WREP delivery:

- **RFP Criteria:** Require the WREP applicant – a State, nongovernmental organization, or Indian tribe – to submit a proposal that justifies and describes the proposed Agreement, including: the need for WRP enrollment to achieve migratory bird conservation and other wildlife objectives; the benefits of the proposed approach; justification for how the reservation of grazing rights will promote science-based wetland conservation; description of the partnership with roles and responsibilities; any offers of easement management assistance; proposed warranty easement deed; funding leveraged by partner contributions to easement acquisition, restoration, and, if applicable, easement management; landowner interest in the WREP; and a request of acres and/or funding.
- **Warranty Easement Deed:** Explore different warranty easement deeds consistent with the purposes of the program by requiring the WREP applicant, as part of the proposal described above, to **submit a proposed warranty easement deed** that could be adopted by NRCS for the specific WREP project. The applicant should be required to explain how this warranty easement deed will achieve the objectives of WRP on working grazing lands. This could be a modification to the existing NRCS WRP Warranty Easement Deed or it could be a completely different warranty easement deed used routinely by partner agencies or non-profit conservation organizations like Ducks Unlimited. Preference could be given by NRCS to proposals that include warranty easement deeds that have been successfully utilized in the past and are proven to be effective in achieving wetland wildlife conservation on grazing lands. Utilizing the warranty easement deed of a respected entity with experience in conservation easement program delivery for wildlife would provide the following benefits:

- Credibility from the Wildlife Community: The WREP Reserved Rights Pilot Program is a substantial departure from the “retirement” model that has been successfully used by WRP since the inception of the program. Some wildlife proponents may be concerned that the subject pilot will weaken the program. As such, it would be advantageous for NRCS to establish partnerships with state fish and wildlife agencies, the FWS, and nongovernmental organizations with a proven track record of achieving their wildlife objectives through conservation easement acquisitions on working lands. The best way to foster such partnerships is to permit use of warrant easement deeds successfully utilized by those agencies or organizations to conserve wetlands and associated habitats.

- Landowner Demand for WRP: Certain wildlife agencies and organizations have substantial backlogs for their wetland easement programs. These landowners would likely be willing to enroll in WRP, thereby helping NRCS achieve its wetland objectives on working lands in cooperation with their long-valued customers, working agricultural producers.

- Easement Management: It would provide the opportunity for NRCS, if all parties concurred, to transfer the management of WRP easements acquired through WREP to qualified entities such as non-profit conservation organizations. Utilization of a proven warranty easement deed would greatly expand the interest of partner organizations in assuming WRP easement management workload and responsibilities. As envisioned in the 2006 WREP RFP, this would reduce NRCS easement management costs. This concern was also raised in the Manager's Report: “The Conference substitute adopts the Senate provision. The Managers are concerned with the long-term implications of managing and monitoring wetland easements. The substitute requires the Secretary to provide a report on the number and location of conservation easements acquired under the WRP and an assessment of the extent to which the oversight of conservation easement agreements impacts the availability of USDA resources, including technical assistance.” (Section 2210 of Conference substitute)

- Enrollment Outreach: This approach would likely result in substantial effort by partner agencies and organizations to promote WRP to landowners they are working with on their own habitat protection and restoration programs. This could immediately create high demand for WRP and result in positive recognition for NRCS in regions where WRP has not previously had a strong presence.

- **State Fish and Wildlife Agency and FWS Approval:** Approval from the state fish and wildlife agency and FWS at the local level could be required for WREP Reserved Rights projects, or, at a minimum, applicants could be asked to provide support letters from these entities. State fish and wildlife agencies are statutorily responsible and entrusted to manage the fish and wildlife resources within their state boundaries and the FWS assumes such statutory responsibility for migratory birds and other trust species. As such, NRCS would benefit substantially from encouraging partnerships with these agencies.
- **Prioritization:** WREP will likely be most successful if it utilizes: 1) a high degree of biological planning and conservation design for migratory birds and other wetland-dependent wildlife, 2) the conservation easement infrastructure of NRCS partners, and 3) wetland conservation partnerships already in existence. These attributes could be emphasized in the NRCS proposal evaluation criteria. For example, over 33% of all the pintails in North America use shallow, flooded wetlands in half a dozen sub-basins in northern California and southern Oregon each spring. Research by USGS has shown the critical importance of this area to continental pintail populations. These pintails spend over two months each spring feeding in grazed, wet meadows on their way to breeding grounds in prairie Canada and Alaska. Ducks Unlimited and other conservation partners have already made this a priority area for wetland conservation actions. Clearly this area should be a priority area for WREP.
- **Grazing Management Plans:** Statute requires WREP enrollments to comply with a conservation plan. NRCS grazing management plans should be required for all enrollments. These plans should be included as an addendum to the easement such that they can be modified over time consistent with NRCS conservation planning policy.