

April 17, 2009

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EQIP

Financial Assistance Programs Division
USDA Natural Resources Conservation Service
Environmental Quality Incentives Program Comments
Docket Number NRCS-IFR-08005
1400 Independence Avenue, S.W., Room 5237S
Washington, DC 20250-2890

RECEIVED APR 24 2009

Re: AWEP Implementation

Dear Sir or Madam,

Congress enacted the Agricultural Water Enhancement Program (AWEP) in the Conservation Title of the 2008 Farm Bill to foster durable stewardship of our nation's agricultural lands and water resources. A broad coalition of agricultural producers, conservation organizations, and water and wastewater agencies write to you now to urge you to change a few of the ways that AWEP is currently being implemented that do not serve its ambitious conservation purpose.

This coalition, as you know, worked hard to ensure AWEP's passage, and we remain committed to ensuring that AWEP will be a successful program that sets a new standard for achieving conservation benefits while supporting agricultural production. It is in this spirit that we highlight our primary concerns, and offer our collective suggestions for AWEP implementation:

- **AWEP projects implemented through individual EQIP contracts.** AWEP's statutory authorization includes selection criteria that give priority to projects that involve multiple partners and involve the highest percentage of producers in a region or watershed. Much of the discussion around AWEP was devoted to the idea of promoting multi-producer, partnership-based water quality and water conservation projects at a watershed scale. While we want to maintain the NRCS's flexibility to implement AWEP projects through individual EQIP contracts when only a small number of producers are involved in the project, this approach is unwieldy with multiple producers. Indeed, AWEP's statutory authorization explicitly provides for project implementation *either* by entering into individual contracts with producers, *or* "by entering into partnership agreements with partners, in accordance with subsection (c) [setting out partnership agreement requirements], on a regional level to benefit working agricultural land." 16 U.S.C.A. § 3839aa-9(b)(2) (emphasis added). Despite this clear direction, however, currently AWEP projects must be implemented through a large number of contracts with individual producers for projects addressing watershed-scale issues

For example, the Sun River canal lining AWEP proposal from Montana contemplates as many as 500 producer EQIP contracts to implement. Even

though the AWEP program is designed for watershed-scale restoration, explicitly provides for single contracts with multiple producers, and indeed prioritizes projects with large numbers of producers, actually implementing a project at that scale through potentially hundreds of EQIP contracts is almost unworkable, and is at odds with AWEP's purpose. Moreover, it is inconsistent with AWEP's explicit statutory directive to provide for partnership agreements in lieu of individual producer contracts when multiple producers are involved at a regional level.

The Managers' Report accompanying congressional authorization of AWEP states that: "The purpose of authorizing partners in AWEP is to leverage federal funds and to encourage producers to *collectively address specific water quality or quantity concerns.*" Joint Explanatory Statement of the Committee of Conference to the Food, Conservation, and Energy Act of 2008 ("Managers' Report") at 52 (emphasis added). Even though the Managers' Report recommends that any federal funding should be delivered to producers, and that AWEP funding may not be used to "cover the administration expenses of partners," the Managers' Report fully authorizes and supports contracting with partners when multiple producers are involved. *Id.*

AWEP's current practice of only allowing funding to be transmitted through multiple, individual EQIP contracts must be corrected to square with AWEP's statutory authorization and Congress' expressed legislative intent.

SUGGESTION: Provide for an AWEP project contract with an irrigation district, association of water users, or a project partner rather than individual producer EQIP contracts when multiple producers are involved.

- **AWEP contracts counted against individual EQIP eligibility.** When AWEP proposals at the irrigation district or watershed scale have to be implemented through individual EQIP contracts, it reduces an individual producer's eligibility for EQIP funds to investment in their own operation. This creates a tension between a producer's support for watershed conservation benefits and realization of a producer's own goals. It also runs counter to AWEP's explicit directive to provide for partnership agreements when there are multiple producers. *See*, 16 U.S.C.A. § 3839aa-9(b)(2). ***SUGGESTION: Provide for an AWEP project contract with an irrigation district, association of water users, or other project partner rather than individual producer EQIP contracts.***
- **Planning cost share.** AWEP proposals that are able to address water allocation or water quality at the watershed scale will necessarily be multi-year projects. Given AWEP's statutory provision for planning costs, a higher cost share for the planning phase of these projects would allow for phased project proposals and further the goals of the AWEP program, since cost-share is most easily accommodated at the construction or implementation phase. In addition, the current lack of an EQIP cost list for an approved cost share on planning activities hampers the implementation of FY2009 AWEP projects. ***SUGGESTION: make 90-100% of planning costs eligible for watershed-scale AWEP proposal***

funding, and make planning costs eligible for FY2009 cost share for AWEP projects funded this year .

- **AGI limitation.** For AWEP proposals that depend on the collaboration of multiple producers, often it is necessary to have everyone's participation within the project area, or the project simply will not work. Given that necessity, it would be helpful to have an exception to the Adjusted Gross Income (AGI) limitation so that ordinarily ineligible producers can still participate in these multi-producer efforts. Indeed, AWEP's statutory authorization provided for such a waiver: "To assist in the implementation of agricultural water enhancement activities under the program, the Secretary shall waive the applicability of the limitation in section 1001D(b)(2)(B) [7 U.S.C.A. § 1308-3a(b)(2), AGI limitation] of this Act for participating producers if the Secretary determines that the waiver is necessary to fulfill the objectives of the program." 16 U.S.C.A. § 3839aa-9(g). ***SUGGESTION: provide an AWEP-specific exception to the AGI limitation that, when invoked, does not compromise or lower the AWEP proposal's priority ranking for multiple-producer proposals.***
- **Dryland farming and state water law.** Conversion from irrigated to dryland farming is clearly identified as a priority under the AWEP program. As water right laws differ from state to state, NRCS needs to assure that no projects conflict with state water laws, and AWEP's statutory authorization does explicitly state that all activities must be "conducted in a manner consistent with State water law." Although not written in the statute, NRCS currently requires that AWEP dryland farming projects be directly submitted through a state agency. While concerns about consistency with state law are well founded, the requirement that a state agency actually submit the proposal is a significant burden as different states have different laws governing if and how state agencies can submit federal proposals. For example, in Oregon any state agency applying for federal funds needs to get full legislative approval which can be a complex and lengthy process. An alternate method to assure compliance with state law would be a more appropriate solution. ***SUGGESTION: Require partnership with or support for the project from a state agency, preferably the appropriate agency which governs water law in the state, while not requiring that the agency be the actual applicant to AWEP. This could be done through direct contact from the appropriate agency to the State Conservationist, assuring that the agency is fully aware of and in support of the proposal.***
- **Make AWEP Watershed Group, NGO, and Water and Wastewater Utilities Partners Eligible for Funding Contracts.** This year's AWEP notice of request for proposals, 74 Fed. Reg. 2040 (Jan. 14, 2009) defines "partner" broadly, and notes that: "Partners that are eligible to participate in AWEP include, *but are not limited to*, federally recognized Indian Tribes, States, units of local government, agricultural or silvicultural associations, or other such groups of agricultural

producers.” 74 Fed. Reg. at 2041 (emphasis added). Allowing a broad array of eligible project partners--NGOs, watershed groups, water districts, and water or wastewater utilities--makes sense. NGOs and watershed groups provide matching funding and expertise, and have a long history of working with producers to help them apply for Conservation Title funding. In addition, water and wastewater utilities will be critical players in many successful regional water projects. Allowing AWEP partners to contract for the AWEP funding would in many cases simplify the contracting process, particularly when hundreds of producers are involved. It is also consistent with AWEP’s explicit directive to provide for partnership agreements when there are multiple producers. *See*, 16 U.S.C.A. § 3839aa-9(b)(2). ***SUGGESTION: Provide for an AWEP project contract with a watershed group, NGO, water or wastewater utility, or other project partner rather than only through individual producer EQIP contracts.***

- **National Fish and Wildlife Foundation Implementation.** Just as the Conservation Innovation Grants program is likely to be administered by the National Fish and Wildlife Foundation (NFWF), so too AWEP may find a better fit with its watershed-scale restoration goals with NFWF. NFWF is more familiar with regional and watershed-scale water quality and water conservation efforts, but also has extensive experience with partner contracting and working with multiple agricultural producers for conservation benefit. ***SUGGESTION: Pursue implementation of AWEP through NFWF.***

We look forward to working with the agency in crafting workable rules for successful AWEP implementation. Thank you for the opportunity to tell you about our primary concerns, and offer our suggestions for their remedy.

Sincerely,

ACWA (Association of California Water Agencies)
American Water Works Association
Association of Metropolitan Water Agencies
Coalition for Sustainable Agriculture (Sonoma County, CA)
Family Farm Alliance
Iowa Corn Growers Association
Klamath Basin Rangeland Trust
Kendall Jackson Family Enterprises
Mississippi River Trust
National Association of Clean Water Agencies
National Water Resources Association
The Nature Conservancy
Trout Unlimited

ATTACHMENT A

16 U.S.C.A. § 3839aa-9

Title 16. Conservation

§ 3839aa-9. Agricultural water enhancement program

(a) Definitions

In this section:

(1) Agricultural water enhancement activity

The term "agricultural water enhancement activity" includes the following activities carried out with respect to agricultural land:

(A) Water quality or water conservation plan development, including resource condition assessment and modeling.

(B) Water conservation restoration or enhancement projects, including conversion to the production of less water-intensive agricultural commodities or dryland farming.

(C) Water quality or quantity restoration or enhancement projects.

(D) Irrigation system improvement and irrigation efficiency enhancement.

(E) Activities designed to mitigate the effects of drought.

(F) Related activities that the Secretary determines will help achieve water quality or water conservation benefits on agricultural land.

(2) Partner

The term "partner" means an entity that enters into a partnership agreement with the Secretary to carry out agricultural water enhancement activities on a regional basis, including--

(A) an agricultural or silvicultural producer association or other group of such producers;

(B) a State or unit of local government; or

(C) a federally recognized Indian tribe.

(3) Partnership agreement

The term "partnership agreement" means an agreement between the Secretary and a partner.

(4) Program

The term "program" means the **agricultural water enhancement program** established under subsection (b).

(b) Establishment of program

Beginning in fiscal year 2009, the Secretary shall carry out, in accordance with this section and using such procedures as the Secretary determines to be appropriate, an **agricultural water enhancement program** as part of the environmental quality incentives program to promote ground and surface water conservation and improve water quality on agricultural lands--

- (1)** by entering into contracts with, and making payments to, producers to carry out agricultural water enhancement activities; or
- (2)** by entering into partnership agreements with partners, in accordance with subsection (c), on a regional level to benefit working agricultural land.

(c) Partnership agreements

(1) Agreements authorized

The Secretary may enter into partnership agreements to meet the objectives of the program described in subsection (b).

(2) Applications

An application to the Secretary to enter into a partnership agreement under paragraph (1) shall include the following:

- (A)** A description of the geographical area to be covered by the partnership agreement.
- (B)** A description of the agricultural water quality or water conservation issues to be addressed by the partnership agreement.
- (C)** A description of the agricultural water enhancement objectives to be achieved through the partnership.
- (D)** A description of the partners collaborating to achieve the project objectives and the roles, responsibilities, and capabilities of each partner.
- (E)** A description of the program resources, including payments the Secretary is requested to make.
- (F)** Such other such elements as the Secretary considers necessary to adequately evaluate and competitively select applications for partnership agreements.

(3) Duties of partners

A partner under a partnership agreement shall--

- (A)** identify producers participating in the project and act on their behalf in applying for the program;
- (B)** leverage funds provided by the Secretary with additional funds to help achieve project objectives;
- (C)** conduct monitoring and evaluation of project effects; and
- (D)** at the conclusion of the project, report to the Secretary on project results.

(d) Agricultural water enhancement activities by producers

The Secretary shall select agricultural water enhancement activities proposed by producers according to applicable requirements under the environmental quality incentives program.

(e) Agricultural water enhancement activities by partners

(1) Competitive process

The Secretary shall conduct a competitive process to select partners. In carrying out the process, the Secretary shall make public the criteria used in evaluating applications.

(2) Authority to give priority to certain proposals

The Secretary may give a higher priority to proposals from partners that--

- (A) include high percentages of agricultural land and producers in a region or other appropriate area;
- (B) result in high levels of applied agricultural water quality and water conservation activities;
- (C) significantly enhance agricultural activity;
- (D) allow for monitoring and evaluation; and
- (E) assist producers in meeting a regulatory requirement that reduces the economic scope of the producer's operation

(3) Priority to proposals from States with water quantity concerns

The Secretary shall give a higher priority to proposals from partners that--

- (A) include the conversion of agricultural land from irrigated farming to dryland farming;
- (B) leverage Federal funds provided under the program with funds provided by partners; and
- (C) assist producers in States with water quantity concerns, as determined by the Secretary.

(4) Administration

In carrying out this subsection, the Secretary shall--

- (A) accept qualified applications--
 - (i) directly from partners applying on behalf of producers; or
 - (ii) from producers applying through a partner as part of a regional agricultural water enhancement project; and
- (B) ensure that resources made available for regional agricultural water enhancement activities are delivered in accordance with applicable program rules.

(f) Areas experiencing exceptional drought

Notwithstanding the purposes described in section 3839aa of this title, the Secretary shall consider as an eligible agricultural water enhancement activity the use of a water impoundment to capture surface water runoff on agricultural land if the agricultural water enhancement activity--

- (1) is located in an area that is experiencing or has experienced exceptional drought conditions during the previous two calendar years; and
- (2) will capture surface water runoff through the construction, improvement, or maintenance of irrigation ponds or small, on-farm reservoirs.

(g) Waiver authority

To assist in the implementation of agricultural water enhancement activities under the program, the Secretary shall waive the applicability of the limitation in section 1308-3a(b)(2)(B) of Title 7 for participating producers if the Secretary determines that the waiver is necessary to fulfill the objectives of the program.

(h) Payments under program

(1) In general

The Secretary shall provide appropriate payments to producers participating in agricultural water enhancement activities in an amount determined by the secretary to be necessary to achieve the purposes of the program described in subsection (b).

(2) Payments to producers in States with water quantity concerns

The Secretary shall provide payments for a period of five years to producers participating in agricultural water enhancement activities under proposals described in subsection (e)(3) in an amount sufficient to encourage producers to convert from irrigated farming to dryland farming.

(i) Consistency with State law

Any agricultural water enhancement activity conducted under the program shall be conducted in a manner consistent with State water law.

(j) Funding

(1) Availability of funds

In addition to funds made available to carry out this part under section 3841(a) of this title, the Secretary shall carry out the program using, of the funds of the Commodity Credit Corporation--

(A) \$73,000,000 for each of fiscal years 2009 and 2010;

(B) \$74,000,000 for fiscal year 2011; and

(C) \$60,000,000 for fiscal year 2012 and each fiscal year thereafter.

(2) Limitation on administrative expenses

None of the funds made available for regional agricultural water conservation activities under the program may be used to pay for the administrative expenses of partners.

CREDIT(S)

(Pub.L. 99-198, Title XII, § 1240I, as added Pub.L. 107-171, Title II, § 2301, May 13, 2002, 116 Stat. 257, and amended Pub.L. 110-234, Title II, § 2510, May 22, 2008, 122 Stat. 1064; Pub.L. 110-246, Title II, § 2510, June 18, 2008, 122 Stat. 1792.)

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

2002 Acts. House Conference Report No. 107-424 and Statement by President, see 2002 U.S. Code Cong. and Adm. News, p. 141.

2008 Acts. House Conference Report No. 110-627, see 2008 U.S. Code Cong. and Adm. News, p. 147, 536.

References in Text

This part, referred to in text, originally read "this chapter", meaning Chapter 4 of Subtitle D of Title XII of the Food Security Act of 1985, Pub.L. 99-198, Title XII, Subtitle D, Ch. 4, as added Pub.L. 107-171, Title II, § 2301, May 13, 2002, 116 Stat. 253, and amended, Joint Explanatory Statement of the Committee of Conference to the Food, Conservation, and Energy Act of 2008 ("Managers' Report") at 52-53

ATTACHMENT B

Joint Explanatory Statement of the Committee of Conference to the Food, Conservation, and Energy Act of 2008 (“Managers’ Report”), pages 52-53.

The Managers believe conservation programs as implemented by USDA should recognize the use of innovative technology such as enhanced efficiency fertilizers. Enhanced efficiency fertilizers, which can protect water quality and reduce greenhouse emissions, include slow and controlled-release fertilizers (absorbed, coated, occluded or reacted) and stabilized nitrogen fertilizers (urease and nitrification inhibitors and nitrogen stabilizers) and are recognized by State regulators of fertilizers. (Section 2509 of Conference substitute)

(13) Ground and Surface Water Conservation (Section 1240I of FSA)

The House bill modifies the purpose of the existing Ground and Surface Water Conservation Program (GSWCP) to allow cooperative agreements between the Secretary, producers, government entities, and Tribes to achieve regional water quality or quantity goals in water quality priority areas. (Section 2106(a) of the House bill)

The House bill requires the Secretary to invite prospective partners to submit competitive grant proposals for a Regional Water Enhancement Program. Proposals will be competitively awarded based on the inclusion of the most lands and producers; the most activities versus costs; contribution to sustaining or enhancing agricultural production or rural economic development; development of performance measures to measure long term effectiveness; the capture of surface water runoff; the participation of multiple interested persons in improving issues of concern; and the assistance provided to producers to meet regulatory requirements that reduce the economic scope of their operation.

The House bill provides \$60,000,000 to be available for each of fiscal years 2008 through 2011.

The Senate amendment maintains the existing GSWCP and provides an increase in funding from \$60,000,000 to \$65,000,000 per year. The provision provides funding for each State that received funding under the program in previous years in an amount that is the simple average of funds provided for fiscal years 2002-2007 or the amount provided in 2007, whichever is greater. For States over the Ogallala Aquifer, not less than the greater of \$3,000,000 or the average of funds provided for fiscal years 2003-2007 is provided.

The Conference substitute adopts the House provision with an amendment. The substitute creates the Agricultural Water Enhancement Program (AWEP) and provides an additional \$40,000,000 in mandatory funding for the program.

The purpose of AWEP is to address water quality and water quantity concerns on agricultural land. The Managers expect the Department to balance its resources among the needs of producers in performing water quantity and quality activities. The Managers intend for producers to participate in the program directly or with other producers who have come together with a partner. The Managers intend for the Department to manage the program so that a producer who chooses to participate as an individual has the same opportunities as one who chooses to participate with a partner.

The purpose of authorizing partners in AWEP is to leverage federal funds and to encourage producers to collectively address specific water quality or quantity concerns. The Managers intend for the program to be delivered according to applicable program rules. Any federal funding must be delivered to producers; no federal funding may be used to cover the administrative expenses of partners.

The Managers expect the Department to require partners to clearly state their objectives and describe how they intend to leverage federal funds and the water quantity or water quality issues they intend to address. The Managers encourage the Department to require the measurement and quantification of actual resource outcomes as part of AWEP projects.

The Managers recognize that water quantity conservation is a significant nationwide concern. The Ogallala Aquifer is a critical source of groundwater for agricultural and municipal uses. Due to the scope and significance of the aquifer, there is a need for regional efforts to address groundwater management in the region. The Managers urge the Department to work with States and agricultural producers in the Ogallala region to coordinate Federal assistance with State programs and to encourage cooperation among States in implementing conservation programs and water reduction practices.

The Managers recognize that water use efficiency projects are an important means to encourage water conservation and expect the Department to continue to support such activities. The Managers intend that additional significance should be placed on water conservation practices that convert irrigated farming to dryland farming to encourage substantial water savings.

To ensure the effectiveness of proposals that convert irrigated farming to dryland farming, the Managers have included provisions to allow the Department to fund proposals for an extended period of five years. In setting the payment rate, the Secretary should take into account the change in the land value of converting an irrigated farming operation to a dryland farming operation.

The Managers intend for the Department to make the construction of small, on-farm reservoirs or irrigation ponds eligible for assistance through AWEP in drought-stricken areas. The Managers intend the Department to use the Drought Monitor as a guide to determine the areas eligible. Any area that has received a D4 drought designation for a month-long period during the previous two years should be eligible. The Managers intend the ponds to be no more than 40 acres in size.

The Managers believe these ponds and related activities will benefit wildlife and demonstrate the potential to capture on-farm surface water runoff in an environmentally beneficial manner. The Managers do not intend for any State water regulation or law to be waived.

In utilizing the authority to waive the eligibility provisions in Section 1001D, the Managers expect the Secretary to take into account the need to accomplish the purposes of the program by enrolling land that would be ineligible to participate in other conservation programs.

The Managers intend for the Secretary to give priority to producers in six priority areas: The Eastern Snake Plain Aquifer region, Puget Sound, the Ogallala Aquifer, the Sacramento River watershed, Upper Mississippi River Basin, the Red River of the North Basin, and the Everglades. (Section 2510 of Conference substitute)

(14) Grassroots Source Water Protection Program (Section 13460 of FSL)

The House bill increases the appropriations authorization from \$5,000,000 each fiscal year to \$20,000,000 each fiscal year through 2012. The provision provides a one-time infusion of \$10,000,000 in mandatory funding to be available until expended (Section 2107 of the House bill)