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United States Senate

COMMITTEE ON
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March 16, 2009

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The Honorable Thomas J. Vilsack
Secretary of Agriculture
200-A Jamie L. Whitten Building
Washington, D.C. 20250

Dear Secretary Vilsack:

On January 15, 2009, USDA published an interim final rule (IFR) for the Wetlands Reserve Program (WRP), *Federal Register* 74:10 (15 January 2009) p. 2317. It is critically important that this regulation complies with the underlying statute and that the program implements Congressional intent. Unfortunately, aspects of these rules are inconsistent with statutory language and Congressional intent, and will prevent this vital program from protecting vulnerable wetland acres.

Restoration and Maintenance of WRP acres: Without any newly-enacted statutory provision, the IFR adds a new subsection, §1467.10(e), governing the program's application to subsequent purchasers of land enrolled in WRP. This provision appears to change the longstanding practice under the program whereby the Natural Resources Conservation Service (NRCS) has planned and carried out the establishment of conservation measures and practices on federal easements under the program, under the mistaken understanding that the statute requires that the *landowner* carry out the practices instead. This mistaken understanding is compounded by requiring subsequent purchasers of the property to meet all the eligibility requirements of the enrolling landowner.

Cost-share for easements: For permanent easements, the cost of carrying out the establishment of conservation measures and practices is generally entirely paid by NRCS, and performance of the necessary restoration work is administered by NRCS. FSA sec. 1237C(a)(1), (b)(1)(A). *The benefit of the restoration accrues to the federal easement.* Typically, to the extent that the enrolling landowner has responsibility for paying some part of the cost share on the land for shorter term easements, that responsibility is carried out by NRCS paying full cost and then reducing the total value of the compensation NRCS pays received for the easement, rather the landowner paying directly for the restoration work as it progresses. The Secretary has broad discretion to determine "that cost sharing is appropriate and in the public interest" to carry out "the establishment of conservation measures and practices, and the protection of the wetland functions and values, including necessary maintenance activities." FSA sec. 1237C(a). *Nothing*

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requires that management of restoration activities on behalf of NRCS is the responsibility of the landowner, who may have little experience in managing environmental restoration activities.

Subsequent Purchasers of Land: Based on a misunderstanding that cost-share provided under the program is a benefit to the owner of the land rather than a benefit to the Federally-held easement, this subsection requires evaluation of the eligibility of a *subsequent* owner of land already enrolled in WRP, if there are still incomplete activities under the Wetland Reserve Plan of Operation [WRPO] entered into by the enrolling landowner. Requiring such an evaluation of the eligibility of a subsequent purchaser of the land is an incorrect interpretation of the program. This new IFR provision is inconsistent with the statute and should be eliminated.

The land owner offering land for enrollment in the program must meet the eligibility requirements to participate in conservation programs specified in FSA, sec. 1001, and must be eligible through closing on the easement. IFR §1467.4(d). Eligibility for the program is determined *prospectively* under the statute. The easement and any associated agreement allocate the obligations of NRCS and the owner conveying the easement. This includes determining the payment for the easement itself, the share of the cost of restoration to be borne by each party, and the obligations of each party concerning managing and carrying out restoration and maintenance.

Once the land has been enrolled in the program and the easement is recorded, the owner's responsibilities flow from the terms of the easement that run with the land, and also from FSA sec. 1237B., Duties of Owners. The statute requires an owner of land under a WRP easement to comply with the terms of the easement and any related agreements; in addition, it requires the owner to agree to the permanent retirement of any existing cropland base and allotment history for the land.

The statute specifically allows the transfer of the obligations under the contract and easement to a succeeding party without regard to the new owner's eligibility under section 1001. FSA sec. 1237D(b) provides that if an owner who is entitled to receive payment under the program (including payments for the easement itself or for cost-share) "is succeeded by another person who renders or completes the required performance, the Secretary *shall* make such payment in accordance with regulations prescribed by the Secretary and *without regard to any other provision of law.*" This broad authority allows land transfers, without regard to the taxpayer's eligibility under FSA sec. 1001, as long as the succeeding owner is in compliance with the easement and agreement.

The IFR's requirement that the owner (rather than NRCS employees) carry out restoration to the land, and that subsequent owners of the land meet eligibility standards, are not needed to protect the government's interest, are not required by statute, are not good public policy, and are contrary to Congressional intent. IFR §1467.10(e) should be eliminated.

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Landowner eligibility: The Food, Conservation and Energy Act of 2008 (FCEA) increased the holding requirement for a landowner seeking to enter land into the program from 12 months to seven years. However, this holding requirement is subject to three critical exceptions:

1. The land was acquired by will or succession as a result of the death of the previous owner;
2. Ownership changed because of a foreclosure and subsequent exercise of a right of redemption by the owner; and
3. The Secretary determines that *the land was acquired under circumstances that give adequate assurances* that the land was not acquired for the purpose of placing it in the WRP program. FSA sec. 1237E(a).

This third provision is critical and must be emphasized. In general, unless there are circumstances known to NRCS that suggest that the land was acquired for the purpose of enrolling it in the WRP program, this provision could be fully satisfied by routinely requiring an applicant enrolling land owned less than seven years to certify that the land was not acquired for purposes of enrolling in the program. NRCS could establish guidelines for staff identifying circumstances that would require further investigation. This construction of the regulation would ensure the ability to enroll wetlands that will maximize WRP's ability to restore, protect or enhance wetlands, while still maintaining the bar on those who acquire land for the purpose of enrolling it in the program.

The Wetlands Reserve Program is extraordinarily successful, and the program's continued expansion is more vital than ever. I ask that you incorporate my comments before promulgating the final rule. Thank you for your assistance on these requests.

Sincerely yours,



Tom Harkin
Chairman

Cc: Dave White, Acting NRCS Chief



HEADS UP

ADVANCE COPY

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DATE: 3-17-09

SUBJECT: Letter from Senator Tom Markkin
with comments on USDA's interim final
rule for the Wetlands Reserve Program

TO: OES
NRCS
FSA

FROM: Chris Sarcone, Acting Deputy Assistant Secretary
 Doug Crandall, Acting Deputy Assistant Secretary
 Julie Allen Janice Griffis

REMARKS: _____

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TO: Chris Simone

FROM: Phil Bohan (202-224-1665)

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DATE: 3-16-09 TOTAL PAGES (INCLUDING COVER): 4

COMMENTS: Comments on WRP for submission.

