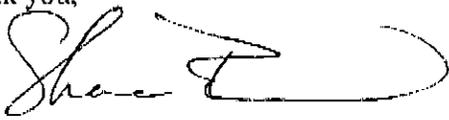




UNITED STATES DEPARTMENT OF AGRICULTURE
OFFICE OF INSPECTOR GENERAL
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TO: Greg Johnson, Director Financial Assistance Programs Division U.S. Department of Agriculture Natural Resources Conservation Service 1400 Independence Avenue SW, Room 5237S Washington, DC 20250-2890	RECEIVED MAR 17 2009
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VOICE: (503) 326-5533	FAX: (503) 326-5421
COMMENTS: Mr. Johnson: Attached for your agency's review are comments to the interim final rule of the U.S. Department of Agriculture (USDA), Natural Resource Conservation Service and Commodity Credit Corporation, which amends regulations governing the USDA's Environmental Quality Incentives Program, published at 74 Fed. Reg. 2,293 (Jan. 15, 2009). If you have any questions, please do not hesitate to contact me. Thank you, 	

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UNITED STATES DEPARTMENT OF AGRICULTURE

OFFICE OF INSPECTOR GENERAL

Washington D C 20250



MAR 16 2009

TO: Greg Johnson
Director, Financial Assistance Programs Division
Natural Resources Conservation Service

FROM: Phyllis K. Fong *Phyllis K. Fong*
Inspector General

SUBJECT: Comments on Interim Final Rule Relating to the Environmental Quality
Incentives Program (Docket Number NRCS-IFR-08005)

The Department of Agriculture (USDA), Office of Inspector General (OIG) has reviewed the interim final rule of the Natural Resource Conservation Service (NRCS) and Commodity Credit Corporation (CCC), which amends regulations governing USDA's Environmental Quality Incentives Program (EQIP), published at 74 Fed. Reg 2,293 (Jan. 15, 2009). OIG offers the following comments for consideration by NRCS and CCC.

I. Section 1466.3, Definitions.

- Estimated income foregone. This term is defined as "... an estimate of the net income loss associated with the adoption of a conservation practice, including from a change in land use or land taken out of production or the opportunity cost associated with the adoption of a conservation practice." *Id.* However, the rule does not state how the estimate is established or supported. OIG recommends that NRCS and CCC clarify the definition, as appropriate. For example, it is not clear who computes the estimate or how the estimate is computed. Additionally, it is not clear what is included in the "opportunity cost" associated with the adoption of a conservation practice or what time period is to be used when calculating the foregone income.
- Socially disadvantaged farmer or rancher. The rule defines a "socially disadvantaged farmer or rancher" as "... 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." However, in the "Summary of Provisions" section of the rule, NRCS states, "[t]his definition originates from Section 2501(g) of the Food, Agricultural, Conservation, and Trade Act of 1990 [(FACTA)], which defines 'socially disadvantaged.'"¹ Under FACTA, a socially disadvantaged farmer or rancher is "... a farmer or rancher who is a member of a socially disadvantaged group." 7 U.S.C. § 2279(e)(2). A socially disadvantaged group is "... a group

¹ OIG notes that the definitions in FACTA were located in section 2501(e), not 2501(g).

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whose members have been subjected to racial or ethnic prejudice because of their identity as members of a group without regard to their individual qualities." 7 U.S.C. § 2279(e)(1). Therefore, under the FACTA, a farmer or rancher only needs to be a member of a group whose members have been subjected to racial or ethnic prejudice rather than actually having been subjected to racial or ethnic prejudice. To the extent that the definition in this rule is based upon the definition in FACTA, OIG recommends that NRCS and CCC clarify the inconsistency between the two definitions.

2. Section 1466.5, National allocation and management. Subsection (a) states that, in order to optimize the overall environmental benefits over the program duration, the Chief of NRCS will "[u]se an EQIP fund allocation formula that reflects national priorities and that uses available natural resource and resource concerns data to distribute funds to the State level." In September 2006, the Government Accountability Office (GAO) reported that the NRCS process for providing EQIP funds to States was not clearly linked to the program purpose of optimizing environmental benefits. See USDA Should Improve Its Process for Allocating Funds to States for the Environmental Quality Incentives Program, Report No. GAO-06-969 (Sep. 2006). GAO reported that while the financial assistance formula included 31 factors and associated weights, which gave the formula an appearance of precision, NRCS did not have a specific, documented rationale for (1) why each factor was included in the formula, (2) how the weights were assigned/adjusted for each factor, and (3) how each factor contributes to accomplishing the program purpose of optimizing environmental benefits. GAO recommended that USDA document its rationale for the factors and weights used in the financial assistance formula and use current and accurate data. USDA agreed that the formula needed review but did not agree that the funding process did not clearly link to the EQIP program purpose, instead contending that the Department had not documented the link. OIG recommends that NRCS ensure that the referenced fund allocation formula has been updated and/or adjusted to address the concerns reported by GAO.
3. Sections 1466.6, 1466.7, Small-scale farms/farmers or ranchers. The rule includes one reference each to "small-scale farms" (§ 1466.6(c)(6)) and "small-scale farmers or ranchers" (§ 1466.7), but does not define what either term means in the context of EQIP. OIG recommends that NRCS consider defining these terms in the rule.
4. Section 1466.8, Program requirements. Subsection (b)(5) requires that an EQIP applicant "[s]upply information, as required by NRCS, to determine eligibility for the program, including but not limited to, information to verify the applicant's status as a limited resource, beginning farmer or rancher, and payment eligibility as established by part 1400 of this chapter." Id. It is unclear as to what information will be required for the verification of an applicant's status. In February 2005, during an audit of EQIP, OIG questioned the reliability and reasonableness of the self-certification process relative to producer designations as limited resource farmers. See OIG Audit on EQIP, Report No. 10099-18-KC (Feb. 2005) (page 6). Therefore, OIG recommends that NRCS specifically

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require a producer to provide supporting documentation and evidence of gross farm sales and household income before the producer is determined to be eligible for the program.

5. Section 1466.10, Conservation Practices Subsection (b) provides, in part, that payments will not be made for a conservation practice that has been applied prior to contract approval, unless a waiver was granted by the State Conservationist or designated conservationist prior to the practice implementation. However, there is no explanation of the waiver process. OIG recommends that NRCS provide clarification on the waiver process, including an explanation of how waivers can be obtained and the criteria used in deciding to grant such waivers.
6. Section 1466.20, Application for Contracts and Selecting Applications. This section states that the State Conservationist or designated conservationist will group applications by similar crop, forestry, and livestock operations, and evaluate applications within such groups. It is unclear whether or how this grouping process will affect historically underserved producers, to the extent that it appears they may be grouped together with more established operations. For example, some of the factors set forth in subsection (b) (e.g., willingness of the applicant to complete all conservation practices in an expedited manner) appear that they may favor larger, more established operations to the potential detriment of historically underserved producers. Therefore, it is unclear as to how such groupings are consistent with NRCS' intent to "... expand[] participation among traditionally underserved populations ..." See 74 Fed. Reg. 2,297.
7. Section 1466.27, Conservation Innovation Grants (CIG) Paragraph (c)(4) sets forth certain costs that may not be covered using CIG, including "... any indirect cost exceeding fifteen percent ..." OIG recommends that NRCS clarify whether this provision limits indirect costs to 15 percent of the total grant or some other figure.
8. Section 1466.36, Environmental Credits. This section states that NRCS recognizes that "... environmental credits may be gained as a result of implementing activities compatible with the purposes of an EQIP contract ..." Although NRCS has no direct or indirect interest in the credits, NRCS "... retains the authority to ensure that operation and maintenance (O&M) requirements for the EQIP-funded improvements are met ..." Further, the section provides that "[w]here 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." To the extent that environmental credits may affect a participant's ability to obtain or perform under an EQIP contract, OIG recommends that NRCS clarify the relationship between the credits and EQIP, by defining environmental credits or including a cross-reference to the regulations governing such credits.

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Thank you for the opportunity to comment on this interim final rule. If you have any questions regarding these comments, please contact Mr. Shenandoah M. Bunn, Assistant Counsel to the Inspector General, on (503) 326-5533.