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**Wyoming Association of Conservation Districts**

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APRIL 17, 2009

Via Facsimile: (202)720-4265

Director, Financial Assistance Program Division  
USDA Natural Resources Conservation Service  
1400 Independence Avenue, SW, Room 5237S  
Washington, DC 20250-2890

**Re: Docket Number NRCS – IFR-08005; Environmental Quality Incentives Program; 7 CFR Part 1466; FR Notice 1/15/09**

Dear Sir/Madam,

The Wyoming Association of Conservation Districts (WACD), representing Wyoming's 34 local conservation districts, political subdivisions of state government, hereby submits the following comments on the above referenced interim final rule. The Environmental Quality Incentives Program is extremely important to the state of Wyoming as it is the largest and most utilized federal conservation program. This program has been integral to meeting the conservation needs and priorities of the agriculture producers while providing for the continued production of agriculture commodities.

**Page 2309;**

**1466.2 Administration**

“(b) NRCS supports “locally led conservation” by using State Technical Committees at the State level and local working groups at the county or parish level to advise NRCS on issues relating to EQIP implementation such as: (1) Identification of priority resource concerns 2) Identification of which conservation practices should be eligible for financial assistance; and 3) Establishment of payment rates.”

**COMMENT:** WACD previously submitted comments on the interim final rule pertaining to State Technical Committees and local workgroups and would like to reiterate the importance of the local workgroup input and the role of the State Technical Committee in the implementation of the EQIP program. This is an important aspect of implementation given the role of the conservation districts in helping to bring resources to bear in their communities from diverse and varied sources. This ensures priorities that may be met by another state and local program, of which NRCS may have minimal involvement, is considered when determining statewide priorities.

### **1466.3 Definitions**

“At-risk species means any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its populations decline.”

**COMMENT:** WACD agrees that the determination of what are to be “at-risk species” should be done with the advice and input of the State Technical Committee. Further, the State Technical Committee and the State Conservationist should seek and consider input from local workgroups. In the past, the agency has relied in part on the state’s “Comprehensive Wildlife Conservation Strategy” as a basis for determining at-risk species. In Wyoming most species contained within the strategy are included merely due to a lack of data versus a supportable determination that the species are truly at risk. A number of factors, including the priority of a species within an area should be considered when determining whether they should be considered as “at risk species”.

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### **1466.3 Definitions**

“*Estimated income foregone* means 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. This shall not include losses of income due to disaster or other events unrelated to the conservation practice.”

**COMMENT:** WACD supports the recognition and inclusion of payment to a producer for foregone income associated with implementation of certain conservation practices.

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### **1466.8 Program requirements**

“However, land may be considered for enrollment in EQIP only if NRCS determines that the land is:

- (1) Privately owned land;
- (2) Publicly owned land where:
  - (i) The land is a working component of the participant’s agricultural and forestry operation, and
  - (ii) The participant has control of the land for the term of the contract, and
  - (iii) The conservation practices to be implemented on the public land are necessary and will contribute to an improvement in the identified resource concern that is on private land;”

**COMMENT:** WACD strongly supports allowing for the use of EQIP funds on federal lands. This is especially important to a state with a large amount of public land (50 percent in Wyoming). Many of the agriculture operations within the state rely on public lands as an integral and vital part of their operation. In addition, as these public land grazing permits are renewed and allotment management plans modified, often conservation practices are identified to address resource conditions and improvements. Unfortunately, the resources are not always available from the land management agency to complete the projects and often times many of the commonly implemented practices such as water developments must

traverse both public and private land. By allowing EQIP funds to be utilized to implement projects that improve the overall health of the resource, regardless of land ownership, increased conservation benefits will be realized.

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#### 1466.9 EQIP plan of operations

“(f) A participant may receive assistance to implement an EQIP plan of operations for water conservation only if the assistance will facilitate a reduction in ground and surface water use on the agricultural operation, unless the producer is participating in a watershed-wide project, as approved by the State Conservationist, which will effectively conserve water in accordance with § 1466.20.” **(Emphasis added)**

**COMMENT:** WACD requests that the language above be amended to read as follows:

#### 1466.9 EQIP plan of operations

“(f) A participant may receive assistance to implement an EQIP plan of operations for water conservation only if the assistance will facilitate a reduction in water use on the agricultural operation, or if the producer agrees not to use any associated water savings to bring new land under irrigation production, other than incidental land needed for efficient operations, unless the producer is participating in a watershed wide project in accordance with § 1466.20.”

The language as proposed appears to go beyond the scope and authorities contained within the statute.

#### Language from Farm Bill:

(h) WATER CONSERVATION OR IRRIGATION EFFICIENCY PRACTICE.—

(1) AVAILABILITY OF PAYMENTS.—The Secretary may provide payments under this subsection to a producer for a water conservation or irrigation practice.

(A) consistent with the law of the State in which the eligible land of the producer is located, there is a reduction in water use in the operation of the producer; **or**

(B) the producer agrees not to use any associated water savings to bring new land, other than incidental land needed for efficient operations, under irrigated production, unless the producer is participating in a watershed wide project that will effectively conserve water, as determined by the Secretary. **(Emphasis added)**

The statute provides that a producer would reduce water use **OR** agree not to use any water savings to bring additional lands under irrigation **UNLESS** the producer is part of a watershed-wide project that accumulatively would reduce water use.

The rule however, would require that the producer reduce ground **AND** surface water use period. The only means to qualify then would be **UNLESS** the producer is again part of a watershed-wide project.

The concerns with the language is first, a demonstration of a reduction of both ground and surface water may not even be applicable if one or the other is the sole source of irrigation water supply.

Secondly, the statute allows for reduced water use OR agreement not to bring new lands under irrigation. Based on the explanation provided in the preamble to the rule, it appears as though the intent was this section would apply to “newly” irrigated acres.

*“It appears in reviewing the summary that the intent of the language at 1466.9 is intended to address bringing new land under irrigation. NRCS inserts paragraph (f) to specify criteria to evaluate acceptable watershed-wide projects for the purposes of implementing water conservation or irrigation practices on newly irrigated lands, ...” Page 2302*

WACD recognizes that the language above references section 1466.20, however without correction the Association believes that a conflict within the rule exists.

WACD would also offer that the direction indicated in the narrative is not appropriate to be included in this rule, nor any criteria. Specifically WACD speaks to the following language in the narrative:

**“NRCS proposes to use the watershed assessments and State, Tribal, and local agency consultation** in order to ensure that conservation practices implemented under EQIP are not in conflict with Federal, State, Tribal and local water laws. The additional criteria also help to ensure that conservation practices are not applied to the detriment of other resource concerns within that watershed. For example, **additional criteria may include**, but is not limited to: Concurrence by State and local water management agencies that the anticipated activities will not be a detriment to existing resources; concurrence from State fish and wildlife agencies **that the land can be irrigated with no detriment to in-stream flow for aquatics**; and verification that the appropriate water permits have been acquired.” **(Emphasis added)**

WACD would refer to the language contained within the statute that references “consistent with state law”. The above discussion and proposed criteria for consideration, would not be consistent with state law. Without getting into a detailed discussion on Wyoming Water Law, suffice it to say that an adjudicated water right can be utilized without a consultation with the state Game & Fish Department’s analysis as to its impacts to “in-stream” flow. Wyoming has specific statutes that provide for “in-stream” flow water rights. Attempting to require “in-stream flow” consultations as a condition to utilize cost-share eligibility for irrigation efficiency projects will do nothing more than serve as a disincentive to producers to participate.

#### **1466.10 Conservation practices**

“(c) A participant will be eligible for payments for water conservation and irrigation related conservation practices only on land that has been irrigated for two of the last five years prior to application for assistance.”

**COMMENT:** WACD understands the intent of the two of last five year rule, however would request that language be included providing recognition that variance to this rule is allowable in situations where drought or other natural disasters have prevented a producer from being able to irrigate more than two of the last five years.

#### **§ 1466.20 Application for contracts and selecting applications.**

(b)(2) For applications that include water conservation or irrigation efficiency practices, the State Conservationist will give priority to those applications where:

(i) Consistent with State law in which the producer's eligible land is located, there is a reduction in water use in the agricultural operation, or where the producer agrees not to use any associated water savings to bring new land under irrigation production, other than incidental land needed for efficient operations.

(ii) A producer who brings new land under irrigated production may be excluded from this latter condition if the producer is participating in a watershed-wide project that will effectively conserve water. The State Conservationist will designate eligible watershed-wide projects that effectively conserve water, using the following criteria:

(A) The project area has a current, comprehensive water resource assessment;

(B) The project plan has demonstrated effective water conservation management strategies; and

(C) The project sponsors have consulted relevant State and local agencies.

**COMMENT:** WACD would suggest that the State Technical committee with input from the local workgroups should have the opportunity to provide input as to what the State Conservationist determines to be "acceptable watershed-wide plans" and "current comprehensive water resource assessments". The Association is extremely concerned with the number of water resource related efforts undertaken by numerous agencies today and anticipates that this language could result in yet one more watershed/water resource planning exercise. There are very likely in existence watershed wide plans that could be utilized, a specific example applicable to Wyoming is the Wyoming Water Development Commission Level I watershed plans.

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**§ 1466.23 Payment rates.** (d) Practice payment rates greater than 50 percent for estimated costs incurred, excluding those described in paragraph (c)(2) of this section, are to be approved by the Chief.

**COMMENT:** WACD understands that the above approval requirement is a change from current practice of State Conservationist approval with concurrence from the Regional Conservationist. WACD would question the need for the elevating approval to the Washington, D.C. level. WACD suggest that this section be modified to previous language that requires State Conservationist approval with concurrence.

**§ 1466.23 Payment rates.** (e) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

**COMMENT:** WACD supports this provision allowing for an adjustment in the practice payment rate in response to inflationary costs.

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**§ 1466.26 Contract violations and terminations.**

(2) Termination of the contract would, as determined by the State Conservationist, be in the public interest; or

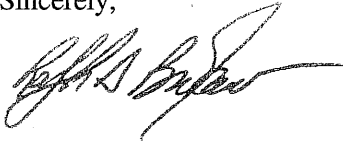
**COMMENT:** WACD request clarification of what would constitute "in the public interest". There does not appear to be any discussion in the preamble of the rule as to what types of situations or conditions would exist to determine it would be "in the public interest" to terminate the contract. Further, WACD could not find any definition included in the rule.

(e)(2)(ii) "In carrying out its role in this section, NRCS may consult with the local conservation district."

**COMMENT:** WACD requests that the above language be modified to read: "..., NRCS shall consult with the local conservation district." It is important that as partners in the delivery of conservation programs, that advance communication occur between the local government and federal agency when constituents and customers will have such an action taken. In addition, it is possible that a producer who may have a EQIP contract cancelled may very well have other contracts and agreements with the local district for additional conservation work therefore consultation between the district and agency becomes increasingly important.

Again, WACD appreciates the opportunity to comment on the interim Environmental Quality Incentives Program rule.

Sincerely,

A handwritten signature in black ink, appearing to read "Ralph Brokaw", written in a cursive style.

Ralph Brokaw  
President

Cc: Wyoming's Conservation Districts  
Wyoming Department of Agriculture  
Wyoming Agriculture organizations