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An Agricultural Law Research Article

## **Green Payments: The Next Generation of U.S. Farm Programs?**

by

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# GREEN PAYMENTS: THE NEXT GENERATION OF U.S. FARM PROGRAMS?

*William J. Even*

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## I. INTRODUCTION: WHY GREEN PAYMENTS?

“Green payment”: a payment that efficiently links the production of environmental goods and services with the opportunity to derive an income over and above the cost of producing those goods and services.<sup>1</sup>

As agriculture’s complex role in our global environment becomes more apparent, interest has increased in policies that can mitigate agriculture’s negative effects while simultaneously enhancing its ability to provide positive public

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1. See CRAIG COX, MAKING CONSERVATION PAY: THE PLACE FOR GREEN PAYMENTS IN U.S. AGRICULTURAL POLICY, SWCS WORKING PAPER (2003) (copy on file with author).

benefits.<sup>2</sup> This is not to imply that agriculture is inherently “bad” but simply that it has the capacity to influence the environment because it is so big. Traditional agricultural policies are coming under increasing criticism for failing to adequately address trade, environmental, and equity problems.<sup>3</sup> Pressure to change these policies comes from multiple sources and draws attention to the need for a fresh approach to agricultural and environmental policy.

This Note will provide a general overview of the topic to facilitate an understanding of the issues and how they influence U.S. agricultural policy. Part II will discuss the impact of global trade agreements on U.S. agricultural strategy, specifically how the World Trade Organization (“WTO”) framework could constrain customary U.S. domestic farm program spending while leaving avenues open to pursue non-trade distorting options. Part III will discuss agriculture’s impact on the environment and how “business as usual” in farm program policy is drawing increasing criticism from the environmental community. Part IV will address the growing public concern over the apparent inequitable distribution of farm program spending in the context of the historical progression and the unintended effects of traditional U.S. farm policy. Part V will define the concept of “multifunctionality” in agriculture and how the concept can be used by policy makers to look at agriculture from a fresh perspective. Part VI will lay out possible design options for a green payments program from a pragmatic perspective. Part VII will cover the new Conservation Security Program and its potential role in transitioning U.S. farm policy to a green payments program. Part VIII will contain concluding remarks on the potential for a green payments program to fit into U.S. agricultural policy.

## II. INTERNATIONAL TRADE AGREEMENTS AND TRAFFIC LIGHTS

One force for change in current U.S. agricultural policy comes from global trade agreements such as the WTO.<sup>4</sup> Signatories to this trade agreement,

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2. See SANDRA S. BATIE & RICHARD D. HORAN FARM FOUNDATION, GREEN PAYMENTS POLICY (2001), available at [http://www.farmfoundation.org/2002\\_farm\\_bill/batie.pdf](http://www.farmfoundation.org/2002_farm_bill/batie.pdf).

3. See Workshop, *Workshop on Performance-based Environmental Policies for Agriculture: Executive Summary*, (2003), available at [http://www.farmfoundation.org/documents/PEPAEXECUTIVESUMMARYFINAL7-03\\_000.pdf](http://www.farmfoundation.org/documents/PEPAEXECUTIVESUMMARYFINAL7-03_000.pdf); CHAD E. HART & BRUCE A. BABCOCK, CTR. FOR AGRIC. & RURAL DEV., U.S. FARM POLICY AND THE WORLD TRADE ORGANIZATION: HOW DO THEY MATCH UP? Working Paper 02-WP294 (2002), available at <http://www.card.iastate.edu/publications/DBS/PDFFILES/02WP294.pdf>.

4. See Robert Randall Green, *Does the Farm Bill Violate Our Trade Commitments?*, THE AGRIC. LAW LETTER, Oct. 2002, at 1 (stating that “[n]o provision of the FSRIA appears to be in blatant violation of the URAA. The interaction of some provisions *could* cause the United States to violate its Total AMS ceiling under some circumstances.”) (emphasis in original), available at

which includes the U.S., have agreed to reduce internal agricultural subsidies that are production and trade distorting.<sup>5</sup> The 1994 Uruguay Round Agreement on Agriculture (“URAA”) disciplines domestic agricultural support programs by committing WTO member countries to spending limits.<sup>6</sup> Programs subject to annual spending limits are those that WTO members deemed, at the time, to have the greatest potential for stimulating too much production and thereby distorting world agricultural trade.<sup>7</sup>

The WTO uses the terms Amber, Blue, or Green Box to categorize farm subsidies in a standardized manner.<sup>8</sup> The WTO explains this use of jargon using an analogy to traffic signals:

In WTO terminology, subsidies in general are identified by “Boxes” which are given the col[or]s of traffic lights: green (permitted), amber (slow down—i.e. be reduced), red (forbidden). In agriculture, things are, as usual, more complicated. The Agriculture Agreement has no Red Box, although domestic support exceeding the reduction commitment levels in the Amber Box is prohibited; and there is a Blue Box for subsidies that are tied to program[s] that limit production. There are also exemptions for developing countries (sometimes called an “S&D Box”).<sup>9</sup>

The Amber Box, with some exceptions, contains all agricultural subsidies and other domestic support measures considered to distort production and trade and the total value of these measures must be reduced under WTO rules.<sup>10</sup>

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<http://www.mwmlaw.com/oct02.pdf>. See also USDA, FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW CENTURY (2001) (stating that the USDA is worried that

[n]oncommodity-specific payments also have increased and potentially could exceed the ceiling of 5 percent of the value of domestic production. If this happens, the full value of the expenditures then must be included in the Aggregate Measure of Support (AMS) and would push [the U.S.] well above its [\$19.1 billion] WTO commitment.),

available at <http://www.usda.gov/news/pubs/farmpolicy01/fullreport.pdf>.

5. See GEOFFREY S. BECKER, NAT’L COUNCIL FOR SCI. AND THE ENV’T, FARM SUPPORT PROGRAMS AND WORLD TRADE COMMITMENTS 1 (2001), available at <http://www.ncseonline.org/NLE/CRSreports/Agriculture/ag-107.pdf>.

6. *Id.* at 1.

7. *Id.* at 1.

8. See WTO, AGRICULTURE NEGOTIATIONS BACKGROUNDER ON DOMESTIC SUPPORT: AMBER, BLUE AND GREEN BOXES at

[http://www.wto.org/english/tratop\\_e/agric\\_e/negs\\_bkgnd13\\_boxes\\_e.htm](http://www.wto.org/english/tratop_e/agric_e/negs_bkgnd13_boxes_e.htm) (last visited Apr. 13, 2005) [hereinafter BACKGROUNDER].

9. See *id.*

10. See *id.*; see generally WTO, Agreement on Agriculture, Annex 2 (listing the domestic support exemptions from the amber box reduction commitments), available at [http://www.wto.org/english/res\\_e/booksp\\_e/analytic\\_index\\_e/agriculture\\_02\\_e.htm](http://www.wto.org/english/res_e/booksp_e/analytic_index_e/agriculture_02_e.htm) (last visited Apr. 26, 2005).

“Under the URAA, the U.S. and other countries agreed to reduce their ‘Total Aggregate Measure of Support’ (“AMS”) through 2000, with that year’s level binding until a new agreement is reached.”<sup>11</sup> The AMS measures trade-distorting domestic subsidies and is calculated by comparing a country’s internal prices to world prices with programs deemed not to distort trade excluded from the AMS and placed in the WTO Green Box.<sup>12</sup> The URAA has a cushion provision known as *de minimis* wherein policies can be classified as Amber Box and yet not count toward the total AMS.<sup>13</sup> It states a “product-specific” support policy with a value that is less than five percent of the value of the commodity to which it applies is *de minimis* and not counted.<sup>14</sup> “Non-product-specific” support policies are also *de minimis* and are not counted if their *cumulative* value is less than five percent of the value of *all* agricultural production.<sup>15</sup>

Some examples of Amber Box subsidies that are utilized by the U.S. are “the dairy, peanut, and sugar price support programs; ‘marketing loan’ programs for grains and cotton; crop storage payments; irrigation and grazing programs; and crop insurance programs.”<sup>16</sup> There is also some debate as to whether or not the new “counter-cyclical payments” (“CCP”) provided to American farmers in the 2002 Farm Security and Rural Investment Act (“FSRIA”) are “product specific” and should be categorized as amber box.<sup>17</sup>

“The Blue Box is an exemption from the general rule that all subsidies linked to production must be reduced or kept within defined minimal (*de minimis*) levels.”<sup>18</sup> It encompasses production distorting payments that are directly linked to acreage and livestock numbers but also involve acreage set aside schemes or animal production quotas.<sup>19</sup> Blue Box “payments must be limited to

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11. Green, *supra* note 4, at 2.

12. *Id.*

13. *Id.* at 3.

14. *Id.*

15. *Id.*

16. BECKER, *supra* note 5.

17. Green, *supra* note 4, at 3 (explaining that counter-cyclical payments are of the type that pay farmers the difference between a congressionally determined target price that is designed to roughly equate to a commodities cost of production and the local county average price. Payments will be large when the local average prices are low and decrease as the local average price rises near the target price. Since such a program is tied to the specific price of a given commodity, some argue counter-cyclical payments should be viewed as product specific thereby putting the US in violation of WTO amber box spending limits); *see generally* The Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 7901 (2002) (detailing the components of the FSRIA, commonly known as the 2002 Farm Bill).

18. BACKGROUND, *supra* note 8.

19. *See id.*

85% of the base level of production” in the given country.<sup>20</sup> Countries that are using Blue Box agricultural subsidies, such as Norway and Japan, defend these partly de-coupled payments on grounds of non-trade concerns, such as food security, and argue that the Blue Box serves as an important transition point on the shift to meeting Amber Box requirements.<sup>21</sup> The U.S. no longer uses any farm subsidies that fall into the Blue Box category and has argued for its phase out stating that it exists as a “temporary measure that distorts trade and has outlived its usefulness.”<sup>22</sup> “The old U.S. target price-deficiency payment program that existed before 1996 was a Blue Box program” because it limited production by basing payments on fixed yields and acreage.<sup>23</sup>

The final traffic signal category in the WTO lexicon is the Green Box. “In order to qualify for the ‘Green Box’, a subsidy must not distort trade, or at most cause only a minimal distortion.”<sup>24</sup> The subsidy “h[as] to be government-funded (not by charging consumers higher prices) and must not involve price support” or “be directed at particular products.”<sup>25</sup> “[D]irect income supports for farmers that are not related to (are ‘decoupled’ from)” production are acceptable.<sup>26</sup> “‘Green Box’ subsidies are therefore allowed without limits, provided they comply with relevant criteria.”<sup>27</sup> Green Box does not mandate that a subsidy is restricted to environmental or conservation purposes, however such programs would qualify if decoupled and non-trade distorting—a key point for the purposes of this Note.<sup>28</sup> The WTO lists the following eleven different general categories where agricultural subsidies are viewed as non or minimally trade and production distorting and therefore qualify for the Green Box classification:<sup>29</sup>

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20. CHAD E. HART & BRUCE A. BABCOCK, CTR. FOR AGRIC. AND RURAL DEV., IOWA STATE UNIV., *IMPLICATIONS OF THE WTO ON THE REDESIGN OF U.S. FARM POLICY 4* (2001), available at <http://www.card.iastate.edu/publications/DBS/PDFFiles/01bp32.pdf>.

21. See BACKGROUND, *supra* note 8.

22. *Id.*

23. HART & BABCOCK, *supra* note 20, at 4.

24. BACKGROUND, *supra* note 8.

25. *Id.*

26. *Id.*

27. *Id.*

28. See ROGER CLAASSEN ET AL., *USDA, AGRI-ENVIRONMENTAL POLICY AT THE CROSSROADS: GUIDEPOSTS ON A CHANGING LANDSCAPE 4* (2001), available at <http://www.ers.usda.gov/publications/aer794/aer794.pdf> (stating that “[m]any U.S. programs—including ‘decoupled’ payments, the Conservation Reserve Program (CRP), and the Environmental Quality Incentives Program (EQIP)—appear to qualify as green box programs that do not count against support ceilings”); see generally BACKGROUND, *supra* note 8.

29. See HART & BABCOCK, *supra* note 20, at 4 (listing Green Box policies and the guidelines that must be followed).

[G]eneral services; public stockholding for food security purposes; domestic food aid; direct payments to producers; decoupled income support; government financial participation in income insurance and income safety net programs; payments for relief from natural disasters; structural adjustment assistance provided through producer or resource retirement programs; structural adjustment assistance provided through investment aids; payments under environmental programs; and payments under regional assistance programs.<sup>30</sup>

Examples of existing U.S. general service agricultural support programs as specified by the WTO that are classified as green box include the Agricultural Research Service; the Tennessee Valley Authority; the Cooperative State Research, Extension, and Education Service; and the Rural Business and Cooperative Development Service.<sup>31</sup> These programs combined accounted for nearly \$7 billion in domestic support in 1997.<sup>32</sup> The food stamp and child nutrition programs accounted for nearly \$36 billion of domestic food aid in 1997, all of which meet WTO Green Box standards.<sup>33</sup> Some environmental programs that qualify for Green Box exemption include the Conservation Reserve Program, Conservation Reserve Enhancement Program, Wetlands Reserve Program, Farmland Protection Program, Environmental Quality Incentives Program, and the Wildlife Habitat Incentives Program.<sup>34</sup>

The URAA provides a continuing mandate for progressive reforms to liberalize world agricultural markets.<sup>35</sup> The U.S., as a signatory to the URAA, which took effect on January 1, 1995, agreed to a \$19.1 billion agricultural spending cap on Amber Box subsidies.<sup>36</sup> While disagreement exists over classification of U.S. farm subsidy spending, some trade experts argue that we are only

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30. *Id.*

31. *Id.* at 6 (noting that additionally the Animal and Plant Health Inspection Service; the Grain Inspection, Packers, and Stockyard Administration; the Food Safety Inspection Service; the Agricultural Marketing Service; the Economic Research Service; the National Agricultural Statistics Service; and the National Resource Conservation Service are also classified as green box general service agricultural support programs. General service programs are those programs that tend to benefit all agricultural producers as a whole rather than producers of specific commodities).

32. *Id.*

33. *See id.*

34. *See id.* at 4; RALPH HEIMLICH, ECON. RESEARCH SERV., AGRIC. RESEARCH AND ENVIRONMENTAL INDICATORS 13 (2003) (listing current USDA environmental and conservation programs), available at [http://www.ers.usda.gov/publications/arei/ah722/arei6\\_1/AREI6\\_1consoverview.pdf](http://www.ers.usda.gov/publications/arei/ah722/arei6_1/AREI6_1consoverview.pdf).

35. FOOD AND AGRIC. POLICY RESEARCH INST., IOWA STATE UNIV., AN ANALYSIS OF THE PROPOSED DOHA ROUND MODALITIES v (2003), available at [http://agecon.lib.umn.edu/cgi-bin/pdf\\_view.pl?paperid=9963&ftype=.pdf](http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=9963&ftype=.pdf) [hereinafter DOHA].

36. BECKER, *supra* note 5, at 11.

meeting our \$19.1 billion Amber Box cap by taking advantage of the 5% de minimis exceptions.<sup>37</sup>

The latest round of WTO agricultural trade negotiation began in early 2000 and was later formalized in what is now called the Doha Round.<sup>38</sup> The Doha Round negotiation follows the same principle laid out in the URAA, with the introduction of three reform anchors: market access, export competition, and reduction of domestic support.<sup>39</sup> Amber Box subsidy rates are to be reduced at three times the previous rate in both developed and developing countries but are applied to the smaller final-bound domestic support limit.<sup>40</sup> Blue Box domestic support is also reduced by 50% for developed countries and by 33% for developing countries in the latest notification.<sup>41</sup> In addition, the Doha Round not only reduces the export subsidy, it completely eliminates it.<sup>42</sup> *This means that any future expansion in farm subsidies must occur with programs that meet the Green Box criteria.*<sup>43</sup> The recent WTO “cotton” ruling against the U.S. demonstrates new-found willingness of developing countries to hold traditional American farm programs legally accountable to the WTO domestic subsidy limits.<sup>44</sup>

Perhaps in recognition of its legal duties under the WTO, the U.S. has not hesitated in recent years to increase its Green Box spending, indicating willingness on the part of policy makers and elected officials to see the value in conservation spending.<sup>45</sup> “Over the period 1986-1988, total expenditures for programs that would have qualified for the [G]reen [B]ox were, on average, just over \$26 billion,” but by 1997, Green Box spending had practically doubled to more than \$51 billion.<sup>46</sup>

To illustrate a specific example, by 1995 the Agricultural Conservation Program (“ACP”), which had been the primary vehicle providing soil and water conservation dollars to farmers for more than fifty years, was being funded at the

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37. See Tassos Haniotis, *The New US Farm Bill from an EU Perspective*, 78th Congress of the Fr. Wheat Growers Assoc., available at [http://www.solidarite.asso.fr/actualites/the\\_new.htm](http://www.solidarite.asso.fr/actualites/the_new.htm).

38. DOHA, *supra* note 35.

39. *Id.*

40. *Id.* at 2.

41. *Id.*

42. *Id.*

43. See HART & BABCOCK, *supra* note 20, at 6 (stating “[b]ecause the Green Box spending is exempt from WTO limits the United States can continue to add to this total”) (emphasis added).

44. See Jeffrey Sparshott, *U.S. Shies from WTO Cotton Ruling*, THE WASHINGTON TIMES, Apr. 28, 2004.

45. See HART & BABCOCK, *supra* note 20, at 6.

46. *Id.*

historically low level of \$50 million.<sup>47</sup> One year later, in 1996, the new Environmental Quality Incentives Program (“EQIP”) replaced ACP and “was funded at \$200 million a year—a four-fold increase from ACP’s original allotment.”<sup>48</sup> In 2003, the 2002 FSRIA more than tripled EQIP funding to \$700 million and in 2004, “funding will increase again to \$1.0 billion and peak at \$1.3 billion in 2007”<sup>49</sup>—over 25 times more conservation funding than was scheduled for ACP only six years ago.<sup>50</sup>

Because legitimate environmental and conservation based funding meets Green Box parameters, it is exempt from WTO spending limits and the U.S. can continue to add to this total. Therefore, a green payments program that compensates farmers for the production of environmental goods and services could be a valid option for meeting our agricultural spending limits under the WTO.

### III. ENVIRONMENTAL PRESSURE

Another source of pressure on status quo agricultural policy comes from the environmental community.<sup>51</sup> U.S. agriculture has long enjoyed political protection from stringent environmental regulation.<sup>52</sup> Practically all of the usual approaches to conservation and environmental problems in agriculture have been voluntary rather than regulatory in nature.<sup>53</sup> These include cost-sharing of farm

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47. See Craig A. Cox, Exec. Dir., Soil and Water Conservation Soc’y, *The Promise and Peril of Technical Service Providers*, Address at the Agricultural Outlook Forum (Feb. 21, 2003), available at [http://www.swcs.org/en/advocacy/society\\_in\\_action.cfm?fuseaction=display&nodeID=6788&newsID=440&year=2003&month=4](http://www.swcs.org/en/advocacy/society_in_action.cfm?fuseaction=display&nodeID=6788&newsID=440&year=2003&month=4).

48. *Id.*

49. *Id.*

50. *Id.*

51. See THOMAS L. DOBBS, S.D. STATE UNIV., *AGRICULTURAL, RESOURCE, AND ECOLOGICAL ECONOMICS WITH A MULTIFUNCTIONALITY’ PERSPECTIVE* (Econ. Staff Paper 2002-3, 2002) (stating that the costs of agriculture’s “abundance are becoming increasingly apparent. Drinking water supplies are becoming contaminated, bird and fish populations have declined, plant and animal biodiversity has been lost, and soil organic matter has declined.”), available at [http://agecon.lib.umn.edu/cgi-bin/pdf\\_view.pl?paperid=5375&ftype=.pdf](http://agecon.lib.umn.edu/cgi-bin/pdf_view.pl?paperid=5375&ftype=.pdf).

52. See WORLD WILDLIFE FUND, AMERICAN FARMLAND TRUST & HENRY A. WALLACE CENTER FOR AGRICULTURAL & ENVIRONMENTAL POLICY, *MIDWEST REGION COMMODITIES AND THE ENVIRONMENT WORKSHOP PROCEEDINGS 18* (2001) (unpublished copy on file with Drake. J. Agric. L.).

53. See CLAASSEN *supra* note 28, at 1 (stating that producer participation in agri-environmental programs has mostly been voluntary and participants receive cost share or incentive payments), available at <http://www.ers.usda.gov/publications/aer794/aer794.pdf>; see also WINROCK INT’L, *WORKSHOP ON PERFORMANCE-BASED ENVIRONMENTAL POLICIES FOR AGRICULTURE: EXECUTIVE SUMMARY 1* (2003), available at [http://www.winrock.org/events/wallace/pepa/PEPA\\_Workshop\\_Executive\\_Summary.pdf](http://www.winrock.org/events/wallace/pepa/PEPA_Workshop_Executive_Summary.pdf).

infrastructure, such as manure storage lagoons or stream bank fencing, and implementation of best management practices (“BMP”), such as grass buffer strips or nutrient management planning.<sup>54</sup> While documented progress has been made in reducing agriculture’s negative environmental effects through these voluntary measures, major problems such as non-point source pollution still exist.<sup>55</sup> One example of agricultural non-point source pollution is the recurring problem of the hypoxic area in the Gulf of Mexico also known as the “Dead Zone.”<sup>56</sup> This seasonal phenomenon starts at the mouth of the Mississippi River, depletes the water of oxygen, kills bottom-dwelling organisms and drives mobile marine life from the area.<sup>57</sup> The underlying cause of hypoxia is widely believed to be nutrient runoff, particularly nitrogen from inorganic fertilizers applied to agricultural lands in the Mississippi River Basin.<sup>58</sup> Troubles such as the “Dead Zone” in the Gulf as well as localized watershed problems have led some conservation and environmental groups to call for mandatory disincentive solutions such as a “nitrogen tax” to be levied on fertilizer applied by farmers.<sup>59</sup> Some argue the long history of voluntary design-based conservation measures is proving to be inadequate in dealing with modern high intensity farming because such programs depend on estimates of improvement instead of relying on actual environmental performance/improvement.<sup>60</sup> The environmental movement has had relative suc-

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54. WINROCK INT’L, *supra* note 53, at 1.

55. *See id.*; *see also* CLAASSEN, *supra* note 28, at iv (stating that soil erosion, at 1.9 billion tons per year, remains significant even though farm programs and changes in farming practices have reduced erosion 40 percent between 1982 and 1997).

56. *See* EPA, ACTION PLAN TO REDUCE THE SIZE OF THE “DEAD ZONE” IN THE GULF OF MEXICO (2001), (discussing how drainage from agricultural lands far removed from the Gulf are causing pollution), *available at* <http://www.epa.gov/msbasin/factsheet.htm> (last visited October 1, 2004).

57. SUZIE GREENHALGH & AMANDA SAUER, WORLD RESOURCE INSTITUTE, AWAKENING THE DEAD ZONE: AN INVESTMENT FOR AGRICULTURE, WATER QUALITY, AND CLIMATE CHANGE 1 (2003), *available at* <http://pdf.wri.org/hypoxia.pdf>. (last visited Oct. 1, 2004).

58. *See* EPA, *supra* note 56; *see also* CLAASSEN, *supra* note 53, at iv.

59. *See* SOIL AND WATER CONSERVATION SOC’Y, SHARING THE COST: CREATING A WORKING LAND CONSERVATION TRUST FUND THROUGH A TAX ON AGRICULTURAL INPUTS? 15 (2003) (detailing an Iowa program that combines an excise tax on nitrogen fertilizer with pesticide registration fees to create a fund used to support conservation activities in the state. The fertilizer tax is 75 cents per ton, which equates to .00046 cents per pound of nitrogen . . . The fertilizer tax and pesticide registration fees have generated between \$3.4 million and \$4.0 million annually for conservation activities. In 2001 the fertilizer tax generated \$913,000, while pesticide registrations generated \$2.7 million, for a total of \$3.6 million), *available at* [http://www.swcs.org/documents/Sharing\\_the\\_Costfinal\\_report\\_112904160832.pdf](http://www.swcs.org/documents/Sharing_the_Costfinal_report_112904160832.pdf); *see also*, GREENHALGH & SAUER, *supra* note 57, at 1.

60. *See* FARM FOUNDATION, WORKSHOP ON PERFORMANCE-BASED ENVIRONMENTAL POLICIES FOR AGRICULTURE: EXECUTIVE SUMMARY 2 (2003), *available at* [http://www.farmfoundation.org/documents/PEPAExecutiveSummaryFINAL7-03\\_000.pdf](http://www.farmfoundation.org/documents/PEPAExecutiveSummaryFINAL7-03_000.pdf).

cess in applying pressure on government and industry on the issue of point source pollution as evidenced by the passage of the Clean Air Act and Clean Water Act.<sup>61</sup> The reason urban and industrial pollution has been targeted effectively by government regulation is that it tends to originate at “point sources”—areas easily monitored for contamination or runoff.<sup>62</sup> In contrast, agricultural pollution tends to originate from “non-point sources”—diffuse areas across the landscape where many individual actors all contribute to the problem making it hard to mitigate, let alone locate.<sup>63</sup> These regulatory “Command and Control” type measures such as the Clean Air Act have been the norm outside of agriculture for decades but some view this regulatory approach to be a cost-effective alternative to the current voluntary cost-share system utilized in agriculture.<sup>64</sup> Farmers should take heed of these trends and be aware that society may elect to apply the “polluter pays” principle to agriculture and require producers to compensate society at large for any damage they do to the environment (the stick) instead of the current voluntary programs (the carrot).<sup>65</sup>

One component of agriculture policy that does border on the regulatory approach is the cross-compliance provision that has been part of the farm bill since 1985.<sup>66</sup> It requires farmers who receive government benefits to develop and apply soil-conserving conservation plans on highly erodible ground, as well as prohibits the draining of wetlands and plowing of highly erodible land.<sup>67</sup> It is worth mentioning that abruptly lowering traditional farm program payments would remove many of the incentives for farmers to participate, thereby eliminat-

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61. See generally Clean Air Act, 42 U.S.C. §§ 7401-7671 (2003); Clean Water Act, 33 U.S.C. §§ 1251-1387 (2003) (both statutes giving wide authority to the EPA to monitor, regulate and fine polluters who violate the statutes).

62. See SARAH LYNCH & KATHERINE R. SMITH, HENRY A. WALLACE INSTITUTE FOR ALTERNATIVE AGRICULTURE, LEAN MEAN AND GREEN . . . DESIGNING GREEN FARM SUPPORT PROGRAMS IN A NEW ERA, Policy Studies Program Capital Report No. 3 at 2, 3 (1994) (copy on file with author).

63. See *id.*

64. See WINROCK INT'L, *supra* note 53, at 1; PAUL FAETH, WORLD RESOURCES INSTITUTE, GROWING GREEN: ENHANCING THE ECONOMIC AND ENVIRONMENTAL PERFORMANCE OF U.S. AGRICULTURE 7 (1995) (showing the results of a 1995 study that “simulated enforced bans on the use of pesticides and inorganic fertilizer” reduced agriculture’s impact on the environment).

65. See Sarah Lynch, *Introduction in* HENRY A. WALLACE INSTITUTE FOR ALTERNATIVE AGRICULTURE, DESIGNING GREEN SUPPORT PROGRAMS, DESIGNING GREEN FARM PROGRAMS: A RANGE OF OPTIONS 6-7 (Sarah Lynch ed., 1994) (copy on file with author) (discussing the regulatory approach of the “polluter pays” principle).

66. See C. Ford Runge, *Designing Green Support: Incentive Compatibility and the Commodity Programs*, in HENRY A. WALLACE INSTITUTE FOR ALTERNATIVE AGRICULTURE, DESIGNING GREEN SUPPORT PROGRAMS, 55, 61-62 (Sarah Lynch ed., 1994) (copy on file with author).

67. See *id.*

ing the positive environmental benefits derived from current conservation compliance provisions in the farm bill.<sup>68</sup> A green payments program may be needed to facilitate any transition into a new farm program paradigm without losing existing environmental gains.

In addressing the environmental community's concerns, policy makers as well as farmers also need to recognize that farmers are increasingly sharing their rural environment with neighbors who care more about their quality of life than their supply of food or even the price of their food.<sup>69</sup> Non-farm residents in rural areas increasingly value open land for its natural resource services and amenities rather than for its conventional capacity to produce a crop.<sup>70</sup> These citizens are growing increasingly restless about the perceived inability or refusal of traditional farm policy to address their environmental concerns.<sup>71</sup> Because of this impatience, agriculture could be facing a critical juncture. Competition for scarce budget dollars is growing in Washington.<sup>72</sup> It is conceivable that current farm program funding could be limited or shifted in order to satisfy competing political demands, and agriculture's current shelter from environmental regulation could evaporate under pressure from environmentalists dissatisfied with voluntary conservation measures. Such a double impact would leave agriculture scrambling to adjust.<sup>73</sup>

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68. See *id.* at 61 (citing a USDA report that warned the effectiveness of conservation provisions in the Farm Bill is dependent on the "attractiveness of Federal price and income supports").

69. See CRAIG COX, SOIL AND WATER CONSERVATION SOC'Y, WHAT SHOULD BE THE ROLE OF RESOURCE STEWARDSHIP IN FUTURE FARM POLICY? (2001) (arguing for policy that encourages agricultural production and conservation system that protect the environment), available at <http://www.usda.gov/oce/forum/Archives/2001/speeches/cox.doc>; see also Jeffrey A. Mollet, *Alternatives to Right to Farm Law Protection*, 21 AGRIC. L. UPDATE, at 6 (June 2004) (recognizing difficulties faced by new farmer-urban neighbors in agricultural production areas).

70. See Lawrence W. Libby, *Farmland Is Not Just for Farming Any More: The Policy Trends*, in AGRICULTURAL POLICY FOR THE 21ST CENTURY 184, 184 (Luther Tweeten & Stanley R. Thompson eds., 2002) (noting that farmland policy also protects land use interests by non-farm owners); see also Mollet, *supra* note 69, at 6 (recognizing unique selling issues when urban buyers move to land in traditional agriculture production areas).

71. See COX, *supra* note 69.

72. See David Graves, "Mandatory" Dominates Agriculture Spending, Agric. L. Letter, (stating that the 2005 agriculture budget relationship is not unique. Non-defense discretionary spending accounts for only 17 percent of the entire federal budget and some people believe there simply is not sufficient non-defense discretionary spending to make the act of balancing the budget with farm programs a very credible proposition), available at <http://www.agriculturelaw.com/budget.htm> (last visited Nov. 2, 2004).

73. See Katherine R. Smith, *Retooling Farm Policy*, ISSUES IN SCI. & TECH. ONLINE, (Summer 2001) (stating "if the federal budget becomes tighter . . . confusion [about farm program goals] can turn to disenchantment with farm programs in general" and "[a]n American public demanding more services from the federal government and aware of the fact that billions of dollars in

Implementing a results oriented voluntary green payments program could avoid such a situation. A green payments program could achieve actual environmental improvement while providing the monetary incentive necessary to ensure widespread participation by farmers and ranchers. Such a program could quell complaints from the environmental community and broaden agriculture's constituency of political supporters.<sup>74</sup>

#### IV. HORSE AND BUGGY IDEAS IN THE GLOBAL AGE: THE UNINTENDED EFFECTS OF TRADITIONAL U.S. FARM POLICY

To understand and appreciate the growing public concern over the apparent inequitable distribution of increasingly substantial farm program spending, it is necessary to undertake a quick historical overview of American taxpayer involvement in agriculture. This summary will point out how the U.S. government became entangled in agriculture—for better or worse—and gives voice to criticisms of contemporary farm programs.<sup>75</sup>

Although direct federal involvement in agriculture arguably began in 1929 with the creation of the Federal Farm Board,<sup>76</sup> the farm programs and underlying policies that still exist in the 21st century trace their family history directly to the creation of the Agricultural Adjustment Act (“AAA”) of 1933.<sup>77</sup> The Depression-era AAA featured voluntary programs of non-recourse loan price supports, government financed buffer stock accumulation of foodstuffs, and paid cropland diversion to control commodity supply.<sup>78</sup> “Although the 1933 Act was

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farm payments are not doing what they have been told they would do won't be sympathetic to future calls for farm support”), at <http://www.issues.org/issues/17.4/smith.htm> (last visited Apr. 26, 2005).

74. See SANDRA S. BATIE, CTR. FOR AGRIC. IN THE ENV'T, AM. FARMLAND TRUST, GREEN PAYMENTS AS FORESHADOWED BY EQIP 12 (1998) (stating that green payments could be used to mute the demands for environmental regulation of agriculture), available at <http://www.aftresearch.org/researchresource/wp/wp98-8.html>.

75. See generally DAVID RAPP, HOW THE U.S. GOT INTO AGRICULTURE AND WHY IT CAN'T GET OUT (1988) (outlining the political history of farm support programs).

76. Luther G. Tweeten, *Agriculture Policy: A Review of Legislation, Programs, & Policy*, in FOOD & AGRICULTURE POLICY 29, 30 (1977).

77. LUTHER TWEETEN, OVERVIEW OF U.S. AGRICULTURAL POLICY 7 (June 1998 paper presented to “Cross-Country Agricultural Policy Symposium and International Comparison in Taiwan”), available at [http://www-agecon.ag.ohio-state.edu/programs/Anderson/papers\\_old/Overview%20of%20US%20Agricultural%20Policy.pdf](http://www-agecon.ag.ohio-state.edu/programs/Anderson/papers_old/Overview%20of%20US%20Agricultural%20Policy.pdf); Agricultural Adjustment Act of 1933, Ch. 25, 48 Stat. 31 (1933).

78. *Id.* at 8 (elaborating that under the non-recourse loan, the producer pledged his recently harvested crop as security for a federal loan at a specified loan rate (crop support price) from the government. If the market price rose above the loan rate, the producer could repay the government loan and sell the commodity to the highest private bidder. If the market price did not rise

declared unconstitutional because it taxed agribusinesses to finance it, the basic features of the legislation were redrafted into other legislation that survives to this day.<sup>79</sup> An example is the paid cropland diversion (a.k.a. “set-aside acres”)<sup>80</sup> in its original form, which seemingly ended with the passage of the 1996 Farm Bill. Nevertheless, the concept of paying farmers to idle land is alive and well under the umbrella of the Conservation Reserve Program (“CRP”).<sup>81</sup> The CRP pays landowners to “divert a specified number of acres of erosion-prone cropland to soil conserving uses for (usually) a 10-year period,” and the landowner is free to plant remaining land with crops of his or her choosing.<sup>82</sup> While on paper, the primary purpose of the CRP is ostensibly to reduce soil erosion, some assert it is really a supply control measure that has environmental benefits.<sup>83</sup> Because the CRP was not originally designed to provide producers with flexible options in achieving broad conservation goals, the long-term environmental effectiveness of such traditional government conservation programs has been called into question.<sup>84</sup> Regardless, the CRP program has become popular with conservationists, landowners and politicians alike even though the General Accounting Office has declared the CRP the least cost-effective conservation program administered by the USDA.<sup>85</sup> The CRP program, while perhaps inadvertently achieving some

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above the loan rate, the farmer could turn in the commodity to the government—the government having no recourse but to accept the commodity as full repayment of the loan. Participation by producers was high so the loan rate tended to set a floor price under the commodity.).

79. *Id.*; see *United States v. Butler*, 297 U.S. 1 (1936) (holding that Congress may not regulate agricultural production since that power is reserved to the states and Congress does not have such authority under the Commerce Clause). See generally Edward Lotterman, *Farm Policy over Two Centuries*, FED. RESERVE BANK OF MINNEAPOLIS, December 1996, available at <http://minneapolisfed.org/pubs/region/96-12/farmpol.cfm>.

80. See Tweeten, *supra* note 76, at 37-38 (discussing the federal farmer set aside program under the Agricultural Act of 1970).

81. See generally BARRY JACOBSON, *THE ECONOMIC EFFECTS OF THE CONSERVATION RESERVE PROGRAM* 8 (S.D. State Univ. Working Paper 2001) (stating that in the U.S. plains states, CRP enrollment exceeds ten percent of the cropland in many counties) (copy on file with author).

82. TWEETEN *supra* note 77, at 9.

83. See FAETH, *supra* note 64, at 27 (stating CRP enrollment is concentrated in major crop producing areas rather than in areas where soil erosion is high).

84. See David E. Ervin & Frank Casey, *The Changing Economic Agriculture Environment*, in *AGRICULTURAL POLICY FOR THE 21ST CENTURY* 267 (Luther Tweeten & Stanley R. Thompson eds., 2002) (stating that “long-term effectiveness for achieving environmental goals is doubtful”).

85. See *GAO Rates CRP Cost-Effectiveness*, 48 J. SOIL & WATER CONSERVATION, July/Aug. 2003, at 322 (stating that the CRP is an expensive program that could be managed more efficiently). *But see* FAETH, *supra* note 64, at 19 (acknowledging that although the CRP is inefficient, it is a much better taxpayer investment than commodity program payments).

positive environmental outcomes, illustrates the need for a fiscally responsible national approach to conservation goals.

The various ad hoc farm programs conceived during the throes of the economic collapse of the 1930s were indeed radical<sup>86</sup> (some would argue necessary) for their time, but economic recovery for agriculture did not really occur until demand for commodities skyrocketed during World War II.<sup>87</sup> But the cease-fire in Korea, success of the Marshall Plan in Europe, and huge increases in fertilizer and chemical usage during the 1950's quickly lead to massive grain overproduction<sup>88</sup> and lower farm prices in the U.S.<sup>89</sup>

From 1952 onward, each successive presidential administration and Congress found itself caught in a vicious cycle of farm overproduction and low prices, followed by brief periods of crop failure and skyrocketing food prices.<sup>90</sup> Agriculture faced an inelastic demand curve and the USDA tried in vain to defeat economic law.<sup>91</sup> Target prices, loan rates, deficiency payments, Farmer Owned Reserve, Payment in Kind, set aside, Soil Bank, Conservation Reserve Programs and Export Enhancement Programs—all creative variations of basic price supports and supply control—were tried from 1949 to 1996.<sup>92</sup> The U.S. spent \$451 billion on these programs from 1950 to 2000 but nothing seemed to work.<sup>93</sup> Politicians jawboned about saving the family farm, but from 1930 to 1996, America lost more than two-thirds of its farmers.<sup>94</sup> Federal government farm programs and the U.S. taxpayer were powerless to avert the massive structural change that was occurring in American agriculture, and as the decades rolled by, USDA farm

86. See FAETH, *supra* note 64, at 21 (stating that during the Great Depression, the link between supply and demand was cut for major crops).

87. See EDWARD LOTTERMAN, FARM BILLS AND FARMERS: THE EFFECTS OF SUBSIDIES OVER TIME, FEDERAL RESERVE BANK OF MINNEAPOLIS, Dec. 1996, available at <http://minneapolisfed.org/pubs/region/96-12/farbill.cfm> (stating that prosperity did not return until the beginning of WWII when "support" prices for certain commodities were implemented); see also David S. Bullock & Jay S. Coggins, *Do Farmers Receive Huge Rents for Small Lobbying Efforts?*, in AGRICULTURAL POLICY FOR THE 21ST CENTURY 146 (Luther Tweeten & Stanley R. Thompson ed., 2002).

88. See Tweeten, *supra* note 76, at 35.

89. See LOTTERMAN, *supra* note 87.

90. See *id.*

91. See RONALD D. KNUTSON ET AL., AGRICULTURE AND FOOD POLICY 232-239 (4th ed. 1998).

92. See LOTTERMAN, *supra* note 87.

93. See Tweeten, *supra* note 76 (based on year 2000 dollars adjusted for inflation).

94. See CAROL GOODLOE, USDA, WHERE HAVE ALL THE OATS AND HORSES GONE?: CHANGES IN U.S. AGRICULTURE OVER THE 20<sup>TH</sup> CENTURY (1999), available at <http://www.usda.gov/ocel/ocel/goodloe.htm>.

programs – for good or ill – became a permanent presence in agriculture.<sup>95</sup> As agricultural economist George Brandow wrote so prophetically during the 1948 debate over the future course of U.S. farm programs, “A withdrawal of government from the farm price field will not happen.”<sup>96</sup>

Like the proverbial cat, government programs have nine lives, even in the face of growing criticism about their effectiveness and equity. Such longevity is due to the fact that federal farm programs exhibit a characteristic known as “path dependence”, wherein congressional leaders tend to try old methods rather than seek new solutions.<sup>97</sup> Reinforcing this trait of path dependence is the fact that the effort to organize the few who benefit from commodity subsidies is less than the effort to rally the many taxpayers who bear the cost.<sup>98</sup> This tends to perpetuate existing programs, regardless of their effectiveness or negative environmental effects, and allows a few farmers to receive large benefits from small lobbying efforts.<sup>99</sup>

This historic overview of how U.S. government farm programs have become entrenched in national policy leads to the most common criticism of current farm programs— inequity— benefits accrue disproportionately to the wealthy and privileged among those eligible.<sup>100</sup> “Commodity support prices tied to production provide[s] larger farmers” (who obviously produce more) “with much greater economic benefits than small farmers.”<sup>101</sup> These large program payments provide economic security and capital, enabling larger operators to leverage their equity, buy out their neighbors, and realize economies of scale.<sup>102</sup> While the economic demographics of farmers have improved markedly during the past thirty years and with the average income of farm families now exceeding their urban counterparts,<sup>103</sup> taxpayers are taking notice that the 2002 Farm Bill is projected to

95. USDA, *A TIME TO CHOOSE: A SUMMARY REPORT ON THE STRUCTURE OF AGRICULTURE* 147, 150 (1981); *see generally* RONALD D. KNUTSON ET AL., *AGRIC. AND FOOD POLICY* 296-337 (4th ed.1998) (discussing how movement towards industrialization under the USDA harms family farms).

96. Bullock & Coggins, *supra* note 87, at 147.

97. Stanley R. Johnson, *Implications of Structural Change for Farms and Rural Economics*, Address at the Agric. Outlook Forum 2001 (Feb. 23, 2001) (discussing that changes in the future depend upon the way we have evolved and current circumstances), *available at* <http://www.usda.gov/oce/forum/Archives/2001/speeches/stanjohnsonppt.PDF>.

98. TWEETEN, *supra* note 77, at 16.

99. *See* Bullock & Coggins, *supra* note 87, at 147 (stating that while agriculture receives tens of billions in transfers, only tens of millions are spent in lobbying).

100. TWEETEN, *supra* note 77, at 17.

101. *Id.*

102. *Id.*

103. ASHOK K. MISHRA ET AL., *ECON. RESEARCH SERV., USDA, INCOME, WEALTH, AND THE ECONOMIC WELL-BEING OF FARM HOUSEHOLDS* iii (2002) (stating that “income available to

pump \$130 billion in subsidies during the next ten years to approximately ten program crops. However, only 40% of American farmers are slated to receive this money.<sup>104</sup>

There is a change blowing in the wind, however. The Environmental Working Group, a non-profit environmental activist organization based in Washington, D.C., has developed a comprehensive searchable internet database containing farm program subsidy amounts paid to U.S. farm program participants.<sup>105</sup> The motive of publication is to generate public debate over the inequitable distribution of farm program spending.<sup>106</sup>

The environmental and conservation groups are not alone in the growing chorus of concern about what the taxpayers are buying and who is receiving this unprecedented level of funding. For example, the USDA Commission on the Application of Payment Limitations for Agriculture has found that the dollars flowing from the U.S. Treasury into farmer's pockets has artificially inflated land prices by fifteen to twenty percent making it difficult for smaller farmers to compete.<sup>107</sup> The Commission has recommended that the USDA directly attribute

farm households can support a standard of living equal to or above that of non-farm households"), available at <http://www.ers.usda.gov/publications/aer812/aer812.pdf>.

104. See ENVTL. WORKING GROUP, FREQUENTLY ASKED QUESTIONS at <http://www.ewg.org/farm/region.php?fips=00000> (last visited Apr. 26, 2005) [hereinafter ENVTL WORKING GROUP FAQ].

105. ENVTL. WORKING GROUP, FARM SUBSIDY DATABASE, at <http://www.ewg.org/farm/> (last visited Apr. 26, 2005); ENVTL WORKING GROUP, ABOUT THE ENVIRONMENTAL WORKING GROUP at <http://www.ewg.org/about/index.php> (last visited Apr. 26, 2005).

106. See ENVTL. WORKING GROUP, FAQ, *supra* note 104 (stating the reason the group has posted the subsidy information as:

We think current policy has badly failed almost everyone in agriculture but the very largest producers of a few favored crops ... [while] [t]ens of thousands of farmers who have applied for USDA conservation programs ... have been turned away because those programs are chronically under-funded ... [because] more than 70 percent of total farm bill dollars w[ere] devoted to crop subsidies....).

107. USDA, REPORT OF THE COMMISSION ON THE APPLICATION OF PAYMENT LIMITATIONS FOR AGRICULTURE 5-6 (2003) [hereinafter PAYMENT LIMITATIONS REPORT] (finding that "higher farmland values increase the wealth of landowners," (41% of whom are not operating farms) thereby "helping them finance the purchase of additional land. Higher farmland values also reduce the ability of limited-resource farms to purchase cropland and are of little benefit to farm operators farming mostly rented land"), available at <http://www.usda.gov/oc/ece/payments/payment-commission.htm>; see also USDA, FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW CENTURY 6 (2001) [hereinafter USDA TAKING STOCK] (stating that:

[w]hile program benefits were intended to help farm operators, most support eventually accrues to landowners, in the short run through rising rental rates and in the longer term through capitalization into land values. For many farm operators, renting land is a key

payments to real “persons,” thereby increasing transparency.<sup>108</sup> The recommendations also include strengthening the criteria for determining eligibility to improve program integrity and urge a phase in of payment limits to slowly remove the distortions that current farm programs have imbedded into the industry.<sup>109</sup> Even the USDA itself recognizes that traditional farm policies are having a detrimental impact on the farm industry by admitting in a 2001 major policy report that:

Many of the program approaches since the 1930s proved not to work well or not at all, produced unexpected and unwanted consequences, became far costlier than expected, and have been continually modified in our long succession of farm laws . . . [C]urrent program benefits still are largely directed to specific commodity producers, resulting in only 40 percent of farms being recipients. And, there still is no direct relationship between receiving benefits and financial status of the farm.<sup>110</sup>

In sum, there is a clear and growing awareness that allocating increasing amounts of limited tax dollars on a 1930s farm program model may not be the best way to achieve the goals demanded by the ninety-eight percent of the American population that is not farming today. This is not to say that the producers of our abundant food supply are undeserving of fiscal support when necessary, but rather that U.S. agriculture needs to find a more credible and equitable approach to achieving 21st century farm and rural objectives. A plausible green payment program could provide income opportunity in all geographic regions, regardless of volume of particular commodity produced.

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strategy to expand[ing] the size of the business and captur[ing] the size economies, as evidenced by 42 percent of farmers renting land in 1999. Clearly, operators farming mostly rented acreage may receive little benefit from the programs),

available at <http://www.usda.gov/news/pubs/farmpolicy01/fullreport.pdf>.

108. PAYMENT LIMITATION REPORT, *supra* note 107, at 12 (stating that “attributing payments directly to individuals (human beings) could improve program transparency, program administration, and farm business efficiency”).

109. *See id.*

110. USDA, TAKING STOCK, *supra* note 107, at 47, 49 (stating that:

[t]he most financially disadvantaged segment of farmers today is the low-income, low-wealth group. This limited-resource group comprised about 6 percent of farms, had average household income of \$9,500, but received less than 1 percent of direct government payments in 1999. In contrast, 47 percent of payments went to large commercial farms, which contributed nearly half of program commodity production and had average household income of \$135,000.).

## V. MULTIFUNCTIONALITY: DO FARMS PRODUCE MORE THAN FOOD?

A third reason necessitating a shift in current U.S. agricultural policies is economic. In order to understand the economic basis, one must first understand the concept of multifunctionality. The discussion of multifunctionality in agriculture “has been beset by the problem that the concept of multifunctionality is not well defined and prone to different interpretations.”<sup>111</sup> While the term is relatively new, the concept it represents is not. The basic idea is that agriculture is more than just producing and selling commodities; it also produces many intended and unintended by-products.<sup>112</sup> Multifunctionality in an agricultural context recognizes that farms and ranches produce more than just commodities; they also produce a wide array of environmental goods and services.<sup>113</sup> These goods and services range from wildlife habitat to air quality to open spaces to wetlands that filter our water supply.<sup>114</sup> “Agricultural commodities have markets, but environmental services do not.”<sup>115</sup> Because these environmental goods and services lack a functioning market as traditionally defined, farmers have little economic incentive to produce them.<sup>116</sup> Such goods are often described as “public goods”—goods for which no one (practically speaking) can be excluded from enjoying, and use by one individual does not diminish the availability of the good for use by other individuals.<sup>117</sup> In a capitalist society, these environmental goods and services will not be produced in adequate amounts by modern agriculture unless there is some incentive, such as profit (or disincentive, such as a tax).<sup>118</sup> There-

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111. LEO MAIER & MIKITARO SHOBAYASHI, ORG. FOR ECON. CO-OPERATION AND DEV., MULTIFUNCTIONALITY: TOWARDS AN ANALYTICAL FRAMEWORK 5 (Apr. 2001), available at <http://www.oecd.org/dataoecd/43/31/1894469.pdf>.

112. MARY BOHMAN ET AL., USDA, THE USE AND ABUSE OF MULTIFUNCTIONALITY 5 (Nov. 1999) (stating that some farm byproducts “are ‘good,’ such as rural employment creation; some are ‘bad,’ such as erosion and pollution; and some are ‘intangible,’ such as the spiritual or symbolic value of preserving our farming heritage”), available at <http://www.gtap.agecon.purdue.edu/resources/download/1265.pdf>.

113. See BATIE & HORAN, *supra* note 2, at 1.

114. See *id.*; DOBBS, *supra* note 64, at 19 (explaining that agriculture can provide ecological and environmental functions such as the “provision of clean water supplies, bird and other wildlife habitat, scenic landscapes, carbon sequestration (to reduce greenhouse gases and mitigate global warming), and flood protection (by wetlands)”).

115. FAETH, *supra* note 64, at 19.

116. See Roger Claassen & Richard D. Horan, USDA, *Environmental Payments to Farmers: Issues of Program Design*, AGRIC. OUTLOOK, June-July 2000, at 15, available at <http://www.ers.usda.gov/publications/agoutlook/jun2000/ao272g.pdf>.

117. Paul M. Johnson, *A Glossary of Political Economy Terms*, available at [http://www.auburn.edu/~johnspm/gloss/public\\_goods.html](http://www.auburn.edu/~johnspm/gloss/public_goods.html).

118. See generally ROGER CLAASSEN, *supra* note 53 (discussing economic incentive and disincentive policies available to influence the production of environmental goods and services).

fore, public goods by their very nature require government involvement in order to correct the inherent market failure associated with them.<sup>119</sup> By recognizing that farms are multifunctional in nature, using U.S. agricultural policies to directly address environmental “non-commodity” outcomes instead of focusing policy on commodity production will steer agricultural activity towards “non-commodity” benefits in line with society’s preferences.<sup>120</sup>

Outside of the U.S., other countries have taken the concept of multifunctional agriculture to heart and have developed domestic farm programs encouraging rural areas to maintain and increase production of non-commodity amenities.<sup>121</sup> These countries have acknowledged that government has a legitimate role in creating markets for services that provide broad public benefits.<sup>122</sup> Pressure from these countries resulted in the WTO members agreeing “that new trade negotiations would take into account ‘non-trade concerns,’ including food security and the need to protect the environment.”<sup>123</sup> Although some critics argue that the only reason Switzerland, the European Union, Norway, Japan, and South Korea are developing multifunctional green payments is due to the fact that they are approaching their Amber Box spending limits as prescribed by the WTO,<sup>124</sup> other European Union countries have also latched onto the multifunctional concept and have created de-coupled farm payment schemes based on environmental objectives.<sup>125</sup>

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119. See MAIER & SHOBAYASHI, *supra* note 111, at 7 (stating that

[t]he key elements of multifunctionality are: i) the existence of multiple commodity and non-commodity outputs that are jointly produced by agriculture; and ii) the fact that some of the non-commodity outputs exhibit the characteristics of externalities or public goods, with the result that markets for these goods do not exist or function poorly.).

120. *Id.* at 13.

121. See BOHMAN, *supra* note 112, at 5 (stating that Switzerland, the European Union, Norway, Japan, and South Korea, have been the biggest proponents of multifunctionality in WTO negotiations).

122. See FAETH, *supra* note 64, at 19.

123. BOHMAN, *supra* note 112, at 5; see Agreement on Agriculture, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Multilateral Agreements on Trade in Goods, Art. 20.

124. BOHMAN, *supra* note 112, at 2-3.

125. DOBBS, *supra* note 51, at 20 (stating that the United Kingdom launched its first multifunctional scheme entitled Environmentally Sensitive Areas (ESA) in 1986 and currently has twelve agri-environmental programs in place); EMILIO GATTO ET AL., RURAL DEVELOPMENT POLICIES AND NON TRADE CONCERNS: THE CASE OF ITALY 4 (2002) (stating that the European Union as a whole is committed to the adoption of a “new” multifunctional paradigm that upgrades the role of Rural Development, shifting resources from market intervention (“first pillar” of the Common Agricultural Policy) to intervention in the area of structures, environment and rural activities diversification, the so-called “second pillar”), available at <http://www.inea.it/opaue/WP15.pdf>.

In sum, a green payment acknowledges the multifunctional aspect of agriculture. A green payment provides the economic signals (i.e. profits) that farms and ranches require as businesses to maintain and increase the production of environmental goods and services that the public desires.<sup>126</sup>

## VI. DESIGNING A GREEN PAYMENT - ENVIRONMENTAL PERFORMANCE AND INCOME OPPORTUNITY: TO WHAT EXTENT CAN THEY CO-EXIST?

Inherent in any policy choice are trade-offs among environmental goals, who gains and who loses, and where in the country those gains and losses occur. The following comments illustrate those trade-offs and also identify critical components of any green payments program.

### A. *The Environmental Performance Route*

Traditionally, the U.S. has spent money on commodity programs and hoped for some type of environmental improvement to jointly appear.<sup>127</sup> In fact, many economic studies conducted on alternative farming methods in the 1980s and 1990s assumed the economic value of natural resource improvement to be zero.<sup>128</sup> Some argue that addressing environmental performance and outcomes directly is a better approach.<sup>129</sup>

If getting the most “bang” for our conservation “buck” is important, then the suggested approach is to target specific, often narrowly defining, environmental problems intensively.<sup>130</sup> This can be done by paying only for those practices most highly correlated with positive environmental outcomes and/or only attacking definite problem areas such as water quality.<sup>131</sup> Environmental cost effectiveness can also be improved by paying larger payments to farmers who are supplying higher prioritized environmental goods and services<sup>132</sup> and/or using a bidding process.<sup>133</sup>

126. See CLAASSEN & HORAN, *supra* note 116, at 18.

127. See generally CLAASSEN, *supra* note 28 (stating that the U.S. has primarily focused on ensuring commodity stability and conservation has come second).

128. FAETH, *supra* note 122, at 31.

129. See FARM FOUNDATION, *supra* note 60, at 1 (stating that “[t]argeting outcomes rather than practices is likely to be more cost-effective”); FAETH, *supra* note 122, at 1 (stating conservation dollars would be better spent if they were targeted to achieve real environmental gains).

130. Cf. BATIE & HORAN, *supra* note 2 (noting that various green payment policies exist to address environmental problems effectively).

131. See *id.*

132. See CLAASSEN & HORAN, *supra* note 116, at 16.

133. See UWE LATACZ-LOHMANN, *ORG. FOR ECON. CO-OPERATION AND DEV., A POLICY DECISION-MAKING FRAMEWORK FOR DEVISING OPTIMAL IMPLEMENTATION STRATEGIES FOR GOOD*

In other words, the most cost effective agri-environmental payment program would *prioritize* environmental goods and services,<sup>134</sup> *target* payments to producers who could meet those priorities,<sup>135</sup> allow for *flexible, least-cost* methods to be chosen by the producer<sup>136</sup> and *build confidence* with taxpayers by *monitoring compliance* and *measuring outcomes*.<sup>137</sup>

While this approach is efficient from an environmental performance standpoint, tradeoffs develop between beneficiaries based on which environmental policy goals are chosen. For example, if water quality is the main goal, income payments flowing from a green payments program will be concentrated in those watersheds where the most serious problems exist or where high value water sources are produced.<sup>138</sup> This would create a dramatic geographic shift in the current distribution of payments.<sup>139</sup>

In contrast, if the payments are based on regional comparative ability to sequester carbon, a wide cross section of farmers and ranchers will be able to participate and any income support derived from such a program could be wide spread.<sup>140</sup>

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AGRICULTURAL AND ENVIRONMENTAL POLICY PRACTICES 25 (2001) (discussing the bidding process for agri-environmental incentive schemes), *available at* [http://www.oelis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c12569d60040e961/\\$FILE/00087676.PDF](http://www.oelis.oecd.org/olis/2000doc.nsf/c5ce8ffa41835d64c125685d005300b0/c125692700623b74c12569d60040e961/$FILE/00087676.PDF).

134. See CLAASSEN & HORAN, *supra* note 116, at 16 (stating “[a] cost-effective agri-environmental payments program aims to achieve the greatest possible environmental benefit for the level of resources committed to the program” by “assign[ing] greater priority to providing agri-environmental services that are more highly valued ...”).

135. See BATIE & HORAN, *supra* note 2, at 3 (stating that cost effectiveness criteria suggests a need for targeting broadly enough for impact, but not so broadly as to dilute the effectiveness of the program).

136. See CLAASSEN & HORAN, *supra* note 116, at 16.

137. See LATACZ-LOHMANN, *supra* note 133, at 28 (stating that transparency of agri-environmental measures is necessary to build trust among stakeholders and outcomes should be critically assessed in the light of the program objectives, and the reports should be made widely available for public scrutiny).

138. See BATIE, *supra* note 74, at 3-4.

139. See *id.* (stating that a “Green Payments Program, if targeted at water-related agro-environmental problems, will not substitute well for traditional income support payments.”).

140. See generally Darrell Smith, *Carbon Becomes a Crop*, TOP PRODUCER MAGAZINE, Mar. 8, 2002 (describing the 2002 pilot carbon credit leasing program between Entergy, a Louisiana based energy company and the Pacific Northwest Direct Seed Association), *available at* <http://www.pointcarbon.com/article.php?articleID=1722&categoryID=187>; JOHN BRENNER ET AL., USDA, THE IOWA CARBON STORAGE PROJECT: QUANTIFYING THE CHANGE IN GREENHOUSE GAS EMISSIONS DUE TO NATURAL RESOURCE CONSERVATION PRACTICE APPLICATION IN IOWA (May 2001) (detailing a two phase project to assess the ability of Iowa farmland to sequester carbon), *available at* [http://www.nrel.colostate.edu/projects/agroeco/projects/statelevel/iowa/Iowa\\_Final\\_Report.pdf](http://www.nrel.colostate.edu/projects/agroeco/projects/statelevel/iowa/Iowa_Final_Report.pdf).

Alternatively, if the environmental focus is on wind erosion and prairie wildlife habitat, there would be a much closer match between traditional income support programs and green payments, but areas outside of the Midwest and South would essentially remain excluded.<sup>141</sup>

Within the environmental performance approach are two sub-options: paying for “good” environmental performance or paying for environmental “improvement.” As a recent USDA report noted:

Payments for “good” environmental performance would focus on management or conservation practices that are environmentally effective. When there is more than one way to achieve an environmental gain, a performance-based payment would allow producers to select the lowest cost alternative for their own resource conditions and farming operation. However, performance-based payments may entail substantial public investment in planning and enforcement and require farm- or field-specific conservation plans.<sup>142</sup>

Payments for “good” practices would limit producer flexibility and may result in the use of practices that are ineffective under some resource conditions. However, planning and enforcement costs may be quite low. Thus, practice-based payments may be more or less cost effective than performance-based payments depending on the environmental problem to be addressed and the resource conditions, crops, and farming practices at hand.<sup>143</sup>

In sum, targeting specific environmental problems with a green payments program raises a bigger conflict than merely traditional subsidy recipients versus new green payment recipients. Targeting really means winners and losers will have to be picked, and any income support achieved may be no more equitably distributed than under the current commodity based system.

### B. *The Income Support Route*

Alternatively, the government could target producers on a broad scale by paying all farmers for the use of environmentally good practices, thereby indirectly attempting to support farm income.<sup>144</sup> While this approach is easy to implement, administer, and would allow for across the board income opportunities, the use of practices as proxies for actual environmental progress may not be the best choice.<sup>145</sup> Traditional conservation measures have relied on such voluntary

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141. See BATIE, *supra* note 74.

142. CLAASSEN, *supra* note 28, at v.

143. *Id.*

144. See LYNCH & SMITH, *supra* note 62, at 15.

145. See CLAASSEN, *supra* note 28, at 27 (stating that targeting payments to producers in need of income support is unlikely to fully address any specific agri-environmental problem).

design based measures for decades but often lack scientific proof of actual environmental improvement.<sup>146</sup> Paying for practices in order to achieve broad income support goals could be less environmentally effective, less cost effective, and could reduce individual producer flexibility by eliminating the ability to choose the best practice.<sup>147</sup>

Essentially there are three main reasons why attempting to use green payments in place of traditional commodity based income support poses problems:

1. Awareness of the aforementioned potential for redistribution of monies may lead current recipients to fight to maintain the status quo.<sup>148</sup>
2. Simply shifting traditional income support subsidies into a green payments program without fundamentally restructuring the basis for such payments would lead to charges from fellow WTO members that the U.S. is simply dressing up its commodity subsidies in “green clothing” to dodge Amber Box subsidy caps.<sup>149</sup>
3. Attempting to construct a green payments program that provides conservation plus income support along side of existing billion dollar commodity programs could very well be financially impossible.<sup>150</sup>

### *C. The Need for Incentives/Profit*

A successful green support program has been defined as a “voluntary program that provides monetary incentives to farmers to modify their behavior by incorporating into their production practices more environmentally sound farming systems and practices.”<sup>151</sup> Therefore, inclusion of an incentive component in any such green payments program is also critical. Producers will only

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146. *See id.* (stating that tradeoffs can occur between farm support measures and environmental objectives).

147. *See id.* at v.

148. *See* BATIE, *supra* note 74, at 16 (stating that “[t]here is every reason ... to believe that there will be political rent-seeking forces from affected farm interests to preserve the status quo should a green payments program seek to replace traditional commodity based programs.”).

149. *See id.* (stating that the U.S.’s “increased income support ‘disguised’ as green support payments could, if large enough, result in exceeding the GATT guidelines for such payments.”).

150. *See id.* at 7 (noting that this type of green payments program can place strain on federal budgets).

151. Jerry R. Skees, *Implementation Issues for Alternative Green Support Programs*, in *DESIGNING GREEN SUPPORT PROGRAMS: POLICY STUDIES PROGRAM REPORT NO. 4* at 95, 101 (Sarah Lynch ed., 1994).

participate in such a program if the payments cover the full cost of participation (i.e. out of pocket costs, opportunity costs, management and time costs) or if the program generates private benefits above and beyond the program payments (i.e. participation increases yields or property values).<sup>152</sup> Regardless of which path is chosen, effective program design accounts for farmers' profit optimizing behavior and as such, requires income incentives to ensure participation and success.<sup>153</sup>

#### D. The Baseline Issue

Another tradeoff occurs when selecting the appropriate baseline from which to measure the payments.<sup>154</sup> Setting a high bar limits the number of producers eligible for the program, therefore, restraining income opportunity but increasing environmental effectiveness.<sup>155</sup> A low threshold opens the door to greater participation but leads to the criticism that taxpayers are subsidizing farmers for things that they already have an existing stewardship obligation to perform. Furthermore, a low threshold may penalize "good actors" who have voluntarily undertaken conservation measures.<sup>156</sup> Underlying all of this is the fact that a green payments program will be tasked to provide benefits and results across a spectrum of indicators in the face of incomplete data accessible by policy makers.<sup>157</sup> In other words, policy makers may not even know where to begin measuring the baseline from.

#### E. Design Summary

A thorough analysis shows that targeting payments primarily to support the incomes of any specific group of farmers is unlikely to solve any particular agri-environmental problem. Conversely, targeting any specific agri-

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152. See COX, *supra* note 1 (defining "green payment" as a payment that efficiently links the production of environmental goods and services with the opportunity to derive an income over and above the cost of producing those goods and services).

153. See Skees, *supra* note 152, at 99.

154. See CLAASSEN & HORAN, *supra* note 136, at 17.

155. See BATIE & HORAN, *supra* note 2.

156. See *id.*; see also CLAASSEN, *supra* note 28, at v. (stating that payments based on environmental improvement would not recognize the past contribution of "good actors"—producers who have already achieved a high level of environmental performance); see generally W.J. BAUMOL & W.E. OATES, *THE THEORY OF ENVIRONMENTAL POLICY* (2d ed. 1988) (describing problems in creating agri-environmental policy).

157. See generally, THE HEINZ CENTER, *THE STATE OF THE NATIONS ECOSYSTEMS 2* (Cambridge Univ. Press 2002) (attempting to compile a scientifically valid list of data about the United States ecosystems for policymakers and pointing out areas where data is incomplete or indicators need to be developed), available at <http://www.heinzctr.org/ecosystems/report.html>.

environmental problem may exclude many producers that policymakers would otherwise include in an income support program. These points demonstrate that determining the key program driver for a green payments program is critical— income support as attempted by traditional commodity programs versus environmental performance.

Essentially, the point becomes one of attempting to strike the best balance possible between environmental performance and income opportunities. Policy makers first need to understand how changing program design will change the balance between the two options. Then, they will need to identify where the optimal solutions lie and decide which blend will offer the best performance.

## VII. THE CONSERVATION SECURITY PROGRAM: A POSSIBLE MODEL FOR A GREEN PAYMENTS PROGRAM

### A. *The Statute*

The FSRIA of 2002 (a.k.a. the 2002 Farm Bill) was passed by the U.S. House of Representatives on May 2, 2002 and by the U.S. Senate on May 9, 2002. President Bush signed Public Law 107-171 into law on May 13, 2002.<sup>158</sup> Included within the bill was a radical new conservation entitlement program proposed by Senator Tom Harkin (D-IA) known commonly as the Conservation Security Program (CSP).<sup>159</sup>

The CSP has been called by some as the first green payments program in the U.S.<sup>160</sup> Secretary of Agriculture Ann Veneman has outlined the administration's vision for CSP as:

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158. The Farm Security and Rural Investment Act of 2002, 7 U.S.C. § 7901 (2004).

159. See Conservation Security Program, 16 U.S.C. §§ 3838-3838c (2002).

160. See MIKE DUFFY, IOWA STATE UNIV., CONSERVATION SECURITY PROGRAM FACT SHEET (2002) (stating that the CSP is the first time that a farm bill has contained provisions for "green" payments because the CSP provides incentive payments for implementing conservation practices on working land), available at <http://www.extension.iastate.edu/Publications/FM1872B.pdf>; Press Release, U.S. Senator Tom Harkin, Statement by Senator Tom Harkin on the Proposed Rules For the Conservation Security Program (Dec. 17, 2003) (proclaiming that "[t]he Conservation Security Program moves our conservation efforts in a new direction. This unique program rewards those who practice conservation techniques on working lands."), available at <http://harkin.senate.gov/press/print-release.cfm?id=216724>; HONGLI FENG, CTR. FOR AGRIC. AND RURAL DEV., IOWA STATE UNIV., GREEN PAYMENTS AND DUAL POLICY GOALS 2 (2002) (stating that "[g]reen payment programs, such as the [C]onservation [S]ecurity [P]rogram...are better positioned to meet the conservation needs for land both in and out of [agricultural] production"), available at <http://www.card.iastate.edu/publications/DBS/PDFfiles/02wp304.pdf>.

- (1) To identify and reward those farmers and ranchers meeting the very highest standards of conservation and environmental management on their operations;
- (2) To create powerful incentives for other producers to meet those same standards of conservation performance on their operations; and
- (3) To provide public benefits for generations to come. *In short, CSP should reward the best and motivate the rest.*<sup>161</sup>

The CSP represents a significant departure in U.S. conservation policy. Until the advent of CSP, the USDA had confined itself to two tactics in dealing with environmental and conservation problems: offering financial and technical assistance to adopt new conservation practices (e.g. cost share for installing grass waterways) and using rent-like payments to temporarily alter land use (e.g. CRP payments).<sup>162</sup>

The CSP takes a fresh approach and is designed to optimize environmental benefits resulting from farmers and ranchers production systems by establishing a mechanism that will reward farmers and ranchers for ongoing stewardship.<sup>163</sup> The CSP's statutory language shows Congressional intent for allowing universal participation based on the eligibility requirements. All agricultural producers, including non-program crop producers (e.g., fruits, vegetables) and livestock producers are eligible to participate if they complete an approved CSP plan and enter into a conservation security contract to implement the plan.<sup>164</sup> This addresses the traditional farm program criticism of inequity, while appeasing environmental groups and maintaining some semblance of income support. The CSP also has the support of the major U.S. farm commodity organizations as well as environmental and conservation groups.<sup>165</sup>

161. NRCS, USDA, CONSERVATION SECURITY PROGRAM: SUMMARY OF PROPOSED RULE 1 (Dec. 2003), available at <http://www.nrcs.usda.gov/programs/farbill/2002/pdf/cspsummary.pdf>.

162. See generally RALPH HEIMLICH, USDA, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS: OVERVIEW OF CONSERVATION PROGRAMS AND EXPENDITURES (2000) (listing the range of policy tools and instruments used to encourage or compel adoption of conservation and environmental practices), available at [http://www.ers.usda.gov/publications/arei/ah722/arei6\\_1/AREI6\\_1consoverview.pdf](http://www.ers.usda.gov/publications/arei/ah722/arei6_1/AREI6_1consoverview.pdf).

163. See NRCS, USDA, FARM BILL 2002: SP FACT SHEET 1 (2003), available at <http://www.nrcs.usda.gov/programs/farbill/2002/pdf/cspfact.pdf>.

164. See 16 U.S.C. § 3838a(b)(1) (2002); see also 16 U.S.C. § 3838(9) (2002) (broadly defining "producer" as "an owner, operator, landlord, tenant, or sharecropper that . . . shares in the risk of producing any crop or livestock . . . and is entitled to share in the crop or livestock available for marketing from a farm . . .").

165. See BARBARA A. JOHNSON, CONGRESSIONAL RESEARCH SERV., THE CONSERVATION SECURITY PROGRAM IN THE 2002 FARM BILL 4 (2004) (listing such diverse supporters of CSP as the National Corn Growers' Association, the American Farm Bureau Federation, the Sierra Club and

The producer's "green" payment level is based upon several factors, including land rental rates, costs of using conservation practices, and local priorities.<sup>166</sup> In addition, farmers and ranchers can choose their level of participation and incentive payment via three tiers.<sup>167</sup> In general, the three levels of voluntary participation are as follows. Tier I, the lowest level of CSP participation, covers appropriate practices that address at least one significant resource of concern for a period of five years, and a portion of the entire agricultural operation can be enrolled.<sup>168</sup> In Tier II, the time frame is lengthened to five to ten years and the farmers and ranchers must address at least one significant resource of concern for the entire agricultural operation.<sup>169</sup> In Tier III, the highest level, a producer is required to employ a comprehensive resource management system on the entire agricultural operation, but the time frame remains at five to ten years.<sup>170</sup>

Payments under the CSP are broken into three components, the base payment, the cost payment and the enhanced payment.<sup>171</sup> The cost payment pays each tier of participation 75% of the average county cost of the conservation practice.<sup>172</sup> Beginning farmers are reimbursed at 90% of the average county cost of the conservation practice as an increased incentive.<sup>173</sup> The base payment is selected by the Secretary of Agriculture from either the national per-acre rental rate or any other appropriate rate for the 2001 crop year.<sup>174</sup> The Tier I participant receives a payment equal to 5% of the base rate,<sup>175</sup> Tier II receives 10% of the

the National Association of Conservation Districts), *available at* <http://www.ncseonline.org/NLE/CRSreports/04Feb/RS21739.pdf>.

166. See 16 U.S.C. § 3838a(d)(4) (2002) (listing a wide range of approved conservation practices as including: "(A) nutrient management; (B) integrated pest management; (C) water conservation (including through irrigation) and water quality management; (D) grazing, pasture, and rangeland management; (E) soil conservation, quality, and residue management; (F) invasive species management; (G) fish and wildlife habitat conservation, restoration, and management; (H) air quality management; (I) energy conservation measures; (J) biological resource conservation and regeneration; (K) contour farming; (L) strip cropping; (M) cover cropping; (N) controlled rotational grazing; (O) resource-conserving crop rotation; (P) conversion of portions of cropland from a soil-depleting use to a soil-conserving use, including production of cover crops; (Q) partial field conservation practices; (R) native grassland and prairie protection and restoration; and (S) any other conservation practices that the Secretary determines to be appropriate and comparable to other conservation practices described in this paragraph.").

167. See 16 U.S.C.S. § 3838a(d)(1), (5) (Law. Co-op. 2002).

168. 16 U.S.C.S. § 3838a(d)(5)(A) (Law. Co-op. 2002).

169. 16 U.S.C.S. § 3838a(d)(5)(B) (Law. Co-op. 2002).

170. 16 U.S.C.S. § 3838a(d)(5)(C) (Law. Co-op. 2002).

171. 16 U.S.C.S. § 3838c(b)(1) (Law. Co-op. 2002).

172. *Id.*

173. *Id.*

174. 16 U.S.C.S. § 3838c(b)(1)(A) (Law. Co-op. 2002).

175. 16 U.S.C.S. § 3838c(b)(1)(C)(i) (Law. Co-op. 2002).

base rate,<sup>176</sup> and Tier III receives 15% of the base rate.<sup>177</sup> The enhanced payment amount is not specified, and the criteria are somewhat subjective.<sup>178</sup> Apparently it is designed to reward participants who go above and beyond the CSP's basic requirements.<sup>179</sup>

In addition, total payments to an individual or entity under a conservation security contract cannot exceed: (A) \$20,000 for a Tier I contract; (B) \$35,000 for a Tier II contract; or (C) \$45,000 for a Tier III contract, and land enrolled in existing USDA conservation programs is ineligible for simultaneous CSP payments.<sup>180</sup> These payment limits attempt to address the equity criticism common in existing commodity-based farm program payments.

### B. *The Proposed Rule*

The CSP was originally designed as a statutory entitlement program.<sup>181</sup> Unfortunately, Congress did not specify funding in the statute, and a political battle developed over allocating scarce tax dollars to the program - with the bizarre end result of the CSP being declared a "capped entitlement program."<sup>182</sup> The NRCS issued a proposed rule for the CSP under notice and comment rule-making on January 2, 2004.<sup>183</sup> Because of the budgetary constraints placed on the CSP,<sup>184</sup> the NRCS proposed limiting the program to periodic sign-ups, increasing

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176. 16 U.S.C.S. § 3838c(b)(1)(D)(i) (Law. Co-op. 2002).

177. 16 U.S.C.S. § 3838c(b)(1)(E)(i) (Law. Co-op. 2002).

178. 16 U.S.C.S. § 3838c(b)(1)(C)(iii) (Law. Co-op. 2002).

179. *See id.* (giving participants credit for such things as addressing local conservation concerns, participating in pilot projects, and participating in watershed-wide conservation plans).

180. *See* 16 U.S.C.S. § 3838a (Law. Co-op. 2004).

181. NRCS, *supra* note 161, at 2.

182. *See id.* (explaining that [t]he Congressional Budget Office assigned a ten-year score of \$2 billion to the Program. The Omnibus Appropriations Act of 2003 (Pub. L. No. 108-7) transformed the CSP into a capped entitlement at \$3.773 billion over a ten year period between FY 2003-2013. This change in the statute was also predicated by a revised CBO score of CSP in January, 2002 assigning a \$6.8 billion estimate for the CSP program over ten years.).

183. *See* Conservation Security Program, 69 Fed. Reg. 194 (proposed Jan. 2, 2004) (to be codified at 7 C.F.R. pt. 1469).

184. *See* Conservation Security Program, 69 Fed. Reg. 34,502 (June 21, 2004) (to be codified at 7 C.F.R. pt. 1469) (stating that "Congress appropriated \$41.443 million to implement CSP in fiscal year 2004.").

eligibility criteria, restricting the program to selected priority watersheds,<sup>185</sup> and drastically reducing the base payments.<sup>186</sup>

An unprecedented number of farm, conservation, and environmental groups commented on the proposed rule.<sup>187</sup> Many felt the proposed rule was not true to the Congressional intent of the CSP.<sup>188</sup> Others questioned the delay in implementing the CSP, pointing to the statutory language in the 2002 Farm Bill that mandated the CSP to be implemented no later than 270 days after enactment of the Farm Bill.<sup>189</sup> (The 2002 Farm Bill was enacted on May 13, 2002).<sup>190</sup> The root of the dissatisfaction was the NRCS's attempt to implement an entitlement program that was vastly under funded<sup>191</sup>— the upshot — no one was satisfied.<sup>192</sup>

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185. See Conservation Security Program, 69 Fed. Reg. 24,560 (May 4, 2004) (detailing the NRCS proposed watershed approach).

186. See 69 Fed. Reg. 194, 197, 210, 213 (proposed Jan. 2 2004) (to be codified at 7 C.F.R. pt. 1469) (proposing reducing base payments by a factor of 0.1 and limiting cost payments well below the 75% statutory cap).

187. See Mark Rey, Under Secretary for Natural Resources and Environment, USDA, Statement to the Senate Appropriations Subcommittee on Agriculture, Rural Development and Related Agencies 4 (Apr. 7, 2004) (stating that the NRCS had received an unprecedented 14,000 public comments on the proposed CSP rule), *available at* <http://www.nrcs.usda.gov/news/speeches04/reysenate.html>.

188. See H.R. CONF. REP. No. 107-424, at 4-78 (2002) (stating the “Managers intend the Secretary will not employ an environmental bidding or ranking system in implementing CSP” and expect the Secretary to implement the CSP to encourage the widest participation possible).

189. See Jill Krueger, Farmers Legal Action Group, What Ever Happened to the Conservation Security Program? 20 (Feb. 13, 2004) (unpublished manuscript, copy on file with author).

190. *Id.*

191. Hongli Feng et al., *Targeting Efficiency in the Conservation Security Program*, 10 IOWA AG. REVIEW, No. 1, 2, 4 (Winter 2004) (stating that “if all of the 1.8 million farms and ranches likely to be eligible for the [CSP] program were to enroll, the total budgetary cap of \$3.77 billion would be completely exhausted in the first sign up”), *available at* [http://www.card.iastate.edu/iowa\\_ag\\_review/winter\\_04/article2.aspx](http://www.card.iastate.edu/iowa_ag_review/winter_04/article2.aspx). See Conservation Security Program, 69 Fed. Reg. 194, 197 (to be codified at 7 C.F.R. p. 1469 2004) (stating the NRCS estimates less than 50,000 agricultural operations would be eligible to participate in the CSP based on the budget cap).

192. See Letter from Craig Cox, Executive Director, Soil and Water Conservation Soc’y, to David McKay, Conservation Planning Team Leader, Conservation Operations Division, NRCS, USDA 1 (Mar. 1, 2004), *available at* [http://www.swcs.org/en/media\\_2.cfm?fuseaction=display&nodeID=6802&newsID=454&year=2004&month=3](http://www.swcs.org/en/media_2.cfm?fuseaction=display&nodeID=6802&newsID=454&year=2004&month=3) (recommending the NRCS fund the CSP at a minimum of \$3 billion annually and recommending that EQIP, rather than CSP should become the driving force for place-based initiatives in priority watersheds or landscape units); Letter from Dee Vaughan, President, Nat’l Corn Growers Assn. to Conservation Operations Division, NRCS, USDA 1 (Feb. 27, 2004), *available at* [http://www.ncga.com/public\\_policy/PDF/CSPComments.pdf](http://www.ncga.com/public_policy/PDF/CSPComments.pdf) (concerned that proposed rule is not farmer-friendly as the land control requirements are too high a barrier to entry, and it does not recognize the trend toward renting); Letter from Ferd Hoefner, WA Rep., Sustainable Agric. Coali-

### C. The Interim Final Rule

On June 21, 2004, after reviewing more than 20,000 comments submitted during the notice and comment period, the NRCS issued the CSP Interim Final Rule.<sup>193</sup> The CSP enrollment process envisioned in the interim final rule encompasses six steps: (1) NRCS selects watershed areas where producers may apply for CSP; (2) NRCS determines criteria for eligibility and enrollment categories; (3) NRCS announces CSP sign-up and publishes sign-up requirements; (4) if a producer has adequately treated soil and water quality, completed a self-screening questionnaire, and completed a Benchmark Condition Inventory, then the producer can apply to CSP; (5) NRCS determines whether an applicant qualifies; if so, NRCS determines the level of CSP participation and places the applicant in an enrollment category; and (6) based on available funding, NRCS selects applications within enrollment categories for funding.<sup>194</sup>

The Interim Final Rule has been characterized as making the CSP “the most environmentally demanding program in the history of USDA conservation efforts [coupled] with unreasonably low incentives for participation.”<sup>195</sup> Regardless of the numerous complaints received concerning the CSP proposed rule,<sup>196</sup> the Interim Final Rule makes few changes<sup>197</sup> and sticks with a limited program confined to competitive bidding in eighteen NRCS selected watersheds.<sup>198</sup> As of

tion, to David McKay, Conservation Operations Division, NRCS, USDA 2 (Mar. 2, 2004) *available at* [http://www.msawg.org/sac/csp/csp\\_comments.pdf](http://www.msawg.org/sac/csp/csp_comments.pdf) (stating the CSP contemplated by the proposed rule misses its mark by a wide margin, bearing only faint resemblance to the statute); Letter from Farmers Legal Action Group, to David McKay, Conservation Operations Division, NRCS, USDA 3-4 (Mar. 2, 2004) *available at* [http://www.flaginc.org/fedreg/comments/2004/20040222\\_NFFC\\_CSP.pdf](http://www.flaginc.org/fedreg/comments/2004/20040222_NFFC_CSP.pdf) (decrying the creation of a competitive bidding process in the proposed CSP rule in direct opposition with the original statute).

193. See Conservation Security Program, 69 Fed. Reg. 34502 (June 21, 2004) (to be codified at 7 C.F.R. pt. 1469).

194. See generally, LAND STEWARDSHIP PROJECT, CONSERVATION SECURITY PROGRAM FACT SHEET #6, CSP: INTERIM FINAL RULE RELEASED—NEXT STEPS (2004), *at* <http://www.landstewardshipproject.org/pdf/CSP06.pdf> (last visited Apr. 26, 2005).

195. Martha L. Noble, *Conservation Security Program Interim Final Rule: A Truncated Green Payments Program for FY04 Needs Future Improvements*, AGRIC. L. UPDATE 5 (July 2004) (copy on file with author).

196. See *id.* at 5,6 (listing a litany of problems with the CSP interim final rule).

197. See generally NRCS, USDA, CONSERVATION SECURITY PROGRAM SUMMARY OF INTERIM FINAL RULE (2004), *available at* [http://www.nrcs.usda.gov/programs/csp/pdf\\_files/Summ\\_Interim\\_Final\\_Rule.pdf](http://www.nrcs.usda.gov/programs/csp/pdf_files/Summ_Interim_Final_Rule.pdf).

198. See 7 C.F.R. § 1469.1-1469.36 (2004); NRCS, USDA, CONSERVATION SECURITY PROGRAM WATERSHEDS, FY 2004 (2004), *available at* <http://www.nrcs.usda.gov/programs/csp/watersheds04.html>.

August 26, 2004 there were 2,200 producers enrolled in the CSP.<sup>199</sup> Hardly what the proponents envisioned and the CSP's long-term outlook is uncertain with some in Congress still attempting to reduce CSP's budget.<sup>200</sup>

### VIII. CONCLUSION

Part of the reason the CSP has proceeded in fits and starts is due to its pioneering nature as a green payments program. The statute attempts to follow the theoretical template of a cost effective agri-environmental payment program by *prioritizing* environmental goods and services, *targeting* payments to producers who can meet those priorities, allowing for *flexible, least-cost* methods to be chosen by the producer, and *building confidence* with taxpayers by *monitoring compliance* and *measuring outcomes*. The USDA is facing all of the uncertainty, variables and entrenched interests as outlined in this Note. In implementing the statute, the USDA is being forced to address these issues in relatively uncharted waters and with limited resources.

This Note has explored the role that green payments could and should play in the next generation of U.S. agricultural policy—a green payments program that is an effective means of enhancing environmental quality *and* creates income opportunities for farmers and ranchers. Pressures for agricultural policy change that can deal with conservation and equity concerns are building from a number of sources: domestic and international, urban and rural, taxpayer and environmentalist. The recent fallout at the WTO conference in Cancun<sup>201</sup> serves to illustrate that developing nations are no longer willing to tolerate the U.S. position advocating free trade on one hand while continuing to fund large farm program subsidies based on mid-twentieth century thinking.<sup>202</sup> American policy makers have a rare opportunity to “test drive” a model green payments program with the CSP as the “concept car.” The 2002 Farm Bill is set to expire in 2007,

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199. News Release, NRCS, USDA, USDA Announces First Conservation Security Program Contract Signings (Aug. 26, 2004), at <http://www.usda.gov/Newsroom/0363.04.html>.

200. Dan Looker, *Iowa Senator Vows to Fight Effort to Cut USDA Funds*, AGRIC. ONLINE ¶ 2 (Oct. 9, 2004) (stating “bill passed by the House of Representatives caps USDA spending on the Conservation Security Program in order to fund” hurricane disaster aid), available at <http://www.gogreenway.com/cgi-bin/national/fullnews.cgi?newsid1097500411,79837>.

201. *Raising the Barricades*, THE ECONOMIST, Sept. 18, 2003, at 6 (stating the reason the September 2003 WTO summit in Cancun, Mexico collapsed was due to poor countries refusing to extend trade negotiations into new areas and accusing “the rich countries of refusing to make serious efforts to dismantle their egregious farm subsidies”).

202. See Dan Morgan, *An End to Days of High Cotton? GOP Constituents Caught in Battle Over Subsidies*, WASH. POST, Mar. 8, 2005, at A01.

and a serious attempt to work out the bugs and bumps in the CSP could pave the way for a full scale production run of a 2008 green payment vehicle.