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An Agricultural Law Research Article

**Comment: Legislative History of
Conservation Security Program**

by

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Originally published in GREAT PLAINES NATURAL RESOURCES JOURNAL
9 GREAT PLAINES NAT. RESOURCES J. 36 (2004)

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LEGISLATIVE HISTORY OF CONSERVATION SECURITY PROGRAM

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INTRODUCTION

Farming in this country provides an enormous bounty of food, and puts the largest amount of "non-point-source" pollution in our lakes and streams of any industry. This country has been slow in addressing "non-point-source" pollution. The largest amount of non-point-source comes from agricultural operations. Congress recently passed a long overdue approach dealing with non-point-source pollution; it is the Conservation Security Program (CSP). This program finally brings together the concepts of helping shore up the agricultural industry by placing

an emphasis on conservation practices of production rather than previous attempts which paid for land to be taken out of production or focused on price supports for specific crops. Even with the shortcomings concerning the implementation of CSP, it is time for serious implementation of a program that will address *and* reward the practice of soil conservation.

I. BACKGROUND

A. INCEPTION OF SOIL CONSERVATION

In 1894, the federal government recognized the “widespread soil erosion” problem in various parts of the United States.¹ At this time the Secretary of Agriculture’s office stated, “thousands of acres of land in this country are abandoned every year because the surface has been washed and gullied beyond the possibility of profitable cultivation.”² With these concerns soil erosion was “identified as a hazard to productivity”³ the United States Department of Agriculture (USDA) “created the Bureau of Chemistry and Soils”⁴ to vigorously address the problem of soil erosion.⁵

Since 1894, many Congressional Acts have been enacted in the name of soil erosion. Ironically many of the Congressional Acts passed did little to address soil erosion problems. As administrations changed, the Bureau of Chemistry and Soil’s programs changed with only minimal improvements to soil erosion. There are three main influences that have effected soil erosion: political forces, concerns for natural resource management and responses to natural disasters or economic disasters.⁶

B. EVOLVING IDEAS OF SOIL CONSERVATION

Congress has enacted everything under the sun in the name of soil erosion. In spite of much Congressional action, the outcome concerning soil erosion has remained impotent. Political forces looking to the next election, whether presidential or congressional, have created jobs, built dams, increased production on

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1. Williams, Craig L., *Soil Conservation and Water Pollution Control: The Muddy Record of the United States Department of Agriculture*, 7 B.C. ENV’T L AFF. L. REV. 365 (1979).

2. U.S. DEP’T OF AGRICULTURE, CORN CULTIVATION, FARMER’S BULLETIN 414 (1910).

3. Craig, *supra* note 1, at 365.

4. Craig, *supra* note 1, at 369.

5. U.S. DEP’T OF AGRICULTURE, CORN CULTIVATION, FARMER’S BULLETIN 414 (1910). In addition, “national awareness of the impact of soil erosion increased during the late 1920’s, largely through the efforts of Hugh Bennett,” an employee of the Bureau of Chemistry and Soils who wrote and lectured on soil erosion and advocated “greater federal involvement in erosion control.” Prompted by Bennett, Congressional hearings focusing on erosion control were conducted, which resulted in the “appropriation of emergency funds for research into the cause and prevention of soil erosion.” Through these funds the Soil Erosion Services (SES) was created; Craig, *supra* note 1, at 369; quoting D.H. Simms, THE SOIL CONSERVATION SERVICE 6-10 (1970).

6. Natural or economic disasters include: the depression, the dust bowl, floods and wars. These influences confounded the purpose of addressing soil erosion because the government used the auspices of soil erosion to create jobs in the depression, or used soil erosion programs to stabilize farmers economically, or funding was nonexistent during WW II.

land, and funneled money to farmers for economic reasons rather than purely address soil erosion problems. Through the early years, the soil erosion program changed names and departments⁷ and expanded its purpose “to preserve natural resources, control floods, prevent impairment of reservoirs, and maintain the navigability of rivers and harbors, protect public health, public lands, and relieve unemployment . . .”⁸ This new re-organization did little to impact problems of soil erosion,⁹ but did secure ample sound bites for re-election campaigns in the media by addressing urgent national economic problems. Economic gain, particularly money to farmers, was a common theme that began to appear consistently concerning soil erosion programs.¹⁰

Unfortunately the changes in the Soil Conservation Service’s (SCS) programs, though major, did not translate into significant changes in soil conservation. An understanding emerged that effective soil conservation programs needed to be implemented locally by a local entity.¹¹ This realization by the SCS, led to “an effort to foster a more individualized approach” by creating soil conservation districts.¹² These conservation districts implemented federal programs and engaged local land owners to help govern soil conservation practices.¹³ Even though the majority of states adopted enabling legislation for such districts of the Standard Act, “farmers . . . prove[d] very reluctant to impose land use restrictions on themselves or others.”¹⁴ The issue of policing farmers who incorporate harmful environmental

7. The Soil Erosion Services (SES) “play[ed] a large role in shaping federal policy and the federal government’s approach to soil erosion.” One major purpose of the SES, while under the Department of Interior, was job creation rather than soil erosion. USDA realized that it had lost an important program when SES was assigned to the Interior Department. USDA regained control of the federal soil erosion program in late 1935 because the program was intertwined with farming methods and farm lands. The Roosevelt administration moved the SES from the Department of Interior back to the USDA and changed its name to the Soil Conservation Service (SCS).; Craig, *Supra* note 1, at 370-374.

8. 16 U.S.C §590(e) (1976).

9. Congress “empowered the Secretary of Agriculture to conduct surveys, investigations and research dealing with soil erosion and the prevention of such erosion; to publish and disseminate the results of information obtained; and to conduct demonstration projects in areas with erosion problems through the Conservation Operations Program.” The Conservation Operations Program served as a “focal point of the SCS’s soil conservation efforts, . . . [and] the Secretary of Agriculture was authorized to undertake a wide range of measures to prevent soil erosion” 16 U.S.C. § 590(a)(1); *See also* TO PROTECT TOMORROW’S FOOD SUPPLY, SOIL CONSERVATION NEEDS PRIORITY ATTENTION, REPORT TO THE CONGRESS BY THE COMPTROLLER GENERAL OF THE GENERAL OF THE UNITED STATES, February 14, 1977.

10. The Secretary of Agriculture was also empowered (at the time) to “condition the extension of benefits to private lands under the Conservation Operations Program.” These include engineering operations, new methods of cultivation, re-vegetation and changes in land use, as well as to enter into agreement with or furnish aid to any agency or person to further the purpose of the Soil Erosion Act. *Id.* § 590(a)(3). The statute states: “enactment and reasonable safeguards for the enforcement of state and local laws imposing suitable permanent restrictions of the use of such lands and otherwise providing for the prevention of erosion” as well as on agreements or covenants as to the permanent use of the lands and on contributions of money, labor, and materials. § 590(c); Craig, *supra* note 1, at 375.

11. Craig, *supra* note 1, at 376.

12. Craig, *supra* note 1, at 376, *See* SOIL CONSERVATION DISTRICTS FOR EROSION CONTROL, U.S. SOIL CONSERVATION SERVICE, U.S. DEP’T OF AGRICULTURE MISCELLANEOUS PUBLICATION 292 (1937).

13. “The districts were authorized to: (1) carry out research, demonstration projects and erosion control operations; (2) enact and enforce land use regulations; (3) enter into contracts and agreements with land occupiers in order to carry out conservation plans; and (4) obtain lands by purchase or gift in order to carry out control operations or retire submarginal lands from production;” Craig, *supra* note 1, at 376.

14. The SCS’s role in soil conservation also met with dissatisfaction as the “Conservation

practices has proven to be politically unpopular and an ongoing detriment to serious soil conservation. It is equivalent to passing a law which no one intends to enforce. Politicians, in effort to secure the agricultural vote, have kept programs voluntary or gutted any real enforcement measures.

One of the most important SCS responsibilities during the late 1930's was the flood prevention program.¹⁵ Though the program was consigned only to studies until after WW II (because Congress did not appropriate funds), it is credited for a "potential boost" to political awareness of how soil conservation directly impacted land productivity.¹⁶ With this new level of support, the SCS pushed for the enactment of the Watershed Protection and Flood Prevention Act of 1954.¹⁷ The Act permitted the SCS "to allocate federal funds to farmers in order to partially reimburse them for the cost of flood control construction."¹⁸ In addition, "the Act authorized the SCS to make financial, planning and other assistance available to local organizations in order to help them carry out structural improvements for flood protection, irrigation and drainage, and land treatment."¹⁹ In reality, the Flood Control Act dealt with land drainage and it was aimed at increasing production rather than soil erosion. Therefore objectives of the 1954 Act were limited in providing environmental conservation by fostering more productive uses of land.²⁰

The Great Plains Conservation Program is "another major soil conservation undertaking added to the duties of the SCS."²¹ This program was "designed to help prevent or reduce the harmful effects of erratic climate in designated portions of ten Great Plains states [which were] experiencing serious wind erosion problems."²² The program's payment helped to stabilize the financial income of the farmer by providing a "more dependable source of income, and a more satisfactory livelihood

Operations Program was not favorably cited in a . . . soil conservation report . . . [as it] criticized the SCS for its passive approach" to soil conservation. Additional programs were instituted and "gradually [the] SCS evolved from an agency concerned almost exclusively with the control of soil erosion, to one with responsibility for a whole gamut of land and water management concerns, especially as those concerns related to increasing farm income and productive capacity." quoting Craig, *supra* note 1, at 376. See also R.B. Held & M. Clawson, SOIL CONSERVATION IN PERSPECTIVE 49 (1965); and D.H. Simms, THE SOIL CONSERVATION SERVICE 79 (1970); and W.R. Parks, SOIL CONSERVATION DISTRICTS IN ACTION 151-59 (1952);

15. Congress passed the Watershed Protection and Flood Prevention Act of 1954, the Great Plains Conservation Program in 1970, the expansion of the Soil Conservation and Domestic Allotment Act of 1936, Craig, *supra* note 1, at 383-384. The Omnibus Flood Control Act recognized that flooding and soil erosion were related problems and authorized investigations and to institute measure for runoff and water flow retardation. *Id.*

16. Agricultural Department Appropriation Bill for 1940: *Hearings before the Subcomm. of House Comm. on Appropriations*, 76th Cong., 1st Sess. 1043 (1939).

17. 16 U.S.C. § 1002 (1976).

18. 16 U.S.C. § 1004(1) (1976). The original limitation on the expenditure of federal funds to the costs of flood control had resulted in the program being restricted almost totally to flood prevention. Craig, *supra* note 1, at 386.

19. Craig, *supra* note 1, at 387, quoting § 1003 (1976). The 1954 Act and its amendments evidence a change in emphasis from the Flood Control Act of 1936, which was enacted primarily as a means of dealing with the problems of soil erosion and mitigating damages from floods., *Id.*

20. Craig, *supra* note 1, at 387.

21. Craig, *supra* note 1, at 389.

22. Craig, *supra* note 1, at 389-390. Under the Act, SCS provided technical assistance and cost-sharing payments to land occupiers who agree to change the use of their lands, including the carry out approved soil and water conservation practices; See also 16 U.S.C. § 590 (p)(b)(1) (1970) The ten states are Colorado, Kansas, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, Texas and Wyoming. *Id.*

for the people of the region".²³ The program was "amended in 1969 to include measures for enhancing fish, wildlife and recreation resources, for promoting the economic use of land and for reducing agriculturally related pollution."²⁴ Even though contracts between the SCS and the land occupier only extended to up to ten years by 1976, "over fifty-one thousand contracts had been entered into with farmers and rancher, covering more than ninety-four million acres."²⁵ In spite of the programs success, it was limited by the terms of the contracts which were compounded by SCS failure to contact farmers when contracts expired, thereby discouraging the maintaining the treated land.²⁶ Because of contract limitations, this program too fell short of any positive permanent soil erosion efforts.

The Resource Conservation and Development Program is a recent example of a bifurcated approach to soil erosion.²⁷ The Program mainly focuses on improving the economic position of farmers rather than soil erosion.²⁸ This program incorporates efforts of several federal agencies and "utilizes local sponsors such as soil conservation districts who, acting with USDA assistance, to prepare master plans identifying specific measures which may qualify for federal financial and technical assistance."²⁹ This change of focus from soil conservation to economic development has weakened the effectiveness in the area of soil conservation.³⁰

Through different Presidential administrations and Congressional activity, various programs have been launched for the purposes of soil conservation.³¹

23. Great Plains Conservation Program: *Hearings Before the Subcomm. on Conservation and Credit of the House Comm. on Agriculture*, 91st Cong., 1st Sess. 23 (1969).

24. Craig, *supra* note 1, at 390; *See also* 16 U.S.C. § 590(p)(b)(1)(a), (b), (c) (1970).

25. Craig, *supra* note 1, at 391. Of these contracts, 37,009 have been terminated, which means that a total of 60,772,430 acres have gone through the program. *Id.* *See also* Cotner, *Rural Land Use and the Environment – Programs and Activities of the U.S.D.A.*, ECONOMIC RESEARCH SERVICE: STATEMENT BEFORE AIR QUALITY-WATER POLLUTION ADVISORY BOARDS 32 (1972).

26. Craig, *supra* note 1, at 392.

27. Congress has yet to pass a pure soil conservation bill. Instead the product looks more like a fruit salad, with only one ingredient focused on soil conservation.

28. U.S.C. 590a (1976).

29. Craig, *supra* note 1, at 393.

30. Craig, *supra* note 1, at 394.

31. The Agricultural Conservation Program is another conservation program administered by the USDA. This program has evolved since the 1930's when it was enacted as a response to the economic depression at that time. In 1971, the program "received a major overhaul, and was redirected to emphasize abating agricultural pollution, improving environmental quality and obtaining more enduring conservation benefits, as well as to concentrate . . . critical conservation problems." *Id.* at 394-396; Pub. L. No. 92-73, 85 Stat. 196 (1971). Some additional Department of Agricultural Programs are the Conservation Reserve Program (CRP), the Food and Agriculture Act of 1962 and the Cropland Adjustment Program. CRP was "authorized by the Soil Bank Act of 1956 and primarily sought to raise farm income and reduce agricultural inventories by diverting land from the production of crops.; *Id.* at 405; *See also* Pub. L. No. 84-540, 70 Stat. 188 (1956); A "secondary purpose [of CRP was] to establish and maintain protective vegetative cover and to undertake other land treatment measures on land taken out of production." The Food and Agricultural Act of 1962 created a new program called the Cropland Conservation Program, which sought to "improve farm family income by aiding landowners in the conversion of cropland into range income-producing uses." In 1966, the Agricultural Stabilization and Conservation Service created yet another new program called the Cropland Adjustment Program. Uses such as forests, grass, water storage wildlife habitat or recreation; Craig, *supra* note 1, at 407; *See also* Pub. L. No. 87-703, 76 Stat. 605 (1962); This program took a broader approach to "maintain farm income, stabilize prices, reduce surpluses, lower government costs and afford greater economic opportunity in rural areas." Specifically, this program aimed at 'reducing the costs of farm programs, assisting farmers in turning their land to non-agricultural uses, promoting the development and conservation of . . . soil, water, forest, wildlife, and recreational resources [and] establishing protecting

Programs seemed to criss-cross at their subsidy seams, with bifurcated focuses on the extremes of either maximizing production (subsidies for commodity production) or by taking land completely out of production (CRP). These different approaches to agricultural policies have confounded the purposes and goals of soil conservation by creating an either/or approach rather than a comprehensive plan.³² To illustrate, on one hand, a farmer is rewarded for maximizing production on his land by commodity payments which do not factor in harmful effects a farmer employs to maximize crop production. While on the other hand, farmers can apply for CRP, which takes the land totally out of production. While CRP's purpose is effective, it simply does not address the problems of soil conservation on land which remains in production. Until the Conservation Security Program (CSP) was enacted, there had been no tangible ongoing financial incentive for farmers who engaged in environmental stewardship.

C. BIRTH OF CSP

Advances in technology and science may have appeared to enhanced USDA's understanding of managing the nation's natural resources of water and soil, enacting a comprehensive program which voluntarily engaged the farmer in land stewardship was proposed.³³ Practically however, soil conservation has not been purely a focus of political forces and election cycles, rather than the scientific data that serves as "writing on the wall" to our generation.

Two articles are cited in the Department of Agriculture's Conservation Security Program's Proposed rule which gives insight to the role played by USDA's in CSP. In September 2001, Secretary of Agriculture, Ann M. Veneman released the report, *Food and Agricultural Policy: Taking Stock for the New Century*,³⁴ which stated the administration's position regarding the debate of the new farm bill. The report offers a set of principles to guide policy development for trade, a farm safety net, system infrastructure, conservation and environment, rural communities, nutrition and food assistance, and program delivery.³⁵ The report also proposed tailored

and conserving open spaces and natural beauty. Craig, *See supra* note 1, at 408; *See also* § 602, 79 Stat. at 1206.

32. While paying farmers to take land out of production, farmers are also subsidized to grow commodities. The commodity subsidies lead to overproduction and flooding the market, which drives down the prices of farm products. In addition with subsidy monies calculated on quantity produced, the farmer is encouraged to farm every crevasse of land—in essence discouraging conservation stewardship.

33. Previous cost-shared programs were focused on short term – one time – improvements or were contracted for a term, such as a ten year CRP contract; *See also* Soil Conservation and Domestic Allotment Act, 16 U.S.C. § 590a- 590h(g) (2003) (payment provisions repealed by Pub. L. 87-703, Title 1, § 101(2), Sept. 27, 1962, 76 Stat. 605), (The earliest federal voluntary working-land program paid farmers annually for choosing to plant soil-enriching rather than soil-depleting crops, and for using soil-enriching practices on cropland and pasture.); *See also* Wayne D. Rasmussen, *History of Soil Conservation, Institutions and Incentives*, in *Soil Conservation Policies, Institutions And Incentives* 3, 10 (Harold G. Halcrow et al. eds. 1982), (Subsequent approaches have included broadening the scope of covered environmental problems, broadening the scope of approaches farmers may voluntarily adopt to solve problems, and offering multi-year, as opposed to annual, payments.)

34. Given the enormity and pace of change, the report recommends that policy makers take stock to examine past policies and programs and, where necessary, define anew goals and principles that can best guide the future growth and development of the farm, food and agriculture industry in the new century.

35. USDA, *FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW*

programs in conservation policy, which includes stewardship incentives on working farmland or the retirement of environmentally sensitive land in response to Americans' growing expectations concerning agriculture's role in promoting and protecting environmental quality.³⁶ Veneman proposes "fundamental, far-reaching changes in policy, programs, procedures and institutions may be required to best prepare our farmers, ranchers and food industry as a whole for the new world marketplace."³⁷ In recognition of CSP's "unique opportunities in the context of USDA's programs, the Secretary's vision for CSP is:

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.³⁸

Another article cited in the Department of Agriculture's CSP Proposed rule which gives insight to USDA's leadership role in CSP is USDA's 21st Century Agriculture: A critical Role of Science and Technology. This report,

highlights a broad range of conventional and emerging technologies that take advantage of new developments in soil, water, nutrient, and pest management. The report accentuates the challenges and opportunities of several key issues, including technology transfer, technology development, and sustainable agricultural systems. These conservation technologies provide a basis for implementation of the CSP enhancement payments through the application of intensive management measures and resource enhancement activities. These management activities can create powerful opportunities for producers to achieve even greater environmental performance and additional benefits for society.³⁹

The USDA CSP contains this broader vision with simple goals— to improve the conditions of America's working farms and ranches and to enhance natural resources for the public as a whole.⁴⁰ In CSP, the enhancement provisions of the program are specifically designed to showcase highly effective conservation activities and demonstrate how more intensive management activities can improve the resource utilization and energy conservation.⁴¹

CENTURY 2001, at www.usda.gov/news/pub/farmpolicy01/fpindex.htm (last visited Jan, 9, 2005).

36. *Id.*

37. *Id.* The report further adds that "greater access to foreign markets requires an aggressive trade policy to lower tariffs and distorting subsidies. Failure to provide strong leadership in global trade liberalization will result in our producers and exporters being left behind." *Id.* "New world marketplace" is a key understatement by the Veneman which refers to the need to reduce subsidies.

38. Conservation Security Program: Proposed Rule, 69 Fed. Reg. 1 (January 2, 2004) (to be codified at 7 C.F.R. pt. 1469).

39. USDA, 21ST CENTURY AGRICULTURE: A CRITICAL ROLE FOR SCIENCE AND TECHNOLOGY (2001).

40. USDA, FOOD AND AGRICULTURAL POLICY: TAKING STOCK FOR THE NEW CENTURY 2001, at www.usda.gov/news/pub/farmpolicy01/fpindex.htm (last visited Jan, 9, 2005).

41. USDA, Agriculture Secretary Ann M. Veneman.

II. "I'M JUST A BILL." HOW THE IDEA FOR CSP BECAME A FEDERAL PROGRAM

A. BILL INTRODUCTION

H.R.2646 was referred to the House Committee on Agriculture on July 26, 2001, by Representative Larry Combest of Texas, the bill's sponsor.⁴² Cosponsor was Representative Charles W. Stenholm, of Texas.⁴³ In September H.R. 2646 made its way out of the Committee on Agriculture and after a brief stop in the Committee on International Relations made its way to the House floor on October 2, 2001. The House passed H.R. 2646 with a vote of 291- 120 on October, 5, 2001.⁴⁴ H.R. 2646 did not have CSP language included into the language the bill.

B. SENATE PASSAGE AND CONFERENCE COMMITTEES

Senator Tom Harkin of Iowa sponsored the Senate Bill (1731) which added the provision for CSP. This new provision had the full support of the USDA and had bipartisan support between the houses, as well as national conservation groups. On July 31, 2001, Gary Mast, First Vice-President of the National Association of Conservation Districts testified before the U.S. Senate Committee on Agriculture, Nutrition, and Forestry.⁴⁵ Mast stated, "America's conservation districts believe the federal government need[ed] to embrace a new approach to conservation on private working lands . . . conservation plans should drive programs, not the reverse."⁴⁶ Mast advocated for greater state and local control in conservation through CSP, which provided new incentives that would create an individualized approach to conservation.⁴⁷ H.R. 2646 was received in the Senate on October 9, 2001.⁴⁸ On February 13, 2002, the Senate struck everything after the Enacting Clause and substituted the language of S. 1731. This language, incorporated CSP (among other programs) and CSP's funding.⁴⁹ The Senate passed H.R. 2646 in its amended form

42. Congressional Record, The bill's title: To provide for the continuation of agricultural programs through fiscal year 2007, and for other purposes.

43. *Id.*

44. *Id.*, Related Bills: H.RES.248, H.RES.403, *Id.*

45. Gary Mast of Millersburg, Ohio is a sixth generation self-employed farmer who operates a dairy farm and custom crop harvest business with his brother and parents. His conservation activities stretch back more than twenty years, and include, service on the local Holmes County Soil and Water Conservation District, state and national boards. He chaired the Technical Advisory Committee on Pollution Abatement in Ohio, leading directly to creation of the current state statutes dealing with nonpoint source pollution.. NACD available at <http://www.nacdnet.org/govtaff/FB/GaryMastStatement7-31-01.htm>, Site last visited :April 19, 2004.

46. *Id.*

47. *Id.*

48. It was placed on the Senate Legislative Calendar under Read the First Time, *Id.*

49. *Id.*; The Senate amendment struck out all of the House Bill after the enacting clause and inserted substitute text – which *then* included CSP; *See also* 15 U.S.C. § 714b(i) (2003); "Congress initially chose not to place a limit on the funds available, meaning the farmer who was eligible to participate in CSP would receive funding however, Congress amended [one year later, (in 2003)] the funding authorization to place a cap of approximately \$3.7 billion on the funds of CCC may make available between 2003 and 2013", *See also* Jesse Ratcliffe, A SMALL STEP FORWARD: ENVIRONMENTAL

with a vote of 58-40, on the same day as S. 1731 made substitute language to the bill.⁵⁰ Because the House version of H.R. 2646 did not contain a comparable provision for CSP, a Conference Committee was held. The House adopted CSP with modifications.⁵¹ The Senate introduced version of S.1731 does differ substantially from the final law. Modifications included: adding a fiscal year (2007) to the bill, changing eligible lands to only include private agricultural land that are already incidental to an agricultural operation that is eligible for enrollment in CSP, lands that are already enrolled in CRP, WRP, or GRP will not be eligible for CSP, and lands must be cropped for more than four out of the past six years.⁵² The bill was signed by President Bush on May 13, 2002 and became Public Law No: 107-171.⁵³

C. FINAL FORM

CSP is authorized by of the Food Security Act of 1985, as amended by the Farm Security and Rural Investment Act of 2002.⁵⁴ The National Resources Conservation (NRCS) is authorized to provide financial and technical assistance to owners and operators of agricultural operations to promote conservation and improvement of the quality of soil, water, air, energy, plant and animal life, and other interested in obtaining public input before developing a proposed regulation. The CSP portion is codified in 16 U.S.C. § 3838. Although the statute is written with broad and general terms, NCRS is issuing a proposed rule with a request for comments.⁵⁵ The proposed rule

implements the Conservation Security Program (CS) [as] set out in the Food Security Act of 1985, as amended by the Farm Security and Rural Investment Act of 2002, enacted on May 13, 2002. The proposed rule describes how NRCS will implement the CSP to provide financial and technical assistance to agricultural producers who conserve and improve

PROTECTION PROVISION IN THE 2002 FARM BILL, 30 ECGLQ 637, 638 (2003).

50. *Id.*

51. Conference Committees for H.R. 2646 between the Houses began on February 28, 2002 and continued until May 8, 2002. *Id.*; Joint Explanation of the Committee of the Conference available at <http://nacnet.org/govtaff/FB/FBmanagersT2.htm>, Site last visited: April 19, 2004.

52. Changes were to discourage producers from using the program as an inducement to cultivate land. The final version of H.R. 2646 also contained provisions relating to "bonus payments," provided a comprehensive list for conservation practices that could be encompassed in CSP and did not exclude Grassland Reserve Program lands from CSP (because a grasslands program did not exist at that point). In addition, the final version differed greatly from the final law in payment structure (for example the Tier III funding cap in S. 1731 was \$50,000 compared with \$45,000 in the final law; Joint Explanation of the Committee of the Conference available at <http://nacnet.org/govtaff/FB/FBmanagersT2.htm>, Site last visited: April 19, 2004.

53. *Id.* See also Title II – Conservation, Subtitle A – Conservation Security Program, (1) Conservation Security Act, (2) Conservation Security Program

54. Title XII, Chapter 2, Subchapter A, 16 U.S.C. § 3838a; See also Proposed Rules, Federal Register Vol. 68, No. 32, Tuesday, February 18, 2003, emphasis added.

55. Secretary Veneman recently stated, "CSP was not in detail described in the farm bill, and there were many decisions left to be made. We've gone out and had a number of public hearings, a number of processes to get public input. And as you may say, our proposed rule was then published; the comment period has now closed. As you rightfully indicate, there are over 12,000 comments and we are in the process of evaluating those comments to determine what the final rule should look like." Statements were made before the Senate Appropriations Agricultural Committee on April 07, 2004; 2004 WL 745898 (F.D.C.H.) (2004).

the quality of soil, water, air, energy, plant and animal life, and support other conservation activities. This proposed rule also addresses public comments that NRCS solicited in an advanced notice of proposed rulemaking (ANPR) published February 18, 2003 in the Federal Register and other comments NRCS received in public workshops and focus groups. In addition, Congress is currently considering legislation that amends the CSP statute.⁵⁶

II. EXPLANATION OF CSP (WHAT, WHERE, WHEN, HOW)

A. SCOPE: PURPOSE AND GOAL OF CSP

CSP is a “voluntary conservation program to support ongoing conservation stewardship of agricultural lands by providing payments to producers who maintain and enhance the condition of [the nation’s] natural resources.”⁵⁷ CSP’s goal is to “identify and reward those farmers and ranchers who are meeting the highest standards of conservation and environmental management on their operations.”⁵⁸ In addition, CSP will create powerful incentives for other producers to meet those same standards of conservation performance.⁵⁹ In short, “CSP will reward the best and motivate the rest.”⁶⁰ Through the rewards and incentives created by the CSP program, “a foundation of natural resource conservation that will provide benefits to the public for generations to come.”⁶¹

CSP will help “producers maintain conservation stewardship and implement additional conservation practices that provide added environmental enhancement.”⁶²

56. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)). Emphasis added.

57. 16 U.S.C. § 3838a; “A new approach authorized in the Farm Act is to provide technical and financial assistance for the conservation and protection of natural resources on private working lands. The Conservation Security Program of the Farm Act offers assistance to all producers who practice good stewardship on their farms and provides incentives to help cover the costs for those who want to add additional conservation practices. 116 Stat. 225-230, codified as amended, 16 U.S.C. § 3838a. These and many other United States Department of Agriculture natural resource conservation programs follow the voluntary, incentive-based model that farmers have supported starting with the soil conservation programs of the 1930’s”, 2003 WL 22118364 United States Supreme Court Amicus Brief, Appellate Brief; See also Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

58. Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003; CSP becomes effective beginning with the 2003 fiscal year, continues through the 2007 fiscal years, and will be managed by the NRCS. CSP is designed to promote the conservation goals of improving soil, water, air, energy, plant and animal life, Chapter 60, United States Department of Agriculture Conservation Programs On Non-Federal Land § 5628.

59. Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

60. Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

61. CSP will provide demonstratable Environmental benefits, by taking a “snapshot” at the beginning of the contract (used to obtain a base line) to look at the natural resources and the producer’s management of: soil organic matter (carbon), nutrients, pesticides, and other resource concerns; Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

62. Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003. The Environmental Quality Incentives Program (“EQIP”) of the Farm Act, 116 Stat. 253-258, codified as amended, 16 U.S.C. §§ 3839aa-3839aa-9, provides technical and financial assistance to landowners to improve soil, water, air, wetlands and wildlife management. Started in the

The “conservation benefits gained will help farms and ranches be more economically and environmentally sustainable and will increase the natural resources benefits provide to all Americans.”⁶³

B. HOW IS CSP DIFFERENT FROM OTHER FARM PROGRAMS?

A key distinction is that CSP will subsidize a qualifying farmer on a continuing basis. In this way, it has the framework with which to partially replace, the Price/Income Supports thought to be inconsistent with World Trade Organization (WTO) rules. Critics contend this is like paying citizens each year for maintaining a good driving record or otherwise achieving some level of “good citizenship.” This statement is not a fair assessment of CSP’s purpose or its goals. CSP is a far more progressive measure because it creates an incentive that the market place does not, to progress beyond being a good citizen to an altruistic one. Sure the benefits are first realized by farmer’s, but the benefits also are reaped by all citizens by the reduction of harmful effects of farming, which affect the integrity of water and soil resources. These same results have been achieved in the industrial sector only after imposition of strict regulations which required massive capital outlay not available in the agricultural sector. These investments were ameliorated by making them tax deductible another idea that offers less incentive to farmers than corporations.

CSP also differs from other USDA programs because it focuses on environmental problems while keeping the land in production.⁶⁴ National Resource Council Service’s Bruce Knight explains,

“The new Conservation Security Program will provide payments for producers who have historically practiced good stewardship on their agricultural lands and incentives to do more . . . First, adjusting to the increased emphasis placed on conservation working lands. Until now, conservation programs for private lands have focused mainly on taking marginal lands out of production. Now, with major investments in EQIP and the new Conservation Security Program, we will be able to help many more farmers and ranchers implement conservation practices on working lands.”⁶⁵

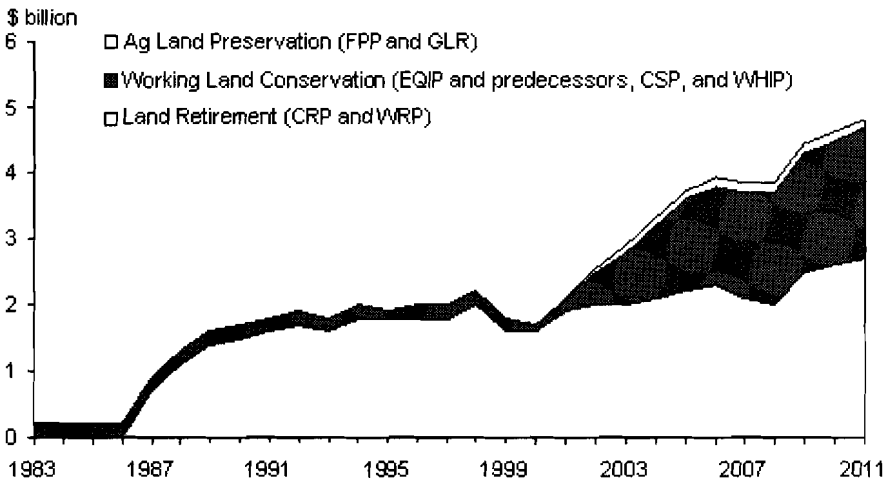
1996 at \$200 million annually, the increased demand for the program by farmers resulted in the expansion of total funding to \$5.8 billion through 2007.

63. Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

64. Natural Resources Conservation Service, United States Department of Agriculture, Questions and Answers, December 2003.

65. Bruce I. Knight, Chief, Natural Resources Conservation Service and Vice President, Commodity Credit Corporation, speaking at the North American Wildlife and Natural Resources Conference, in Winston-Salem, N.C. on March 27, 2003.

Conservation emphasis will shift from land retirement to working land



Sources: Office of Budget and Policy Analysis, USDA, and the Congressional Budget Office

C. HOW DOES IT WORK?

The first CSP sign-up will be offered in selected priority watersheds across the United States.⁶⁶ Once a producer meets eligibility criteria and completes a benchmark inventory documenting the existing conservation practices already implemented on the land within the agricultural operation for the land enrolled, the producer may submit an application.⁶⁷ Necessary materials for the inventory prior to the initial sign-up, will be provided by the National Resource Conservation Service (NCRS). NCRS then determines which program tier applies by looking at both the benchmark inventory and the follow-up interview.⁶⁸

To determine the eligibility of the producer's operation, both the producer and the producer's operation⁶⁹ must meet the basic eligibility criteria:

66. Since the funding is capped the focus is on prioritization. "NCRS has sought and received 568 comments on this issue. . . . Overwhelming support for entitlement status nationwide with Tier III contracts given preference. There appeared to be mixed reactions on how allocations should be made to State and/or local levels. NCRS has addressed the constraint of program funding by defining eligibility criteria and limit program participation, and establishing a system of conservation enrollment categories that would enable the Secretary to prioritize funding to eligible applicants consistent with sign-up funding allocation. NCRS is proposing to use watersheds as the mechanism for focusing CSP participation in high-priority areas of the country." Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)).

67. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)); See also Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

68. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)); Natural Resources Conservation Service, United States Department of Agriculture, Fact Sheet, December 2003.

69. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)). A significant definition is "agricultural operation" because the term defines the land area that can or must be enrolled in CSP contracts under the three tiers of participation. NCRS

- The land must be privately owned or Tribal land and majority of the land must be located within a selected priority watershed.
- The applicant must be in compliance with highly erodible and wetland provisions of the Food Security Act of 1985, have an active interest in the agricultural operation, and have control of the land for the life of the contract.
- The applicant must share in the risk of producing any crop or livestock and be entitled to a share in the crop or livestock marketed from the operation.⁷⁰

In addition, there are three tier eligibility and contract requirements. Tier I “level of treatment addresses at least one significant natural resource concern to a non-degradation level on part of the agricultural operation.”⁷¹ Tier I contracts have a base payment rate of five percent of the “average national rental rate, or appropriate rate” and are limited to five years.⁷² Tier II “level of treatment goes a step further; it must treat at least one significant natural resource concern to a non-degradation level and involve the entire agricultural operation.”⁷³ Tier II contracts have a base payment rate of ten percent of the “average national rental rate, or other appropriate rate” and the contracts range from “five to ten years, as determined by the producer.”⁷⁴ Tier III “level of conservation management must treat all natural resource concerns to a non-degradation level and involve the entire agricultural operation.”⁷⁵ Tier III contract’s base payment is fifteen percent of the “average national rental rate, or other appropriate rate.”⁷⁶

D. ENROLLMENT (APPLICATION SELECTION)

First an “inventory will be conducted to identify significant resource concerns”, which will determine the extent of conservation treatment that is being applied and maintained on the land, and to identify opportunities for further conservation

believes its approach to defining an ag operation will create a cohesive conservation unit over which the stewardship benefits are achieved. In particular, the definition is instrumental in separating Tier I from Tier II and III applicants. The CSP proposed rule reads, “agricultural operation means all agricultural land, and other lands determined by the Chief, whether contiguous or noncontiguous, under the control of the participant and constituting a cohesive management unit, where the participant provided active personal management of the operation on the date of enrollment.” *Id.*

70. *Id.*

71. “Section 1238C.(b)(1)(ii) of the CSP legislation allows for base payments to be determined from ‘another appropriate rate for the 2001 crop year that ensures regional equity.’ Therefore, for the proposed rule, base payments are derived from the average NASS regional rental rates for the 2001 crop year for specific land use.” 16 U.S.C.A. § 3838 a(d)(5)(A); *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

72. § 3838 a(d)(5)(A); *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

73. § 3838 a(d)(5)(B); *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

74. § 3838 a(d)(5)(A); *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

75. § 3838 a(d)(5)(C); *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

76. *Id.*; *See also* Natural Resources Conservation Service, United States Department of Agriculture, CSP Proposed Rule Benefit Cost Assessment, p. 14, November 2003.

treatment.⁷⁷ Then to participate in CSP, a producer must submit a conservation security plan to be approved by the Secretary.⁷⁸ The conservation security plan must identify the land and resources to be conserved, the tier in which the producer chooses to participate, the particular conservation practices the producer will implement, and a schedule for implementation of these practices.⁷⁹

Once the conservation security plan has been approved, the producer must enter into a conservation security contract with the Secretary to implement the conservation security plan.⁸⁰ The conservation security contract must include language providing that the producer will not be considered to be in violation of a conservation security contract for failure to comply due to circumstances beyond the producer's control.⁸¹ In the contract, the producer must agree to implement the terms of the conservation security plan, maintain and make available records showing that the plan is being implemented, and not to engage in any activities contrary to the purposes of the CSP.⁸² The producer must also agree that it will refund the appropriate payments or accept adjustments to payments if the Secretary determines that the contract has been violated.⁸³

E. FUNDING

1. *Amount of funding available (Nationwide and State)*

The amended Congressional 2002 Farm bill authorized \$3.77 billion for CSP over a 10 year period, from 2003 to 2013.⁸⁴ CSP will be funded through the Commodity Credit Corporation (CCC).⁸⁵ The CBO estimates spending of \$369 million for FY 2003-2007 and \$2 billion over 10 years on CSP payments.⁸⁶

77. § 3838a(c).

78. § 3838a(b)(1); *See also* WEST-FDADM §5628 (2003).

79. § 3838a(c); *See also* WEST-FDADM §5628 (2003), (Accepted conservation practices include nutrient management, invasive species management, contour farming, controlled rotational grazing, partial field conservation practices, and native grassland and prairie protection and restoration).

80. § 3838a(e)(1); *See also* § 3838a(e)(2)(A), A producer may request that the Secretary modify its conservation security contract if the proposed modification is consistent with the purposes of CSP; *See also* WEST-FDADM §5628 (2003).

81. § 3838a(f); *See also* WEST-FDADM §5628 (2003).

82. § 3838b; *See also* WEST-FDADM §5628 (2003).

83. § 3838b; *See also* WEST-FDADM §5628 (2003).

84. The CSP will provide payments to producers for maintaining or adopting a wide range of structural and/or land management practices that address a variety of local and/or national resource concerns. 15 U.S.C. § 714b(i) (2003); *See also* Natural Resources Conservation Service, United States Department of Agriculture, Questions and Answers, December (2003).

85. 16 U.S.C. § 3841(a)(3); *See also* 15 U.S.C. § 714b(i); *See also* Pub. L. No. 107-171, Title II, Sec. 2701 (2002); "Funding for the CSP comes from the Commodity Credit Corporation (CCC). The CCC is a wholly government-owned corporation that is authorized to borrow money to make funds available to farmers, as provided for in agricultural legislation. The piratical significance of the CCC mechanism is that programs funded through the CCC are not reliant on the congressional appropriation process, in theory making it more difficult for Congress to remove funding from a program. When Congress chooses to fund a program through CCC, it authorizes the CCC to make certain amount of funds available at the time the program is enacted. In the case of CSP, Congress initially chose *not* to place a limit on the funds available [as] enacted," but later capped the funds available to the CCC for ten years, Ratcliffe, *supra* note 36, at 638; emphasis added.

86. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)); *See also* USDA, Economic Research Service, Economic Analysis, <http://www.ers.usda.gov/features/farmbill/analysis/conservationoverview.htm>, last visited April 4, 2004.

CSP contract payments include one or more of the following:

- An annual base component for the benchmark conservation treatment.
- An annual existing practice component for those maintaining existing conservation practices.
- An enhancement component for exceptional conservation effort and additional conservation practices or activities that provide increased resource benefits beyond the prescribed level. The five enhancement components are: installing additional conservation measures, addressing locally identified conservation needs, participating in watershed related activities, on-farm research and demonstration, and assessment and evaluation activities.⁸⁷
- A one-time new practice component for additional needed practices.

Total payments are determined by the tier of participation.⁸⁸ Tier I, contracts are for five years with a maximum payment of \$20,000 annually.⁸⁹ Under Tier I, the producer is paid five percent of the base payment and seventy-five percent for the cost of the practice chosen.⁹⁰ A beginning farmer is paid ninety percent of the practice cost.⁹¹ Tier II, contracts are for five to ten years with a maximum payment of \$35,000 annually.⁹² Tier III, contracts are also for five to ten years with a maximum payment of \$45,000 annually.⁹³ Tier III contracts require the producer to enter into a five-to ten-year plan that applies a resource management system meeting the appropriate nondegradation standard for all resources of concern for the entire agricultural operation⁹⁴.

87. 16 U.S.C.A. § 3838c (a) and (b). *See also* Natural Resources Conservation Service, United States Department of Agriculture, Questions and Answers, December 2003.

88. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)); *See also* § 3838a(d)(1), (5); "There are three tiers of conservation contracts that producers may enter into to participate in the CSP," *See also* West-FDADM § 5628 Conservation Security Program (2003).

89. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)); § 3838c(b)(1)(A); "Tier I is the base level of CSP participation, Tier II the second level of participation, and Tier III the highest level of participation. Under each of these contract options, payments are composed of two parts, (1) base payment and (2) average county cost for adopting or maintaining the practice for the 2001 crop year. The base payment is either the average national per-acre rental rate for a specific land use during the 2001 crop year or an appropriately adjusted rate for the 2001 crop year to ensure regional equity;" *See also* West-FDADM § 5628 Conservation Security Program (2003).

90. § 3838c(b)(1)(C); *See also* West-FDADM § 5628 Conservation Security Program (2003).

91. *Id.*

92. § 3838c(b)(1)(D); (The producer is paid ten percent of the base payments and seventy-five percent of the average cost for the practices the producer has chosen. Beginning farmers are paid ninety percent of the practice cost.); *See also* West-FDADM § 5628 Conservation Security Program (2003).

93. *Id.*; *See also* § 3838c(b)(1)(E), The producer is paid fifteen percent of the base payment and seventy-five percent of the average practice costs. As with Tier I and II, beginning farmers receive ninety percent of average practice costs.

94. *See also* § 3838a(d)(5)(C); *See also* § 3838(8) (defining "nondegradation" standard as "the level of measures required to adequately protect, and prevent degradation of, 1 or more natural resources, as determined by the Secretary in accordance with the quality criteria described" in the NRCS handbooks); *See also* § 3838c(b)(1)(E), (The producer is paid fifteen percent of the base payment and seventy-five percent of the average practice costs. As with Tier I and II, beginning farmers receive ninety percent of

2. *Capped funding and how it effects implementation of the program*

As originally enacted, CSP “was an entitlement program where *many* producers would have received payments if they [had been] eligible.”⁹⁵ However outgoing CSP payments became limited “[s]ubsequent to the enactment of the 2002 Act, the Omnibus Bill of 2003 amended the Act to limit CSP’s total expenditures to a total of \$3.8 billion over eleven years, Fiscal Years 2003 through Fiscal Year 2013.”⁹⁶ The “Omnibus Appropriations Bill for Fiscal Year 2004, (Conference Report H. Rpt. 108-401), however, contains language that, if enacted, would remove the \$3.8 billion funding limitation for the program over eleven years, but also institute a cap for Fiscal Year 2004 of \$41 million.”⁹⁷

By law, Natural Resource Conservation Service (NRCS) cannot incur technical assistance for costs NRCS employees or approved technical assistance providers in excess of 15 percent of the available funds for operating the program and providing assistance to producers.⁹⁸ NRCS expects that a large number of producers will seek participation in CSP and ask for assistance to determine their potential eligibility for the program. Thus the statutory cap on technical assistance of 15 percent becomes another limiting factor for implementing CSP.⁹⁹

IV. CONCLUSION

It is a new day in conservation history because no other program recognizes and rewards farmers for ongoing high levels of environmental stewardship while still producing. CSP is the first federally funded farm program of its kind. In terms of conservation commitment, “CSP will reward the best and motivate the rest.”¹⁰⁰ CSP will improve the condition of America’s working farms and ranches and enhance natural resources for the public as a whole.¹⁰¹ However one of CSPs fatal flaws lays embedded in one of its proclaimed strengths, it is self selecting. This will leave many of farming’s worst offenders beyond the reach of CSP. It is self evident that this will diminish the program’s ability to attain its full and true benefit, if not its politically driven intent.

One could easily argue that if CSP was truly about attaining improvements in

average practice costs).

95. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)).

96. The Secretary is given broad digression on how to implement the entitlement program within the statutory fiscal constraints; Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)).

97. While considering the change in funding, the Department decided to publish and seek public comment on the preferred CSP alternative; Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)).

98. Natural Resources Conservation Service, United States Department of Agriculture, Questions and Answers, December 2003.

99. Conservation Security Program, 69 Fed. Reg. 1 (proposed January 2, 2004) (to be codified at 7 CFR Part 1469.194 (2004)). Natural Resources Conservation Service, United States Department of Agriculture, Questions and Answers, December 2003.

100. *Id.*

101. Natural Resources Conservation Service, United States Department of Agriculture.

land conservation it would provide some authorization for Conservation District's representatives to prioritize most needed areas and highlight offenders similar to other environmental legislations listing of "bad actors." This leads to a two fold inevitable shortcoming for CSP, too many limitations on participation from the willing and too little power to direct participation in areas of greatest need.