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SPECIAL POINTS OF INTEREST:

- ◆ Land Eligible for EQIP
- ◆ Farmers Eligible for EQIP
- ◆ Conservation Practices Eligible for EQIP
- ◆ Assistance Under EQIP
- ◆ Priorities in Awarding EQIP Contracts
- ◆ EQIP Application Process
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IS YOUR FARM “EQIPED” FOR CONSERVATION?

A FARMERS' GUIDE TO UNDERSTANDING THE ENVIRONMENTAL QUALITY INCENTIVES PROGRAM

By Jill E. Krueger

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INTRODUCTION

The Environmental Quality Incentives Program (EQIP) is a voluntary conservation program for farmers and ranchers administered by the Natural Resources Conservation Service (NRCS) within the United States Department of Agriculture (USDA). EQIP was created to assist eligible farmers and ranchers to address conservation concerns affecting soil, water, air, and related natural resources. Through EQIP, farmers and ranchers can apply for financial assistance, information, and training to implement eligible conservation practices on their farms.

EQIP was created by the 1996 Farm Bill.¹ The 2002 Farm Bill made changes to EQIP, some of which have been controversial.²

For example, the 2002 Farm Bill increased the maximum EQIP payment per producer from \$50,000 to \$450,000 and removed a ban on assistance for constructing animal waste facilities on large confined animal feeding operations.³ As this article is being written, Congress is in the midst of writing another Farm Bill, so more changes may be on the horizon for EQIP.

Farmers who agree to participate in EQIP are bound by three documents that together make up the official EQIP contract. The first is the Conservation Program Application.⁴ The second is the Appendix to the

Conservation Program Contract.⁵ The third is the Conservation Plan.⁶ It is important that farmers read, understand, and keep copies of the application, appendix, and conservation plan.

In addition to the contract documents, the legal rights and responsibilities of farmers and ranchers who participate in EQIP are set out in several separate sources. Congress has

passed laws that govern EQIP. These laws are found in Title 16 of the United States Code.⁷ After the 2002 Farm Bill was enacted, USDA adopted new EQIP regulations. These regulations are found in Title 7 of the Code of Federal Regulations.⁸ NRCS sets out EQIP policies and agency operating procedures in an EQIP manual.⁹ In addition, from time to time, NRCS issues “National

Bulletins” and “State Supplements” to announce EQIP policies. Decisions in USDA administrative appeals relating to EQIP can also help farmers understand EQIP requirements.¹⁰ This article is based on information from all of these sources and includes endnotes with full citations, so that farmers, farm advocates and advisors, and attorneys can find the original sources.¹¹ This article is intended to provide general legal information based upon the laws and policies in effect at the time it was written; that is, the spring of 2007. For advice about a specific situation, farmers should consult an attorney.



LAND ELIGIBLE FOR EQIP

In order to participate in EQIP, a farmer must propose to carry out conservation practices on eligible land.

Land on Which Livestock or Crops are Produced

In general, land on which livestock or agricultural commodities are produced is eligible for EQIP.¹² More specifically, land used as cropland, grassland, rangeland, pasture, private non-industrial forest land, and other agricultural land that poses a serious threat to soil, air, water, or related resources (as determined by the Secretary of Agriculture) is eligible for EQIP.¹³



Land Ownership

1. Privately Owned Land Generally Eligible

In general, privately owned land is eligible for enrollment in EQIP.¹⁴

2. Other Land Sometimes Qualifies

a. Publicly owned land

Publicly owned land may be eligible for EQIP if NRCS determines that (1) the land is under private control for the contract period; (2) the land is included in the farmer's operating unit; and (3) the conservation practices will contribute to an improvement in the identified natural resource concern.¹⁵

b. Indian land

Tribal land, allotted land, or Indian trust land may be eligible for EQIP.¹⁶

Eligible Land for Irrigation-Related Practices

Irrigation-related conservation practices may be funded through EQIP. For these practices to receive assistance, however, the land must have been irrigated for at least two of the five years before the EQIP application is submitted.¹⁷

FARMERS ELIGIBLE FOR EQIP

EQIP imposes several eligibility requirements on farmers.

Be a Farmer

An EQIP applicant must demonstrate that the farming operation has produced or sold agricultural products worth at least \$1,000 per year.¹⁸ An eligible farming operation may be operated by an individual, an entity, or a joint operation.¹⁹

Individual farmers must provide a Social Security number or other unique identification number.²⁰ An entity applying for EQIP benefits must provide a list of all members of the entity, along with the members' Social Security numbers, and must indicate each member's percentage of interest in the entity.²¹

Have an Interest in the Farming Operation

Applicants must have an interest in the farming operation.²² Farmers have an interest in a farming operation if they can show at least one of the following:

- ♦ they own or rent the land, or
- ♦ they have an interest in the commodities produced, or
- ♦ they are a member of a joint operation that owns or rents the land or has an interest in the commodities produced.²³

Have Control of the Land

An EQIP applicant must demonstrate control of the land for the proposed EQIP contract period.²⁴

IN GENERAL, LAND ON WHICH LIVESTOCK OR AGRICULTURAL COMMODITIES ARE PRODUCED IS ELIGIBLE FOR EQIP.

1. Rented Land

Farmers who are tenants on agricultural land must provide a written agreement from the landowner if they wish to use a conservation practice that involves adding a structure, including vegetative plantings or terracing.²⁵

2. Indian Lands

Farmers whose farming operation is located on tribal land or on land allotted by the Bureau of Indian Affairs should seek a determination from the NRCS Chief that there is a sufficient assurance of control for the farmer to meet this requirement.²⁶

Submit an Acceptable Conservation Plan

An eligible applicant must submit a conservation plan that complies with EQIP requirements.²⁷ Conservation plans are discussed in more detail later in this article.

Supply Information Supporting Eligibility as Limited Resource Farmer or Beginning Farmer, If Desired

Farmers who wish to participate in EQIP as limited resource farmers or ranchers or as beginning farmers and ranchers must supply NRCS with information to verify their status.²⁸ As is explained further below, limited resource and beginning farmers and ranchers may receive a higher level of cost-share assistance than other farmers.

Meet Adjusted Gross Income Requirements

In general, a person with an average adjusted gross income greater than \$2.5 million for the last three tax years is not eligible to participate in EQIP.²⁹ However, if 75 percent or more of this income came from farming, ranching, or forestry operations, the person may be considered eligible to participate by NRCS.³⁰

Comply with Highly Erodible Lands and Wetlands Requirements

Farmers must be in compliance with USDA's

highly erodible land and wetland conservation requirements.³¹

CONSERVATION PRACTICES ELIGIBLE FOR EQIP

An EQIP applicant must submit a conservation plan that NRCS determines is in compliance with the terms and conditions of the program.³² The plan will identify the conservation practice or practices that the farmer is proposing to implement and the natural resource concerns that the farmer is seeking to redress.

A conservation practice is a treatment that is intended to address soil, water, air, or other natural resource concerns. To be eligible for EQIP, the practice must be planned and carried out according to NRCS standards and specifications.³³ In general, conservation practices in two broad categories may be eligible for EQIP. These are land management practices and structural practices, described below.

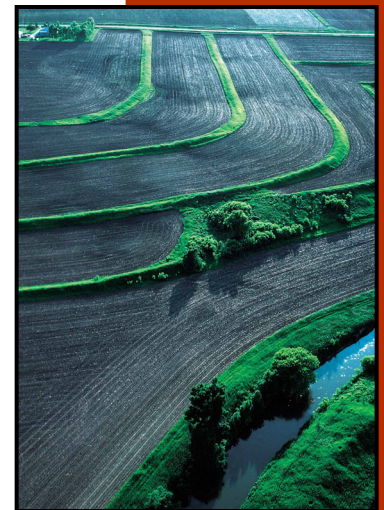
NRCS determines which conservation practices are eligible for EQIP. A non-exclusive list of eligible practices is set out in the NRCS Field Office Technical Guide and is available to the public at NRCS offices.³⁴ To be eligible for EQIP, a given conservation practice must address the resource concern "in the most cost-effective manner."³⁵

Land Management Practices

A land management practice is a conservation practice that primarily uses site-specific management techniques and methods to conserve, protect, or improve soil, water, air, or related natural resources.³⁶

Eligible land management practices include, but are not limited to:

A CONSERVATION PRACTICE IS INTENDED TO ADDRESS SOIL, WATER, AIR, OR OTHER NATURAL RESOURCE CONCERNS.



- ◆ nutrient management
- ◆ manure management
- ◆ integrated pest management
- ◆ integrated crop management
- ◆ irrigation water management
- ◆ tillage or residue management
- ◆ stripcropping
- ◆ contour farming
- ◆ grazing management
- ◆ wildlife habitat management.³⁷

Other land management practices might be eligible for EQIP if they protect the land in a cost-effective way and are approved by NRCS.³⁸



Structural Practices

A structural practice is a conservation practice that involves establishing, constructing, or installing a site-specific “structure” to conserve, protect, or improve soil, water, air, or related natural resources.³⁹ This may

include vegetative plantings and terracing. Examples of structural conservation practices include, but are not limited to:

- ◆ animal waste management facilities
- ◆ terraces
- ◆ grassed waterways
- ◆ tailwater pits
- ◆ livestock water developments
- ◆ contour grass strips
- ◆ filterstrips
- ◆ critical area plantings
- ◆ tree planting
- ◆ wildlife habitat
- ◆ capping of abandoned wells.⁴⁰

Other structural practices might qualify for EQIP if NRCS determines they are needed to protect the land.⁴¹

Ground and Surface Water Conservation Practices

When Congress reauthorized EQIP in 2002, it added a provision intended to promote ground and surface water conservation practices.⁴² These practices are not addressed in detail in the EQIP regulations, although they are addressed in the EQIP Manual.⁴³

1. Water Conservation Practices Eligible for EQIP

Eligible ground and surface water conservation practices include those which:

- ◆ improve irrigation systems,
- ◆ enhance irrigation efficiencies,
- ◆ convert land to the production of less water-intensive agricultural commodities or to dryland farming,
- ◆ improve the storage of water through measures such as water banking and groundwater recharge, or
- ◆ mitigate the effects of drought.⁴⁴

The Secretary of Agriculture is authorized to approve other projects that improve groundwater and surface water conservation.⁴⁵

2. Project Must Result in a Net Savings of Ground or Surface Water

Eligible ground and surface water conservation practices are those expected to result in a net savings in groundwater or surface water resources.⁴⁶

Pilot Projects and Coordination with Other USDA Programs

NRCS may approve interim conservation standards and provide financial assistance for pilot projects to evaluate new technology or new conservation practices.

Some EQIP conservation practices are also required or recognized under other programs administered by USDA, primarily the National Organic Program and the Conservation Security Program. Arguably, USDA should increase its efforts to coordinate these

NRCS MAY
APPROVE PILOT
PROJECTS.

programs to minimize administrative burdens on farmers and to provide the most effective assistance.

1. Transition to Organic Certification

Organic production is a production system that is managed to respond to site-specific conditions by integrating cultural, biological, and mechanical practices that foster cycling of resources, promote ecological balance, and conserve biodiversity.⁴⁸ Just as EQIP requires a conservation plan to allow NRCS to review and approve the farmer's proposed conservation practices, the National Organic Program requires farmers to have an approved organic system plan in order to demonstrate compliance with organic standards.⁴⁹ A farmer's conservation plan and organic farm plan may refer to one another, or even be blended together into a total plan for the farmer.⁵⁰

Some state NRCS offices have adopted land management practice standards to target EQIP incentive payments to farmers who are in the process of transitioning to organic agriculture, such as organic dairy farming.⁵¹ Farmers may want to ask whether their state NRCS has adopted or would consider adopting similar land management or structural practices to allow them to use EQIP assistance to reduce the financial disincentive of the three-year transition period to organic certification.⁵² Even in states where there is no specific practice standard for transition to organic farming, a farmer transitioning to organic production may adopt a variety of practices which may be eligible for EQIP assistance. Such practices include diverse extended crop rotations, use of cover crops, establishing buffer zones which may provide wildlife habitat and reduce wind erosion, reducing tillage, and nutrient management.⁵³ Other practices commonly adopted by organic farmers which may be eligible for EQIP assistance include

integrated pest management and year-round rotational or managed grazing systems.⁵⁴

2. Conservation Security Program

Like EQIP, the Conservation Security Program (CSP) provides payments to farmers for adopting conservation practices on working farmland.⁵⁵ Many advocates of sustainable agriculture have argued that EQIP should be more closely coordinated with CSP to encourage adoption of conservation practices that would help farmers prepare to participate in CSP.⁵⁶ Congress is debating this issue as it works on the 2007 Farm Bill.⁵⁷

Several specific issues involving the relationship between EQIP and CSP have arisen through the administrative appeals process administered by USDA's National Appeals Division (NAD). For example, in one decision the NAD Director concluded that having an active EQIP contract does not, in itself, make the farmer ineligible to participate in CSP.⁵⁸ Another decision concluded that if a farmer has adopted special practices in order to comply with an EQIP contract, the farmer may notify NRCS of this and list his or her normal farming practices on a CSP application.⁵⁹

In October 2006, after a review by the Government Accountability Office raised a concern about duplicate payments, NRCS adopted a policy that farmers may not receive payments under both CSP and EQIP for nutrient management practices or other duplicate practices.⁶⁰ Farmers who received possible duplicate payments for nutrient management practices before October 1, 2006, were permitted to keep the payments. Those who received duplicate payments after October



EQIP MAY ASSIST FARMERS WHO SEEK ORGANIC CERTIFICATION OR WHO ARE PREPARING FOR THE CONSERVATION SECURITY PROGRAM.

1, 2006, are being instructed to refund the duplicate payment and modify their contracts. Some farmers have appealed this policy to NAD.⁶¹

Existing Practices Generally Not Eligible

1. Conservation Practices Implemented Before Applying Are Not Eligible for Funding

A conservation practice implemented or installed prior to submission of an EQIP application will not be eligible for EQIP assistance.⁶²

2. In General, Conservation Practices Implemented Before the Application Is Approved Are Not Eligible for Funding

In general, a conservation practice implemented or installed prior to approval of the EQIP application is not eligible for EQIP assistance.⁶³

3. Farmers May Request a Waiver to Allow Implementation of a Conservation Practice Before Approval of a Contract

A conservation practice implemented before EQIP contract approval may be eligible for EQIP assistance if the farmer requests and receives a waiver of the pre-approval requirement from the NRCS State Conservationist.⁶⁴ The waiver must be

requested before the conservation practice is implemented.⁶⁵

ASSISTANCE UNDER EQIP

There are three main types of assistance available to farmers and ranchers under EQIP to enable them to implement conservation practices on their farms.⁶⁶

Technical Assistance

Information and training about conservation practices, called “technical

assistance,” is one component of EQIP assistance. EQIP technical assistance includes:

- ◆ evaluating and assessing the farmer’s operation and maintenance needs.
- ◆ conducting conservation planning, conservation practice survey, layout, design, installation, and certification.
- ◆ training, certifying, and assuring quality of professional conservationists.⁶⁷

1. NRCS Must Provide Technical Assistance to the Extent Appropriate

To the extent appropriate, NRCS must assist farmers in achieving conservation and environmental goals by providing them with information and training to aid in the implementation of the conservation plan.⁶⁸

2. Certified Technical Service Providers May Provide Technical Assistance

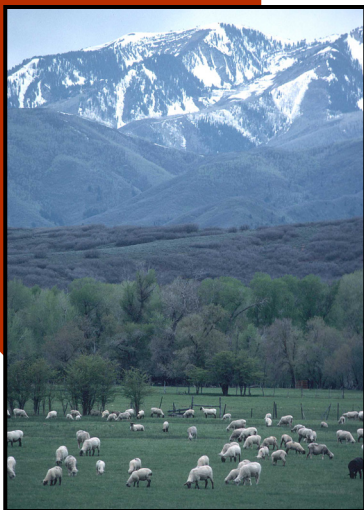
Farmers may receive a reimbursement from NRCS for the costs of technical assistance from a Technical Service Provider certified by NRCS.⁶⁹ The work by the Technical Service Provider must be part of an approved conservation plan.

Cost-Share Payments

Financial assistance under EQIP for structural conservation practices is in the form of “cost-share payments.” Through a cost-share payment, NRCS “shares” the cost of installing the structural conservation practice by paying the farmer a portion of the costs incurred.⁷⁰ Payment is made by NRCS after the practice has been completed in accordance with the EQIP contract.⁷¹

1. In General, NRCS Will Share Up to 75 Percent of Costs

EQIP cost-share payments will generally be no more than 75 percent of the actual cost of a structural practice.⁷² In some cases, the cost-share will be less than 75 percent.



2. Limited Resource Farmers May Receive Up to 90 Percent of Costs

NRCS may share up to 90 percent of the cost of structural conservation practices for limited resource farmers or ranchers.⁷³ NRCS defines a limited resource farmer or rancher as a person with both:

- ♦ direct or indirect gross farm sales of not more than \$100,000 in each of the previous two years,⁷⁴ and
- ♦ total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous two years.⁷⁵

3. Beginning Farmers and Ranchers May Receive Up to 90 Percent of Costs

NRCS may share up to 90 percent of the cost of structural conservation practices for beginning farmers or ranchers.⁷⁶ NRCS defines a beginning farmer or rancher as an individual who meets both of the following:

- ♦ Has not operated a farm or ranch for more than ten consecutive years, and
- ♦ Will materially and substantially participate in the operation of the farm or ranch. The individual or the individual's immediate family must provide substantial day-to-day labor and management of the farm or ranch, consistent with the practices in the county or state where the farm is located.⁷⁷

For a farm business entity to qualify as a beginning farmer or rancher, the entity must meet both of the following:

- ♦ Not have operated a farm or ranch for more than ten consecutive years. This requirement applies to all members of the entity, and
- ♦ Materially and substantially participate in the operation of the farm or ranch. All members must materially and substantially participate in the operation of the farm or

ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management, necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.⁷⁸

4. Restrictions on Duplicate Payments

a. Total assistance from all sources may not exceed 100 percent of actual cost of practice

NRCS will reduce its cost-share contribution if the total financial contributions for a structural practice from all sources would exceed 100 percent of the actual cost of the practice.⁷⁹

b. No EQIP payments if receiving other USDA conservation assistance for the same practice on the same land

In addition, a farmer will not be eligible for EQIP cost-share or incentive payments for conservation practices on eligible land if the farmer receives any other payments for the same practice on the same land under any other conservation program administered by USDA.⁸⁰

5. EQIP Cost-Share Assistance and Tax Planning

EQIP payments are reported to the Internal Revenue Service on Form 1099-G.⁸¹ Farmers may be able to exclude EQIP cost-share assistance from their income for tax purposes.⁸² Farmers should review IRS publication 225 (the Farmers Tax Guide) or consult their tax professional for advice.



LIMITED
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Incentive Payments

Financial assistance under EQIP for land management conservation practices is in the form of “incentive payments.” An incentive payment is a payment intended to encourage the farmer to adopt a land management practice that would not be initiated by the farmer if there were no assistance.⁸³ Payment is provided in an amount and at a rate deemed necessary to encourage the farmer’s action.



NRCS State Conservationists determine which land management practices are eligible for incentive payments.⁸⁴ With advice from the State Technical Committee and Local Work Groups, each NRCS State Conservationist develops a list of eligible conservation practices with incentive payment levels.⁸⁵ The incentive payment levels for each practice should take into account each of the following: (i) the conservation practice’s cost-effectiveness and innovation; (ii) the degree of treatment of priority natural resource concerns; (iii) the number of resource concerns the practice will address; (iv) the longevity of the practice’s environmental benefits; and (v) other pertinent local considerations.⁸⁶

Limitations on EQIP Payments

An individual or entity may not receive a total of more than \$450,000 in cost-share and incentive payments, directly or indirectly, for all EQIP contracts entered into during fiscal years 2002 through 2007.⁸⁷

NRCS may disburse more than \$450,000 to a tribal venture if an official of the Bureau of Indian Affairs or a tribal official certifies in writing that no one person directly or indirectly will receive more than the \$450,000

maximum.⁸⁸

Creditor Claims on EQIP Payments

In general, EQIP payments will be made to the farmer without taking into account any interest or lien claimed by the farmer’s creditors. The two situations in which a farmer’s creditor will have a direct claim on the EQIP payment are described below. Regardless of a creditor’s claim on any EQIP payment, the farmer remains responsible for meeting all obligations under the EQIP contract.

1. Payments May Be Assigned

EQIP regulations permit a farmer to assign his or her EQIP payment to a creditor. If payment is assigned, NRCS will issue the EQIP payment check jointly to the farmer and the creditor.⁸⁹

2. Administrative Offset

EQIP payments may be offset and applied to delinquent nontax debts owed to the United States.⁹⁰ Farmers who plan to use EQIP payments to comply with their remaining duties under the EQIP contract may want to meet with USDA to attempt to set up a repayment plan for any delinquent debt and prevent the EQIP payment from being taken through offset.⁹¹

PRIORITIES IN AWARDING EQIP CONTRACTS

In general, the funding appropriated by Congress for EQIP has not been enough to cover all of the requests for EQIP assistance. Because there is not enough funding to cover all eligible applicants, NRCS uses national priorities to determine which farmers will be awarded EQIP contracts from funds allocated to each state.⁹² Though EQIP is a national program, it stresses “locally-led conservation.”⁹³ Input from State Technical Committees and Local Work Groups is used to adapt national priorities to address local resource concerns in the process of ranking EQIP applications in each state. Farmers may

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be members of a State Technical Committee.⁹⁴

Priority on Practices Related to Livestock Production

Sixty percent of the funds made available for EQIP financial assistance are targeted to conservation practices relating to livestock production.⁹⁵ This includes construction of animal waste management facilities, manure management, comprehensive nutrient management, and management-intensive and rotational grazing practices and other practices relating to livestock production.

For purposes of EQIP, livestock is defined as animals produced for food or fiber, such as dairy cattle, beef cattle, buffalo, poultry, turkeys, swine, sheep, horses, goats, fish or other animals raised by aquaculture, and any other animals identified by the NRCS State Conservationist with advice from the State Technical Committee.⁹⁶

National Priorities

The EQIP national priorities are resource issues identified by the NRCS Chief, with the advice of State Conservationists and other federal agencies, which are used to determine the distribution of EQIP funds.⁹⁷ The national priorities also guide local implementation of EQIP.

The national priorities set forth in the final EQIP regulation adopted by NRCS in 2003 include:

- ◆ Reductions of nonpoint source pollution, such as nutrients, sediment, pesticides, or excess salinity in impaired watersheds, as well as the reduction of groundwater contamination and the conservation of ground and surface water resources.
- ◆ Reduction of emissions, such as particulate matter, nitrogen oxides, volatile organic compounds, and ozone precursors and depleters.

- ◆ Reduction in soil erosion and sedimentation from unacceptable levels on agricultural land.
- ◆ Promotion of at-risk species habitat conservation.⁹⁸

In addition, energy conservation is viewed as an element in all of these priorities.⁹⁹ The regulations state that NRCS should review and update the priorities annually.¹⁰⁰ NRCS published a request for public comments about national priorities for EQIP in the spring of 2005.¹⁰¹ At the time this article was written, NRCS had not yet published a new list of national priorities.

State and Local Priorities

NRCS State Conservationists identify state priority natural resource concerns that, if met, would contribute directly toward meeting the national priorities.¹⁰² For example, a natural disaster may create a local natural resource concern and lead to identification of a state or local priority of preventing nutrient runoff caused by flooding.¹⁰³

NRCS Funds Applications Based on a Ranking System

The NRCS State Conservationist or Designated Conservationist develops a ranking process to give higher priority to EQIP applications which address priority natural resource concerns.¹⁰⁴ NRCS ranks applications based on each of the following factors:

- ◆ Cost-effectiveness.
- ◆ The magnitude of expected environmental benefits.
- ◆ Treatment of multiple resource concerns.
- ◆ Long-term environmental benefits.
- ◆ Compliance with federal, state, local, or tribal regulatory

60 PERCENT OF EQIP FINANCIAL ASSISTANCE IS TARGETED TO CONSERVATION PRACTICES RELATING TO LIVESTOCK PRODUCTION.



THE
CONSERVATION
PLAN IS AT THE
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EQIP.

requirements concerning soil, water, and air quality; wildlife habitat; and ground and surface water conservation.

- ◆ Locally pertinent factors.¹⁰⁵

The size of the farming operation is not a factor in the ranking.¹⁰⁶ The highest-ranked applications are funded periodically, as is described further below.¹⁰⁷

EQIP APPLICATION PROCESS

A farmer may obtain an EQIP application from a USDA Service Center. A conservation program application can also be obtained online at: www.nrcs.usda.gov/PROGRAMS/EQIP/. Applications may be submitted in person, or sent by mail or fax to the local USDA Service Center.

Continuous Application Process, But States Set Cut-off Dates for Consideration

The regulations governing EQIP specify that applications are accepted throughout the year.¹⁰⁸ However, each state issues program announcements which set a cut-off date by which an application must be received to be considered for funding in that cycle.¹⁰⁹ Applications received after the cut-off date are considered for funding in the next cycle.

NRCS Must Make Available Information about the Process

Farmers who understand the process used by NRCS for awarding EQIP contracts will increase their chances of having their applications approved. NRCS must make

national, state, and local level information regarding EQIP available to the public.¹¹⁰ This includes details about resource allocation, eligible practices, ranking processes,

allocation of base and reserve funds, and program achievements.¹¹¹

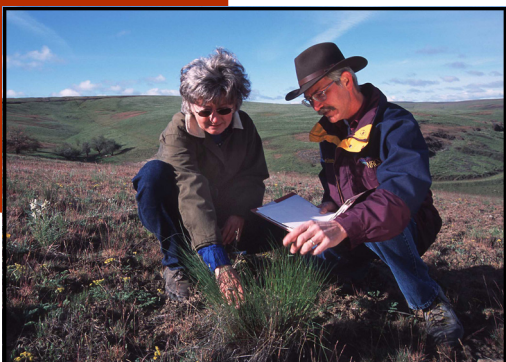
Develop and Submit a Conservation Plan

The EQIP conservation plan is at the heart of every application to participate in EQIP.¹¹² This plan is also known as the “schedule of operations” or “plan of operations.” NRCS will assist the farmer in developing the conservation plan.¹¹³ NRCS must determine that the plan is in compliance with EQIP requirements to find the farmer eligible to participate in EQIP.

1. Elements of a Conservation Plan

Under the EQIP regulations, a conservation plan must include all of the following information: (i) specific conservation and environmental objectives; (ii) targets to demonstrate progress toward meeting the objective; (iii) a description of one or more conservation practices to be implemented; (iv) a proposed schedule, setting forth when and in which order conservation practices will be implemented; (v) information that will help NRCS evaluate how well the plan is tailored to achieve the environmental objectives;¹¹⁴ and (vi) cost-share and incentive payments to be made by NRCS.¹¹⁵

In practice, the conservation plan is created on NRCS Form AD-1155, and may be as short as one page, depending upon the number of conservation practices to be implemented. The planned conservation treatment is referred to by name and number on the form, using the list of practices set out in the NRCS Field Office Technical Guide (FOTG). The specifications for each conservation practice are contained in the FOTG. All conservation practices included in the conservation plan must be planned, applied, operated, and maintained in accordance with the specifications of the FOTG.¹¹⁶ Some



conservation practices may be further broken down into practice components. The EQIP form also includes a completion schedule by year, with an estimated EQIP payment by year. Form AD-1155 also includes columns to enter the estimated number of units needed to carry out the practice (for example, the number of feet of irrigation pipe or hours of labor), the cost basis per unit, and the cost share percentage for that practice.

2. List of Costs and Cost-Share Rates

In practice, rather than making payments based upon farmers' actual costs, NRCS state offices establish cost lists based upon county or state averages for unit costs for many items.¹¹⁷ The use of these cost lists may result in an individual farmer receiving payments based upon a cost that is higher or lower than the actual costs of a given conservation practice. As discussed above, in general, EQIP may not pay more than 75 percent of the actual cost of structural conservation practices.¹¹⁸

Farmers have sometimes challenged the unit costs contained in EQIP contracts as being set too low, compared to their actual costs, especially as costs rose over the years of a contract. Until recently, farmers were bound to the unit cost contained in a conservation plan throughout the entire term of an EQIP contract.¹¹⁹ The October 2006 revision of the appendix to the EQIP contract states that, if funds are available, payments for a conservation practice implemented as scheduled after 2007 will be updated to the payment rate in effect for the year the practice application was started.¹²⁰

The cost-share payment per unit is the result when the approved cost per unit of an item is multiplied by the cost-share rate. The NRCS State Conservationist develops a list of cost-share rates for eligible conservation practices or practice components.¹²¹ The cost-share rate for

each practice should take into account a variety of factors, including: (i) cost-effectiveness; (ii) innovation; (iii) the degree of treatment of priority natural resource concerns; (iv) the number of resource concerns the practice will address; (v) the longevity of the practice's environmental benefits; and (vi) other pertinent local considerations.¹²² Many practices receive cost-share at a rate lower than the 75 percent maximum.

3. Plans for Animal Waste Storage Facilities Must Include a Nutrient Management Plan

If the EQIP plan includes an animal waste storage or treatment facility, such as a lagoon, the producer must provide for the development and implementation of a comprehensive nutrient management plan.¹²³

Submitting an EQIP Application Means the Farmer Agrees to Participate If the Contract Is Approved

The EQIP contract has three parts: the application, the appendix, and the conservation plan. The application and appendix must be signed by the announced cut-off date to be considered in a given funding cycle.¹²⁴ While it may be possible to sign the EQIP application and appendix before completing the conservation plan, it is generally a good idea to delay signing the EQIP application and appendix until the conservation plan has been completed and agreed to by both the farmer and NRCS. When a farmer signs the application, the farmer is agreeing to participate in EQIP if the contract is approved, so farmers should know exactly what they are committing themselves to before they sign.¹²⁵ In any case,



THE THREE
PARTS OF THE
EQIP CONTRACT
ARE:
APPLICATION,
APPENDIX, AND
CONSERVATION
PLAN.

NRCS will be unable to rank the application for funding purposes until the conservation plan is completed.¹²⁶

Farmers should obtain a copy of all three contract documents—the application, the appendix, and the conservation plan—and keep them in their records.

EQIP CONTRACTS

In order to receive EQIP assistance, a farmer must enter into a binding contract with NRCS.¹²⁷ Farmers should be sure to read and

understand the EQIP application and the appendix before signing them. Farmers who do not understand the contract should consult an attorney, farm advocate, or farm advisor for assistance.

The EQIP application, appendix, and

conservation plan serve as the EQIP contract when signed by the farmer and approved by NRCS. (The farmer does not typically sign the conservation plan, the third part of the EQIP contract.¹²⁸) Farmers should keep a copy of all three parts of the contract in their records.

An EQIP contract must run for a minimum of one year after the farmer has completed the last conservation practice, but not more than ten years total.¹²⁹

Contract Requirements for Farmers

In general, the farmer must implement the conservation practices agreed to in the EQIP contract. The contract and appendix set forth additional obligations of the farmer.

1. Start No Conservation Practice Before Approved

When a farmer submits an application for EQIP, the farmer agrees not to begin any of

the conservation practices or use any of the technical assistance included in the conservation plan until the contract is approved.¹³⁰ Beginning such practices before approval may be seen as a sign of a lack of good faith, unless the farmer secures a waiver from this requirement.¹³¹

2. Start One Conservation Practice Within 12 Months of Award

In general, a farmer whose application is funded must start at least one conservation practice within 12 months of signing the contract.¹³² If circumstances prevent initiation of the practice, the farmer may seek a waiver of this requirement from the NRCS State Conservationist.

3. Implement, Operate, and Maintain Conservation Practices

Farmers must operate and maintain conservation practices implemented under an EQIP contract.¹³³ Operation and maintenance means work performed by the farmer to keep the conservation practice functioning for its intended purpose during its life span.¹³⁴ Farmers must also maintain any previously installed conservation practices not covered by the contract if the success of the EQIP practices depends upon them.¹³⁵ All work should be done in compliance with NRCS specifications as set forth in the Field Office Technical Guide.¹³⁶

4. Comply with All Laws

Farmers must obtain the authorities, rights, easements, or other approvals necessary for the EQIP conservation practice.¹³⁷ Farmers also agree to be responsible for following all laws and for any legal actions resulting from their performance under the EQIP contract.

5. Supply Information and Allow NRCS to Inspect Work

Farmers must supply information required by NRCS to determine eligibility for EQIP and



TO RECEIVE EQIP ASSISTANCE, A FARMER MUST ENTER INTO A BINDING CONTRACT WITH NRCS.

compliance with the EQIP contract.¹³⁸ A farmer must allow NRCS to inspect the farming operation and evaluate the performance of planned conservation practices.¹³⁹ NRCS must make a reasonable effort to contact the farmer prior to the inspection.

6. Submit Payment Request

Farmers must follow the procedures set forth in the contract appendix for submitting payment requests.¹⁴⁰ They should use Form NRCS-1245, Practice Approval and Payment Application. Farmers may be required to submit receipts, invoices from Technical Service Providers, or other documentation of work completed.

7. Pay Refund and/or Damages if the Contract Is Terminated

As discussed in more detail below, if an EQIP contract is terminated by NRCS, the farmer generally must refund all payments received under the contract and also pay damages to NRCS.¹⁴¹ If an EQIP contract is terminated voluntarily by the farmer, the farmer must also pay damages, but generally will not be required to refund payments.¹⁴² In some circumstances, NRCS may reduce or waive the duty to refund payments and/or pay damages.¹⁴³

Contract Requirements for NRCS

Under an EQIP contract, NRCS agrees to make cost-share and incentive payments, and to provide technical assistance or to reimburse the farmer for eligible technical assistance costs.¹⁴⁴

NRCS must comply with its own laws, regulations, and policies in implementing EQIP. For example, NRCS is to conduct an annual review of implementation of each contract.¹⁴⁵

Contract Modifications

The farmer and NRCS may agree to modify an EQIP contract.¹⁴⁶ Farmers may wish to modify

their conservation plans for a variety of reasons—for example, they may seek an extension of time to complete practices, or they may wish to change practices or practice components. It is important that farmers actively monitor implementation of the plan, so that if problems arise, they can try to address them. Farmers who wish to modify their contract should prepare a revised EQIP conservation plan and seek approval of the modifications from NRCS.¹⁴⁷ The NRCS form used is AD-1156, “Revision of Plan or Schedule of Operations or Modification of a Contract.” Farmers should never rely upon an oral agreement with NRCS to change the conservation plan.¹⁴⁸ Farmers should always get approval in writing.

If, during the period of an EQIP contract, Congress enacts a statute which would substantially change the terms and conditions of the contract, NRCS may require the farmer to choose between modifying the contract in order to comply with the new statute or terminating the contract.¹⁴⁹

Transfers of Ownership and Loss of Control of the Land

1. Contracts May Be Transferred to Another Party

A farmer may transfer contract responsibilities to another party if both NRCS and the farmer agree to the transfer.¹⁵⁰ The person to whom the contract is transferred must be an eligible farmer and must agree to fulfill all contract terms.

2. Contracts May Not Be Transferred to Another Tract of Land

An EQIP contract is tied to the land for which it is written, and may not be transferred to another tract of land.¹⁵¹



FARMERS AND NRCS MAY AGREE IN WRITING TO CHANGE THE EQIP CONSERVATION PLAN.

FARMERS SHOULD
CONSIDER
WHETHER THEY MAY
WANT TO SELL THE
FARM BEFORE
ENTERING INTO A
LONG-TERM
CONTRACT.

3. Loss of Control of the Farm Without Transfer of the Contract

If the farmer sells or loses control of the land without successfully transferring EQIP contract responsibilities, the farmer will be in violation of the EQIP contract.¹⁵² NRCS may terminate the contract and require the farmer to pay damages and/or a partial or full refund of EQIP payments already received.¹⁵³

4. Options for Transfer of Ownership of EQIP Land

Before applying for EQIP and entering into a long-term EQIP contract, farmers should consider the likelihood that they may wish to transfer ownership of the land. Farmers who apply for EQIP but then receive inquiries about the sale of the land before approval by NRCS may want to ask NRCS to defer consideration of their EQIP application while they explore the possibility of selling the land. Farmers who are interested in selling but who are already bound by an EQIP contract may wish to consider one or more of the following options:



- ◆ delay a sale or transfer of ownership of the farm until the end of the EQIP contract period.
- ◆ make it a condition of the sale or transfer that the new owner be willing and eligible to assume the EQIP contract, or that the new owner actually assume the contract.
- ◆ seek voluntary termination of the EQIP contract, provide written explanation to NRCS of any circumstances compelling the sale, and seek a waiver of the damages owed.
- ◆ set the sales price at a level which includes an allowance for the refund and/or damages the farmer may be required to pay

to NRCS as a result of terminating the contract. Farmers may want to ask NRCS to provide an estimate of this amount.

TERMINATING AN EQIP CONTRACT

Termination of an EQIP contract can have serious financial consequences. In general, the farmer must make a payment to NRCS after termination of an EQIP contract. The type and amount of the payment due will depend upon whether the contract was terminated by the farmer (voluntary termination) or by NRCS (involuntary termination). In some circumstances, the payment due may be reduced or waived.

Farmers should be aware of these consequences when applying for EQIP assistance and during the term of the contract itself. The USDA National Appeals Division has concluded that NRCS has no duty to warn farmers of the financial consequences of contract termination, because the duty to pay a refund and/or liquidated damages is set forth in the appendix to the EQIP contract.¹⁵⁴

Contract Violations and Contract Termination

1. In General, Farmers Are Given Opportunity to Cure Violations

In general, if NRCS determines that a farmer is in violation of the terms of an EQIP contract, it must give the farmer a reasonable amount of time to correct the violation and comply with the contract.¹⁵⁵ If the farmer does not correct the violation, NRCS may terminate the EQIP contract.¹⁵⁶

2. Immediate Contract Termination for Certain Violations

NRCS may terminate a contract immediately if a farmer is found to have submitted false information, misrepresented any fact affecting a program determination, filed a false claim, knowingly adopted any scheme or device that

tends to defeat the purpose of the program, or taken action NRCS decides warrants immediate termination.¹⁵⁷

Termination Ends the Right to Receive Future Payments

After termination of an EQIP contract by NRCS or the farmer, the farmer will no longer be entitled to receive future EQIP payments.¹⁵⁸

Duty to Refund Payments After Termination by NRCS

After termination of an EQIP contract by NRCS, the farmer is required to refund part or all of payments already received under the contract, plus interest.¹⁵⁹ NRCS may reduce the amount of the refund required if (a) an already-installed conservation practice can function independently, (b) the practice is not adversely affected by the violation, (c) the practice is not adversely affected by the absence of other conservation practices that would have been installed under the contract, and (d) the farmer agrees to operate and maintain the installed conservation practice for the lifespan of the practice.¹⁶⁰

Farmer May Terminate the Contract Voluntarily

The farmer may voluntarily terminate an EQIP contract if NRCS determines that it is in the public interest to terminate the contract.¹⁶¹ Before requesting a voluntary termination, farmers may want to consider whether a change in the contract, if granted, might make it possible for them to comply. Farmers who voluntarily terminate an EQIP contract are not required to refund payments received.

Duty to Pay Damages

Liquidated damages are money which the farmer agrees to pay NRCS if the farmer fails to adequately complete the EQIP contract.¹⁶² Liquidated damages are an estimated amount; they are intended to help NRCS to recover its

costs in processing the application and assisting the farmer to develop and implement the conservation plan. Liquidated damages may be assessed even if no payments were made under the contract. Under the EQIP contract, the farmer agrees to pay liquidated damages following voluntary termination by the farmer or termination by NRCS due to breach of contract. The duty to pay damages is in addition to the duty to refund payments already received if the contract is terminated by NRCS.¹⁶³



1. Calculating Liquidated Damages

The appendix to the EQIP contract sets forth provisions for “Recovery of Costs.”¹⁶⁴ According to the appendix to the EQIP contract, NRCS may assess liquidated damages up to an amount equal to 20 percent of the total financial assistance obligated to the farmer under the EQIP contract.¹⁶⁵ The “total financial assistance obligated to the farmer under the EQIP contract” is not simply payments already made under the contract, but the total amount of assistance that would be paid under the contract if the contract were carried out in full. It is the total amount of funds that NRCS initially set aside for that farmer in its budget when it awarded the EQIP contract.

According to the Conservation Program Manual, NRCS may require farmers to pay damages at a rate less than the 20 percent maximum authorized in the appendix. In the first year of the contract, the liquidated damages assessed by NRCS for termination of the contract will be 7.5 percent of the total financial assistance obligated; and in the second year of the contract, the liquidated damages will be up to 15 percent of the total financial

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assistance obligated.¹⁶⁶

2. NRCS May Waive Damages or Reduce the Amount Owed

NRCS may reduce the amount of money damages owed by a farmer or waive the duty to pay liquidated damages, depending upon the circumstances of the case.¹⁶⁷

a. Good faith effort to comply with contract

NRCS may reduce the amount owed by the farmer to the extent the farmer made a good faith effort to comply with the contract.¹⁶⁸

b. Hardship cases

NRCS may also reduce the amount owed by a farmer if the farmer suffered hardships beyond his or her control, and these hardships prevented compliance with the EQIP contract.¹⁶⁹

3. Documenting the Waiver Request

Arguably, NRCS should consider granting a waiver or reducing the amount owed by the farmer in every EQIP contract termination, but to ensure that NRCS does so, the farmer should make a written request.¹⁷⁰ Especially in

the case of a voluntary request for termination, the farmer should explain the reasons for the request for termination and for waiver of the duty to pay money to NRCS. If possible, the farmer should give evidence to

support any claim of hardship. NRCS must document its consideration of the request and its reasons for granting or denying the request.¹⁷¹

EQIP APPEALS PROCESS AND EQUITABLE RELIEF

When NRCS makes a decision that is adverse

to a farmer, the farmer has the right to seek informal review of the decision, to appeal the decision, or both. Farmers may also seek “equitable relief” from strict application of EQIP requirements. On May 16, 2006, NRCS issued new interim final regulations to govern NRCS’s informal appeals process.¹⁷²

Farmers who seek relief from adverse decisions through any of these processes must comply with all deadlines. Farmers should note that these deadlines are strictly enforced.

Appealable Decisions

Final decisions made by NRCS that are adverse to an individual farmer may be appealed.¹⁷³ For example, a determination that a farmer is not eligible for EQIP, a denial of EQIP benefits, or a decision that a farmer has not complied with EQIP requirements should all be subject to appeal. However, general determinations by NRCS that apply to all program participants—such as payment rates, payment limits and cost-share percentages, and eligible conservation practices—are not subject to appeal.¹⁷⁴

Because of this exception for general program requirements, NRCS sometimes informs farmers that a decision is not appealable. But NRCS does not have the final word on appealability. A farmer who believes an adverse NRCS decision should be appealable because it is based upon his or her individual situation should seek review of whether the decision is appealable by submitting a timely written request to either the NRCS State Conservationist or to USDA’s National Appeals Division (NAD).¹⁷⁵ NAD is an independent appeals agency within USDA.¹⁷⁶ It is difficult to determine whether an NRCS State Conservationist has ever granted a farmer’s request that a decision be found appealable, but NAD has. For example, NAD has allowed appeals to go forward despite NRCS’s position that a voluntary termination of an EQIP



contract is not appealable, because it is not adverse to the farmer.¹⁷⁷ When farmers have requested a review of whether there was an appealable decision in this situation, NAD has reasoned that voluntary termination triggers a duty to pay money to NRCS, which is adverse to the farmer, and is therefore appealable.

NRCS Internal Appeals Process—Mediation, Reconsideration, and NRCS Hearing

Farmers may choose to seek review of an adverse decision through NRCS’s internal appeals system or to file an appeal with NAD, as discussed in the next section. If a farmer chooses to pursue the internal NRCS processes described here, further appeal to NAD will be possible if those processes are unsuccessful.¹⁷⁸

NRCS’s internal appeals system includes three processes—mediation, reconsideration, and a hearing before the NRCS State Conservationist.¹⁷⁹ The processes available depend upon the type of decision to be appealed. A “preliminary technical determination” is the initial written decision by NRCS on a technical matter having to do with the condition of natural resources or farming practices.¹⁸⁰ A “program decision” is a written decision by NRCS concerning eligibility for program benefits, program administration, or program implementation.¹⁸¹

Mediation involves a qualified mediator who serves as a neutral party to attempt to help the farmer and NRCS to reach an agreement.¹⁸² Mediation can be helpful as a means to allow the parties to discuss new facts and develop new insights.¹⁸³ The EQIP regulations continue to apply during the mediation process. Mediation is available for both technical determinations and program decisions.

Reconsideration involves a review by the original NRCS decision maker of a preliminary technical determination.¹⁸⁴ Reconsideration is

not available for program decisions.

An NRCS hearing is an informal appeal proceeding before the State Conservationist in which farmers may present evidence and testimony to show why a program decision was wrong.¹⁸⁵ A hearing is not available for preliminary technical determinations.

Although the language of the NRCS appeals rule appears to limit farmers to either mediation or an internal review process, this is inconsistent with the statute governing farmer appeals within USDA.¹⁸⁶ Arguably, farmers have the right to choose more than one option in the NRCS internal appeals system.¹⁸⁷

Appeals Beyond NRCS—FSA County Committee and National Appeals Division

In addition to NRCS’s internal appeals process, farmers have two other appeal options.

First, farmers may appeal an NRCS program decision or final technical determination to the Farm Service Agency (FSA) county committee.¹⁸⁸ A final technical determination is issued when a farmer pursues reconsideration of a preliminary technical determination.¹⁸⁹ A preliminary technical determination also becomes final if it is not appealed within NRCS or if mediation is not resolved within 30 days. If the FSA county committee believes the farmer’s case has merit, the case will be referred to the NRCS State Conservationist.¹⁹⁰ The State Conservationist will make a determination, and then refer the case back to the FSA county committee for a decision based upon the NRCS determination.¹⁹¹ The decision of the FSA county committee not to refer the case to the State Conservationist may be appealed to the

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FSA state committee.¹⁹²

Farmers may choose to appeal an NRCS program decision, final technical determination, or FSA county committee decision directly to NAD.¹⁹³ Appeals are heard by a NAD Hearing Officer. Farmers or NRCS may then seek review of the hearing officer's determination by the NAD Director. NAD hearing officer decisions and NAD Director review determinations in previous EQIP appeals are posted on the NAD Web site.¹⁹⁴ Reviewing these decisions may help farmers to prepare for their appeals. Farmers may appeal a final NAD decision in federal court.¹⁹⁵ Research for this article did not reveal any reported court cases concerning EQIP.

Farmers have the right to appeal to NAD when NRCS renders a final decision.¹⁹⁶ This includes the right to seek a NAD appeal after attempting to resolve the dispute using NRCS's internal appeals processes.¹⁹⁷ If NRCS does not advise farmers in these circumstances of their appeal rights, the farmers should contact NAD directly.

If all of the administrative appeal processes have been unsuccessful, a farmer may seek review of the NAD determination upholding NRCS's adverse decision in court.¹⁹⁸

Equitable Relief

In an appeal, farmers generally argue that they have satisfied the program requirements, and that the decision by the agency to deny a benefit or require a payment from the

farmer was incorrect. In some EQIP cases, farmers admit that they did not satisfy all program requirements, but argue that they are still entitled to a program benefit, or that they

should be excused from a duty to pay money.¹⁹⁹ These farmers seek "equitable relief" from the strict application of EQIP requirements. Equitable relief may consist of retaining benefits already received, continuing to be eligible for program benefits, or receiving a reduction of the amount to be repaid to NRCS.

1. NRCS or NAD Director May Grant Equitable Relief

Farmers may seek equitable relief from the NRCS State Conservationist.²⁰⁰ The total amount of relief granted under general NRCS equitable relief regulations may not exceed \$20,000 during a fiscal year (October 1 to September 30).²⁰¹

The NAD Director has authority to grant equitable relief to the same extent as NRCS.²⁰² Farmers should explain any claim for equitable relief during a NAD hearing. Although NAD hearing officers may not grant equitable relief, they will include the claim in the hearing record, and then the farmer may request review by the NAD Director, who may grant or deny relief. A denial of equitable relief may not be reviewed in court.²⁰³

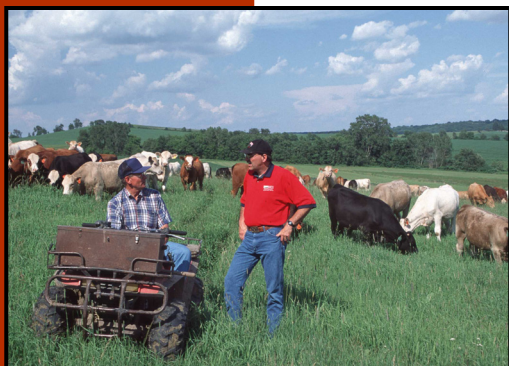
Neither NRCS nor the NAD Director is required to grant equitable relief.

2. Grounds for Equitable Relief

NRCS regulations set forth two general grounds for equitable relief.²⁰⁴

a. Reliance Upon the Mistaken Action or Advice of NRCS

Equitable relief may be granted for "misaction or misinformation," if a farmer applied a conservation practice incorrectly, but consistently with instruction from an NRCS employee.²⁰⁵ The farmer must not have known, or have had reason to know, that the action or advice from NRCS was in error.



b. Good Faith Effort to Comply

If a farmer made a good faith effort to comply fully with EQIP requirements and rendered substantial performance under the contract, the farmer may be eligible for equitable relief.²⁰⁶

DISCRIMINATION IS ILLEGAL

NRCS is prohibited from subjecting any person to discrimination in any program on the basis of race, color, religion, sex, age, national origin, marital status, familial status, sexual orientation, disability, or the receipt of income from any public assistance program.²⁰⁷ Prohibited discrimination may involve excluding a person from participation in EQIP or denying program benefits. To the extent a farmer would like to file a claim specifically based upon on the alleged discrimination, the farmer may file a complaint within the Office of Civil Rights within USDA.

CONSERVATION INNOVATION GRANTS

Conservation Innovation Grants (CIG) are competitive grants awarded under EQIP whose purpose is to encourage use of innovative conservation approaches and technologies on agricultural land.²⁰⁸

CIG Eligibility

CIG funds are available to Indian tribes, state and local units of government, nongovernmental organizations, and individuals.²⁰⁹ Farmers receiving direct or indirect payment from a CIG grant must meet the minimum eligibility requirements for EQIP.²¹⁰

Eligible CIG projects entail the development, field testing, evaluation, and implementation of either: (1) promising conservation technologies, practices, systems, procedures, and approaches; or (2) incentives for adoption of conservation practices.²¹¹

CIG Assistance

Grantees may receive up to 50 percent of the total project cost.²¹² Applicants must obtain non-federal funding for at least 50 percent of the project cost. A portion of the non-federal funding may be from in-kind contributions, such as labor and use of equipment.²¹³ Grantees are responsible for obtaining any technical assistance they need.²¹⁴

Funding for CIG, when available, is announced in a Request for Proposals which is published in the *Federal Register*.²¹⁵ The CIG Request for Proposals contains evaluation criteria and guidance on how to apply. CIG grant applications require a narrative project description describing the use of innovative approaches or technologies to address a natural resource conservation concern or concerns.²¹⁶ CIG is not intended to fund research, though it may be used for pilot projects and field demonstrations.²¹⁷ The NRCS Chief makes the final grant award decisions, based upon recommendations of a peer review panel and a Grant Review Board.²¹⁸ ♦

Samantha Bobrman provided research assistance for this article during a summer clerkship at FLAG.

Photos courtesy of USDA NRCS



PROHIBITED
DISCRIMINATION
MAY INVOLVE
EXCLUDING A
PERSON FROM
PARTICIPATING IN
EQIP OR DENYING
PROGRAM
BENEFITS.

1. Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, Title III, Subtitle D, § 334, 110 Stat. 888 (April 4, 1996).
2. Farm Security and Rural Investment Act of 2002, Pub. L. No. 107-171, Title II, Subtitle D, § 2301, 116 Stat. 134 (May 13, 2002).
3. Compare the maximum payment set forth in 7 U.S.C. § 3839aa-7(a) (2001) *with* the maximum payment set forth in 7 U.S.C. § 3839aa-7 (2007). The ban on EQIP assistance for building animal waste management facilities for large confined livestock operations was found at 7 U.S.C. § 3839aa-2(e)(1)(B) (2001). For purposes of the ban, USDA defined a large confined livestock operation as one with the equivalent of more than 1,000 animal units. 7 C.F.R. § 1466.7(b)(1) (2001).
4. Conservation Program Application, Form NRCS-CPA-1200 (*hereinafter* “Application”).
5. Appendix to Form NRCS-CPA-1202 (*hereinafter* “Appendix”).
6. Conservation Plan Schedule of Operations, Form AD-1155 (*hereinafter* “Conservation Plan”).
7. 16 U.S.C. §§ 3839aa to 3839aa-9.
8. 7 C.F.R. pt. 1466 (2007); 68 Federal Register 32,348 (2003).
9. Title 440 Conservation Programs Manual, Part 515 Environmental Quality Incentives Program, 440-V-CPM, First Edition, Amendment 35, October 2006 (*hereinafter* EQIP Manual). The EQIP Manual is one part of the Title 440 Conservation Programs Manual (*hereinafter* Conservation Programs Manual), which is available on the Internet at www.info.usda.gov/scripts/lpsius.dll/M/M_440.htm. NRCS should provide copies of program manuals to farmers upon request. There may be a nominal fee.
10. NAD EQIP decisions may be found by entering “EQIP” as a search word at www.nad.usda.gov/public_search.html.
11. NRCS has posted many of its materials regarding EQIP on the Internet at <http://www.nrcs.usda.gov/PROGRAMS/EQIP/>.
12. 16 U.S.C. § 3839aa-1 (2)(A); 7 C.F.R. § 1466.8(c) (2007).
13. 16 U.S.C. § 3839aa-1 (2)(B)(i-vi).
14. 7 C.F.R. § 1466.8(c)(1) (2007).
15. 7 C.F.R. § 1466.8(c)(2)(i-ii) (2007). For an appeal decision related to the evidence needed to show control of public land, *see* NAD Director Review Determination 2005W000302 (Aug. 25, 2005).
16. 7 C.F.R. § 1466.8(c)(3) (2007).
17. 7 C.F.R. § 1466.10(d) (2007).
18. EQIP Manual § 515.51(C)(2)(v).
19. 7 C.F.R. § 1466.3, “Applicant” (2007); 7 C.F.R. § 1400.3, “Farming Operation” (2007).
20. 7 C.F.R. § 1466.24(b)(3) (2007). Applicants who provide a unique identification number as an alternative to a Social Security number must use that number for all EQIP contracts.
21. 7 C.F.R. § 1466.24(b)(4) (2007).
22. 7 C.F.R. § 1466.8(b)(2) (2007).
23. 7 C.F.R. § 1400.3, “Interest in a Farming Operation” (2007).
24. 7 C.F.R. § 1466.8(b)(3) (2007). For an appeal decision involving this issue, *see* NAD Hearing Officer Decision 2006E000794 (Mar. 28, 2007) (quitclaim deed insufficient proof of control, at least in case where control is disputed).
25. 7 C.F.R. § 1466.8(b)(3)(ii) (2007).
26. 7 C.F.R. § 1466.8(b)(3)(i) (2007).

27. 7 C.F.R. § 1466.8 (b)(4) (2007).
28. 7 C.F.R. § 1466.8(b)(5) (2007).
29. 7 C.F.R. § 1466.8(b)(5) (2007); 7 C.F.R. § 1400.600(a) (2007).
30. 7 C.F.R. § 1400.600(b) (2007).
31. 7 C.F.R. § 1466.8(b)(1). The highly erodible land and wetland provisions can be found at 7 C.F.R. pt. 12 (2007).
32. 7 C.F.R. § 1466.8(b)(4) (2007).
33. 7 C.F.R. § 1466.3, “Conservation practice” (2007).
34. 7 C.F.R. § 1466.10(a) (2007).
35. 7 C.F.R. § 1466.3, “Land management practice,” “Structural practice” (2007).
36. 7 C.F.R. § 1466.3, “Land management practice” (2007).
37. 7 C.F.R. § 1466.3, “Land management practice” (2007).
38. 16 U.S.C. § 3839aa-1(6)(A).
39. 7 C.F.R. § 1466.3, “Structural practice” (2007).
40. 7 C.F.R. § 1466.3, “Structural practice” (2007).
41. 16 U.S.C. § 3839aa-1(6)(A).
42. 16 U.S.C. § 3839aa-9(b).
43. EQIP Manual, § 515.81(A)(2).
44. 16 U.S.C. § 3839aa-9(b)(1-5).
45. 16 U.S.C. § 3839aa-9(b)(6).
46. 7 C.F.R. § 1466.9(e) (2007).
47. 7 C.F.R. § 1466.10(e) (2007).
48. 7 C.F.R. § 205.2, “Organic production” (2007).
49. *Compare* 7 C.F.R. pt. 205 (2007) *with* 7 C.F.R. pt. 1466 (2007).
50. *Organic Agriculture and Resource Conservation: What Conservationists Need to Know about Organic Growers*, available on the Internet at http://soils.usda.gov/sqi/management/org_farm_2.html. *See also* the companion article, *Organic Agriculture and Resource Conservation: What Organic Growers Need to Know about NRCS and Conservation Programs*, available on the Internet at soils.usda.gov/sqi/management/org_farm_1.html.
51. *See* 2007 Minnesota EQIP Conservation Practice Payment Docket, 440-V-CPM, Amend. MN-49, December, 2006 (setting forth Practice 328b, Organic Conservation Crop Rotation and Practice 528, Organic Prescribed Grazing); “2007 Contracts with Organic Incentive Payments” EQIP Docket pages MN515.P.162-49-50 (March 2004).
52. For a report on use of interim standards in several northeastern states, *see*, Interim Conservation Practice Standard Annual Evaluation FY 2006: Transition to Organic Production, NRCS Interim Practice Code 789, available on the Internet at: www.vt.nrcs.usda.gov/technical/Organic_Farming/Practice_Standard_Multi-state_Report06.pdf.
53. *Organic Agriculture and Resource Conservation: What Conservationists Need to Know about Organic Growers*, available on the Internet at http://soils.usda.gov/sqi/management/org_farm_2.html.
54. Conference Committee Report on Farm Security and Rural Investment Act (H.R. 2646) (2002), House Report N. 107-424, at 498-499. *See also* Kari Hamerschlag, *More Integrated Pest Management Please: How USDA Could Deliver Greater Environmental Benefits from Farm Bill Conservation Programs*,

Natural Resources Defense Council Issue Paper (Feb. 2007), available on the Internet at <http://www.nrdc.org/health/pesticides/ipm/contents.asp>.

55. 7 C.F.R. pt. 1469 (2007).
56. *See, for example*, Statement of Ferd Hoefner, Policy Director, Sustainable Agriculture Coalition, Hearing on Conservation Policy Recommendations for the Farm Bill, U.S. Senate Committee on Agriculture, Nutrition, and Forestry (Washington, D.C., May 1, 2007), available on the Internet at agriculture.senate.gov/Hearings/hearings.cfm?hearingid=2725&witnessId=6403.
57. For example, Senator Tom Harkin, the chair of the Senate Agriculture committee, has proposed combining EQIP, CSP, and the Wildlife Habitat Incentives Program into one Conservation Stewardship Incentives Program in the Farm Bill. *See* Dan Looker, *Ag. Committees Seek Boost to Conservation Programs*, (May 24, 2007), available on the Internet at www.agriculture.com/ag/story.jhtml?storyid=/templatedata/ag/story/data/1180046962383.xml.
58. NAD Director Review Determination Case No. 2006W000836 (Mar. 29, 2007).
59. NAD Director Review Determination Case No. 2006S000600 (Jan. 4, 2007). A full exploration of criteria for eligibility for CSP is beyond the scope of this article.
60. NRCS National Bulletin 300-7-1 (Oct. 23, 2006), available on the Internet at <http://www.info.usda.gov/scripts/lpsius.dll/NB/NB.htm>.
61. NAD Hearing Officer decisions 2007E000316 (Apr. 6, 2007), 2007E000317 (Apr. 6, 2007), and 2007E000326 (Apr. 16, 2007). It is not clear whether the farmers will seek equitable relief from the NAD Director, nor whether it will be awarded, if sought.
62. 7 C.F.R. § 1466.10(b) (2007).
63. 7 C.F.R. § 1466.10(c) (2007).
64. 7 C.F.R. § 1466.10(c) (2007).
65. NAD Hearing Officer Determination 2006W000619 (July 13, 2006). In cases of natural disaster, a farmer should seek pre-approval before implementing conservation practices if possible. If circumstances required immediate action, the Farm Service Agency may be able to approve assistance after the fact under the Emergency Conservation Program *See* 7 C.F.R. 701.15(b)(1)-(2) (2007). *See also* FLAG's *Farmers' Guide to Disaster Assistance*, available on the Internet at www.flaginc.org.
66. 7 C.F.R. § 1466.8(a) (2007).
67. 7 C.F.R. § 1466.3, "Technical Assistance" (2007).
68. 16 U.S.C. § 3839aa-6(2).
69. 7 C.F.R. § 1466.11 (2007). For more information about NRCS's use of technical service providers, *see* 7 C.F.R. pt 652 (2007).
70. 7 C.F.R. § 1466.3, "Cost-Share Payment" (2007).
71. 7 C.F.R. § 1466.24(b)(11) (2007).
72. 7 C.F.R. § 1466.23(a)(1) (2007).
73. 7 C.F.R. § 1466.23(a)(1) (2007).
74. 7 C.F.R. § 1466.3, "Limited Resource Farmer or Rancher" (2007). Since 2004, the \$100,000 per year threshold has been increased to adjust for inflation.
75. 7 C.F.R. § 1466.3, "Limited Resource Farmer or Rancher" (2007).
76. 7 C.F.R. § 1466.23(a)(1) (2007).
77. 7 C.F.R. § 1466.3, "Beginning Farmer or Rancher" (2007).
78. 7 C.F.R. § 1466.3, "Beginning Farmer or Rancher" (2007).
79. 7 C.F.R. § 1466.23(a)(2) (2007).

80. 7 C.F.R. § 1466.24(a)(10) (2007).
81. Appendix, para. 5.D.
82. 26 U.S.C. § 126; Rev. Rul. 97-55, 1997-2 C.B. 20 (July 1997).
83. 7 C.F.R. § 1466.3, “Incentive Payment” (2007).
84. 7 C.F.R. § 1466.23(b) (2007).
85. 7 C.F.R. § 1466.23(c) (2007).
86. 7 C.F.R. § 1466.23(c) (2007).
87. 7 C.F.R. § 1466.24(a) (2007).
88. 7 C.F.R. § 1466.24(b)(5) (2007).
89. 7 C.F.R. § 1466.34(b) (2007).
90. 7 C.F.R. § 1466.34(a) (2007).
91. 7 C.F.R. § 3.28 (2007).
92. NRCS’s process for allocating funds to the states has been questioned. *USDA Should Improve Its Process for Allocating Funds to States for Environmental Quality Incentives Program*, GAO-06-969 (Sept. 2006).
93. 7 C.F.R. § 1466.2(c) (2007). State Technical Committees and Local Work Groups are advisory committees established by NRCS. 7 C.F.R. § 1466.3, “Local Work Group,” “State Technical Committee” (2007). *See* 440-CPM pts. 500 and 501.
94. 7 C.F.R. § 610.22(b) (2007).
95. 16 U.S.C. § 3839aa-2(g).
96. 7 C.F.R. § 1466.3, “Livestock” (2007).
97. 7 C.F.R. § 1466.3, “National priorities” (2007).
98. 7 C.F.R. § 1466.4(a) (2007).
99. EQIP Manual at § 515.3.B(5).
100. 7 C.F.R. § 1466.4(b) (2007).
101. 70 Fed. Reg. 14,578 (2005).
102. 7 C.F.R. § 1466.6(a) (2007).
103. EQIP Manual § 515.3.B(5).
104. 7 C.F.R. § 1466.20(b) (2007). For a comparison of conservation and other benefits which might result from prioritizing four different sets of practices, *see* George Boody, et. al., *Multifunctional Agriculture in the United States* at 27, BioScience (January, 2005).
105. 7 C.F.R. § 1466.20(b)(1-6) (2007).
106. 7 C.F.R. § 1466.20(d) (2007).
107. 7 C.F.R. § 1466.20(b) (2007).
108. 7 C.F.R. § 1466.20(a) (2007).
109. EQIP Manual § 515.70.
110. 7 C.F.R. § 1466.5(d) (2007).
111. 7 C.F.R. § 1466.5(d) (2007). State and local program announcements and EQIP ranking processes should be available on the NRCS Web site at www.nrcs.usda.gov/programs/eqip.
112. 7 C.F.R. § 1466.9 (2007).

113. Conservation Programs Manual pt. 512.
114. 7 C.F.R. § 1466.9 (b)(1-5) (2007).
115. 7 C.F.R. § 1466.21(b)(1) (2007).
116. 7 C.F.R. §§ 1466.3, “Field office technical guide,” 1466.9(a), 1466.24(b)(11) (2007).
117. EQIP Manual § 51.91.
118. 7 C.F.R. § 1466.23(a)(1) (2007).
119. NAD Director Review 2005E000432 (May 5, 2005).
120. EQIP Appendix, para. 5.B. To find out if their EQIP payments may be increased based on higher costs in later years of the contract term, farmers should review the appendix to their EQIP contract to see if it includes a provision to allow such an adjustment. In general, if the appendix to a farmer’s EQIP contract contains this provision, the farmer may receive cost share based upon higher unit costs for conservation practices that are scheduled to be implemented after 2007, and are in fact implemented after 2007, provided that NRCS has funds available to pay based upon the higher cost.
121. 7 C.F.R. § 1466.23(c) (2007).
122. 7 C.F.R. § 1466.23(c)(1-5) (2007).
123. 7 C.F.R. § 1466.9(c) (2007).
124. EQIP Manual § 515.71.B(1).
125. Appendix Para. 12; EQIP Manual § 515.80.
126. 7 C.F.R. § 1466.20(b) (2007); NAD Hearing Officer Decision 2006W000572 (July 19, 2006).
127. 7 C.F.R. § 1466.21(a) (2007).
128. In NRCS’s view, the farmer indicates agreement with the conservation plan by signing the application. EQIP Manual § 515.80.A(1) Note.
129. 7 C.F.R. § 1466.21(b)(2) (2007).
130. Appendix, para. 3(A)(2).
131. NAD Director Review Determination 2006W000395 (June 30, 2006).
132. 7 C.F.R. § 1466.21(c) (2007).
133. 7 C.F.R. § 1466.22 (2007).
134. 7 C.F.R. § 1466.3, “Operation and maintenance” (2007). Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed practice safe and functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.
135. 7 C.F.R. § 1466.22 (2007).
136. 7 C.F.R. § 1466.9(a) (2007). Farmers should be given the opportunity to correct any failure to follow specifications. NAD Director Review Determinations 2006W000395 (June 30, 2006) and 2006E000232 (Apr. 10, 2006). A farmer who decides not to correct conservation practices may risk being found not to have acted in good faith. In some cases, NRCS may have discretion to certify practices, even if the farmer departed from specifications. NAD Hearing Officer Determination 2007W000062 (Jan. 17, 2007).
137. 7 C.F.R. § 1466.31 (2007).
138. 7 C.F.R. § 1466.21(b)(3)(v) (2007).
139. 7 C.F.R. § 1466.32 (2007).

140. Appendix, para. 5.
141. 7 C.F.R. § 1466.26(b)(1) and (b)(2) (2007).
142. 7 C.F.R. § 1466.26(b)(2) (2007).
143. 7 C.F.R. § 1466.26(b) (2007).
144. 7 C.F.R. § 1466.21(a) (2007).
145. Conservation Program Manual § 512.55 (Amend. 32, Oct. 2006).
146. 7 C.F.R. § 1466.25(a) (2007).
147. 7 C.F.R. § 1466.25(a) (2007).
148. Farmers take a risk if they rely on an NRCS employee's willingness to "look the other way." NAD Director Review Determination 2003W000534 (Oct. 6, 2003).
149. EQIP Appendix § 12.
150. 7 C.F.R. § 1466.25(b) (2007).
151. NAD Director Review Determination 2006E000165 (Apr. 7, 2006).
152. Conservation Program Manual § 512.54 (Amend. 32, Oct. 2006).
153. 7 C.F.R. §§ 1466.25(c), 1466.26 (2007).
154. *See, for example*, NAD Director Review Determination 2004W000975 (Feb. 10, 2005).
155. 7 C.F.R. § 1466.26(a)(1) (2007).
156. 7 C.F.R. § 1466.26(a)(1) (2007).
157. 7 C.F.R. §§ 1466.26(a)(2), 1466.35(b) (2007).
158. 7 C.F.R. § 1466.26(b)(1-2) (2007).
159. 7 C.F.R. § 1466.26(b)(1) (2007); Appendix para. 10.A.
160. 7 C.F.R. § 1466.26(b)(1) (2007).
161. 7 C.F.R. § 1466.26(b)(4) (2007).
162. 7 C.F.R. § 1466.3, "Liquidated damages" (2007).
163. 7 C.F.R. § 1466.26(b)(2) (2007); Appendix para. 12.
164. Appendix para. 11.
165. Appendix para. 11.
166. EQIP Manual § 515.106 refers readers to 440 CPM Manual § 512.58.
167. 7 C.F.R. § 1466.26(b)(2) and (b)(3) (2007).
168. 7 C.F.R. § 1466.26(b)(3) (2007). *See* NAD Hearing Officer Decisions 2006E000446 (May 16, 2006) (good faith only applies to efforts before sale of land) and 2007W000137 (Mar. 8, 2007) (effort to comply in spite of drought and high fuel costs).
169. 7 C.F.R. § 1466.26(b)(3) (2007). *See* NAD Director Review Determinations 2006W000175 (May 25, 2006) (ill health), 2005S000467 (Aug. 19, 2005) (depression and car accident), 2006E000165 (Apr. 7, 2006) (urban sprawl), and 2006W000709 (Nov. 8, 2006) (development pressure); NAD Hearing Officer Decisions 2007E000162 (Feb. 22, 2007) (illness), 2006S000430 (June 13, 2006) (hurricane).
170. NAD Director Review Determinations 2006W000709 and 2006W000712 (both Nov. 8, 2006). The Conservation Program Manual states, "While it is the participant's responsibility to request a reduction in the amount of cost recovery, State Conservationists should document whether a total or partial waiver of the recovery amount has been considered, along with an explanation for granting or denial of this relief." Conservation Program Manual § 512.58.B.(4).

171. Conservation Program Manual § 512.58.B.(4). *See also* NAD Director Review Determination 2006W000709 (Nov. 8, 2006).
172. 71 Fed. Reg. 28,239 (2006) (codified at 7 C.F.R. pt. 614). FLAG filed comments on behalf of the National Family Farm Coalition raising serious concerns about whether the interim final regulations fully complied with NRCS's statutory duties with respect to appeals rights. *See* Comments on Interim Final Rule for Natural Resources Conservation Service Appeal Procedures (submitted June 15, 2006), available on the Internet at <http://www.flaginc.org/topics/fedreg/comments/index.php>.
173. 7 C.F.R. § 1466.30 (2007). *See also* 7 C.F.R. pts. 614, 780, and 11 (2007). A failure to issue a decision is also appealable under 7 C.F.R. pt. 11.
174. 7 C.F.R. § 1466.30 (2007).
175. 7 C.F.R. § 614.13 (2007); 7 C.F.R. § 11.6 (2007); NAD Director Review Determination 2006W000395 (June 30, 2006).
176. *See* 7 U.S.C. § 6992; 7 C.F.R. pt. 11 (2007).
177. NAD Director Review Determinations 2004W000888 (Dec. 2, 2004) and 2006W000175 (May 25, 2006).
178. 7 C.F.R. §§ 614.6(b)(3), 614.8 (2007).
179. 7 C.F.R. §§ 614.7 through 614.9 (2007). *See also* Conservation Programs Manual pt. 510.
180. 7 C.F.R. § 614.2(n) (2007).
181. 7 C.F.R. § 614.2(o) (2007).
182. 7 C.F.R. § 614.11 (2007).
183. *See* 71 Fed. Reg. 28,239, 28,241 (2006) (prefatory comments).
184. 7 C.F.R. § 614.7 (2007).
185. 7 C.F.R. §§ 614.9(b)-(d) and 614.2(j) (2007).
186. 7 U.S.C. § 6995.
187. *See* Comments on Interim Final Rule for Natural Resources Conservation Service Appeal Procedures (submitted June 15, 2006), available on the Internet at <http://www.flaginc.org/topics/fedreg/comments/index.php>.
188. 7 C.F.R. §§ 614.8 through 614.10 (2007).
189. 7 C.F.R. § 614.8(a) (2007).
190. 7 C.F.R. § 780.11(b) (2007).
191. 7 C.F.R. § 780.11(d) (2007).
192. 7 C.F.R. § 780.11(c) (2007).
193. 7 C.F.R. §§ 614.8(b)(2), 614.9(a)(3) (2007). Contact FLAG or visit the FLAG Web site, www.flaginc.org, for more information about NAD appeals.
194. The NAD Web site is <http://www.nad.usda.gov/>. NAD decisions may be searched at http://www.nad.usda.gov/public_search.html. While a NAD Director Review Determination would likely be binding upon a hearing officer, the decision of another hearing officer likely would not be.
195. 7 C.F.R. § 614.17 (2007).
196. 7 C.F.R. § 614.1 (2007).
197. 7 C.F.R. §§ 614.6(b)(3), 614.8 (2007).
198. 7 U.S.C. § 6999.
199. 7 C.F.R. § 635.7(d) (2007).

200. 7 C.F.R. § 635.6 (2007).
201. 7 C.F.R. § 635.6(a)(2) (2007).
202. 7 C.F.R. § 11.9(e) (2007).
203. 7 U.S.C. § 7996(f).
204. 7 C.F.R. pt. 635 (2007). *See also* Conservation Program Manual pt. 509.
205. 7 C.F.R. § 1466.33 (2007); 7 C.F.R. § 635.3 (2007); Conservation Program Manual § 509.01(d), “Acting in Good Faith—Misaction/Misinformation.”
206. 7 C.F.R. § 635.4 (2006). *See, for example*, NAD Director Review Determination 2006W000175 (May 25, 2006).
207. 7 C.F.R. pt. 15d (2007).
208. 7 C.F.R. § 1466.27(b)(1) (2007).
209. 7 C.F.R. § 1466.27(e)(1) (2007).
210. 7 C.F.R. § 1466.27(e)(2) (2007).
211. 7 C.F.R. § 1466.27(b)(5)(i-ii) (2007).
212. 7 C.F.R. § 1466.27(c)(2) (2007).
213. 7 C.F.R. § 1466.27(c)(2) (2007).
214. 7 C.F.R. § 1466.27(c)(3) (2007).
215. 7 C.F.R. § 1466.27(c)(1) (2007). The *Federal Register* is available on the Internet at <http://www.gpoaccess.gov/fr/index.html>.
216. 7 C.F.R. § 1466.27(f) (2007).
217. 7 C.F.R. § 1466.27(b)(4) (2007).
218. 7 C.F.R. § 1466.27(g) (2007).

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Farmers' Legal Action Group, Inc. (FLAG) is a 501(c)(3) nonprofit law center dedicated to providing legal services to family farmers and their rural communities in order to help keep family farmers on the land.

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