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**From:** jkaplan@nrdc.org  
**Sent:** Tuesday, October 05, 2004 7:29 PM  
**To:** FarmBillRules  
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**Subject:** NRDC comments on CSP Interim Final Rule

**Attachments:** NRDC\_CSP\_IFR.pdf



NRDC\_CSP\_IFR.pdf  
(168 KB)

Please find attached NRDC's comments on the Conservation Security Program Interim Final Rule.

<<NRDC\_CSP\_IFR.pdf>>  
We've moved! As of June 25, 2004 my new address is:

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NATURAL RESOURCES DEFENSE COUNCIL

October 5, 2004

Mr. Craig Derickson  
Conservation Security Program Manager  
Financial Assistance Programs Division  
USDA NRCS  
P.O. Box 2890  
Washington, DC 20013-2890

Re: Interim Final Rule for the Conservation Security Program

*Via U.S. Mail and electronic mail*

**RE: Comments on the Conservation Security Program; Interim Final Rule and Notice, 69 Fed. Reg. 34502 et seq. (June 21, 2004).**

Dear Mr. Derickson,

On behalf of the Natural Resources Defense Council ("NRDC") and its 550,000 members nationwide, we submit the following comments regarding NRCS's Interim Final Rule to implement the Conservation Security Program ("CSP") under the Farm Security and Rural Investment Act of 2002 ("2002 Farm Bill").

We are pleased to have an opportunity to comment on the Interim Final Rule ("IFR"). NRDC has supported the development of the Conservation Security Program and we continue to believe that CSP has the potential to become the agency's flagship conservation program. As the only entitlement-based conservation program in the 2002 Farm Bill, CSP can play a critical role in shifting controversial agricultural subsidies to "green box" payments that are allowed by the World Trade Organization and our trading partners. Fully implemented, the CSP can help producers throughout the US achieve a high level of environmental performance, reducing environmental liabilities and providing important public benefits, and begin the process of restructuring US farm bill policy to better accommodate our obligations in the global marketplace.

Overall, we are disappointed that NRCS continues to implement the CSP as a severely restricted program in which participation is limited to a handful of watersheds, arbitrarily created "categories," and biased toward stewards of soil and water quality at the expense of other resources. By designing this program as if it were capped—limiting its

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implementation to discrete areas, resources and practices – NRCS is missing an enormous opportunity to provide producers and the environment with a far-reaching conservation program. By severely restricting the scope of this program, NRCS may also discourage Congress from funding it fully in the future.

The following concerns and recommendations are detailed below:

1. **Make CSP available to all producers as required by law and eliminate references to limiting the program to priority watersheds.**
2. **Eliminate arbitrary enrollment “categories” and make CSP available to all producers.**
3. **NRCS should not limit CSP to the protection of soil and water quality, at the expense of ignoring other resources warranting conservation.**
4. **NRCS should eliminate the per-acre payment limitation on combined stewardship, existing practice, and enhancement payments.**
5. **NRCS should ensure that its resource quality criteria (also called ‘minimum level of treatment’) attain a non-degradation level of performance as intended by Congress.**
6. **To make CSP work on the ground, NRCS should develop guidelines for measuring compliance with NRCS quality criteria for specific resource considerations.**
7. **NRDC supports use of “enhancement payments” to promote on-farm demonstration projects and target CSP funds to state priorities.**
8. **NRCS should allow a broad array of conservation practices and must, at a minimum, include specific practices authorized by the 2002 Farm Bill.**
9. **NRCS should implement CSP on a rolling basis, rather than through an annual sign-up.**

**1. Make CSP available to all producers as required by law and eliminate references to limiting the program to priority watersheds.**

The IFR states that participation in the program will be limited to producers in select watersheds identified by the Secretary. IFR § 1469.5(d)(vi). The IFR further states: “It is not feasible to conduct a nationwide sign-up for any purpose because the technical assistance cost would far exceed the 15 percent cap.” IFR at 34505. By restricting program participation to a few select watersheds, NRCS is unlawfully excluding numerous qualified producers.

In fact, NRCS is obligated by statute to make CSP available to *all* eligible producers. The statute does not contain any terms that could be construed to geographically limit producer eligibility. Rather, the statute provides that in order to be eligible to participate in CSP, a producer must develop and submit a conservation security plan to USDA and enter into a conservation security contract. CSP § 1238A(b). The statute further states that private agricultural land, land under the jurisdiction of an Indian tribe, and incidental forested land “shall be eligible for enrollment in the conservation security program.” *Id.*

Congress' intent in making CSP available to all producers is also clearly evident in the CSP's legislative history. In the 2002 Farm Bill House Conference Report, the Managers state: "[We] expect the Secretary to implement the CSP in a manner that will allow all agricultural producers, including fruit and vegetable producers and livestock producers, to participate equitably in the program. The Managers also direct the Secretary to begin CSP at the full national level as soon as practicable." House Conference Report 107-424, p. 203.

There is no evidence in the IFR that NRCS has explored options to streamline the eligibility process to minimize administrative costs as necessary to comply with limited resources for technical assistance. Despite the fact that USDA manages to administer other entitlement-based programs serving thousands of producers nationwide, the IFR proposes, without any rational explanation, to limit CSP. NRCS determined that the program as implemented in FY 2004, during which time it was capped at only \$41.4 million, cannot be feasibly made available nationwide with a 15% cap on technical assistance. Yet, the IFR fails to explain why it cannot make this program available nationwide now that program funding has been uncapped by Congress.

Finally, allocating CSP funding through watersheds makes the program susceptible to political influence and creates new incentives for political interests to attempt to direct funding to key states, counties or districts that may or may not represent worthy conservation priorities.

Please note that NRDC does not categorically oppose targeting 2002 Farm Bill conservation programs to projects in priority watersheds. For other programs, such as the Environmental Quality Incentives Program, it may be good policy and sound interpretation of law to target program funding to priority hotspots, such as key watersheds. CSP, however, was explicitly designed as an entitlement program on par with other entitlement-based commodity assistance programs to create stewardship incentives for all producers.

NRDC Recommendation: CSP should be a nationwide program available to all types of producers in all regions of the country with all types of conservation objectives, as provided by law. Now that the program is uncapped, NRCS should make the program available to all producers as intended by Congress.

## **2. Eliminate arbitrary enrollment "categories" and make CSP available to all producers**

*Use of "categories" to restrict CSP implementation is unlawful*

Like the Proposed Rule issued in January of this year, the IFR provides that the Chief will announce enrollment categories and sub-categories that are eligible to be funded at the beginning of each sign-up period. IFR § 1469.6(b). In May, NRCS adopted categories and sub-categories for several types of land use. 69 Fed. Reg. 24560 et seq (May 4, 2004). For cropland, NRCS limited program participation to producers meeting criteria for increasing soil organic matter content and practicing conservation tillage. The proposed use of

categories and sub-categories will unlawfully deprive thousands of qualified producers from participating in CSP and stifle the program's ability to serve diverse regional needs.

NRCS has no statutory authority to use arbitrary categories to exclude large numbers of producers who are otherwise eligible from participation in the program. The statute provides guidelines for eligibility and clearly delineates the Secretary's authority in implementing the program. It specifically authorizes the Secretary to: 1) identify eligible CSP conservation practices in addition to those provided by statute, CSP § 1238A(d)(4); 2) identify criteria for implementing and maintaining CSP conservation practices, CSP § 1238A(d)(3)(A); and 3) determine if a conservation security plan is adequate to meet the appropriate non-degradation standard for one or more resources, CSP § 1238A(d)(5). None of these provisions, nor any other, allows the Secretary to exclude particular resources (e.g. air, water, soil, habitat, etc.) from the program. The statute does not mention or contemplate the use of additional "categories" as promulgated in the IFR.

To the contrary, several other provisions of the statute and in the legislative history clearly indicate that *all* resources should be eligible for conservation under CSP. Consider:

- The 2002 Farm Bill statute states that in implementing the CSP the Secretary shall carry out a program to assist producers with the "conservation and improvement of the quality of soil, water, air, energy, plant *and* animal life..." CSP § 1238A(a) (emphasis added).
- The statute identifies a list of 18 specific conservation practices that are eligible under the CSP. CSP § 1238A(d)(4). These include practices to protect water quality ("nutrient management"), water quantity ("water conservation"), soil ("soil conservation"), air quality ("air quality management"), energy ("energy conservation measures") and habitat (e.g. "fish and wildlife habitat restoration"). *Id.* The statute states that a producer may include any of these in a conservation security contract pursuant to the program, indicating a required option for the producer to address any of these resources.
- The 2002 Farm Bill House Conference Report states: "The Managers intend to assist agriculture producers to concentrate on resource problems, including soil, air water plant and animal (including wildlife) *and* energy conservation, on their particular operation using a *broad array of conservation practices.*" The 2002 Farm Bill House Conference Report 107-424, p. 203 (emphasis added). Here again, the legislative history clear shows that Congress intended the CSP to be widely available to help producers address multiple, diverse resource challenges. By contrast, the IFR seeks to restrict participation to a few geographic areas and limit participation to growers who fit in narrow, yet-to-be-defined, categories.

Therefore, the imposition of arbitrary categories, such as those promulgated by NRCS in May of this year limiting the program to producers with improved soil organic matter and that practice conservation tillage, is a violation of both the letter and the spirit of the 2002 Farm Bill.

*Top-down, one-size-fits all categories will result in poor implementation*

In addition to being inconsistent with the law, the use of nationally devised categories will result in poor implementation of the program on the ground -- especially if NRCS attempts to promulgate one-size-fits-all national categories imposed for use everywhere. The categories used to implement CSP in FY 2004 illustrate some of the pitfalls of pursuing this approach. In May, NRCS adopted categories for cropland based on growers' success in increasing organic soil content and practicing conservation tillage. 69 Fed. Reg. 24560 et seq (May 4, 2004). While the objectives of improving organic matter in soil and practicing conservation tillage are meritorious, they are inadequate as sole criteria for distinguishing model agricultural stewards. Growers who have innovated exemplary integrated pest management systems, created wildlife habitat on their farms, conserved energy or eliminated sources of priority air pollutants, among many others, may have been wrongfully denied participation under the program as implemented in FY 2004.

NRDC Recommendation: NRCS should eliminate the proposal to use categories and sub-categories as a means of reducing the number of program participants. If limiting program participation is necessary due to funding limitations, NRCS should devise a means of doing so that better reflects the priorities stated and implied in the statute.

**3. NRCS should not limit CSP to the protection of soil and water quality, at the expense of ignoring other resources warranting conservation.**

The IFR requires producers to achieve compliance with minimum treatment standards for soil and water quality as condition of being eligible for Tier I and II of the CSP. IFR § 1469.5(e). As a result, producers who achieve minimum treatment standards to comply with NRCS quality criteria for other resources, such as habitat, air quality, and energy efficiency, would be excluded from the program if they do not also attain NRCS' standards for soil and water quality.

As discussed above in detail, Congress intended the CSP to reward producers who implement a broad array of conservation practices and directed NRCS to make the CSP available to all producers who meet the program's eligibility requirements. We see no justification or authority for limiting the program to reward only those producers who conserve soil and water quality.

NRDC Recommendation: We urge NRCS to revise the IFR to allow any producer that attains NRCS' non-degradation standard for any resource concern (eg, air, water, soil, habitat, etc) to be eligible for program participation.

**4. NRCS should eliminate the per-acre payment limitation on combined stewardship, existing practice, and enhancement payments.**

The IFR inexplicably creates a new payment cap on total CSP payments, limiting the total combined stewardship, existing costs and enhancement payments to a percentage of the acreage rental rate times the number of acres enrolled. IFR § 1469.23(e)(5). This has the effect of creating a per-acre maximum payment, favoring large scale producers and producers in high-rent regions. Producers on smaller farms or in regions with lower rental

rates will be subject to a lower per-acre cap, even if they are providing greater environmental benefits.

The proposed per-acre cap is arbitrary and unsupported by law. The 2002 Farm Bill provides NRCS with clear instructions for capping CSP payments. The statute directs the Secretary to cap total program payments for each individual or entity covered by a conservation security contract, providing tier-specific limits to reward higher performance. CSP § 1238C(b)(2). This directive caps the total amount any individual producer may receive under the program annually. There is no other provision in the statute that allows the Secretary to impose further program caps.

In crafting the CSP, we believe Congress sought to balance the needs of large and small scale producers. NRCS' imposition of an arbitrary per-acre cap disrupts this balance. As a result, small family farm operations and producers in regions with lower rent rates will be placed at disadvantage.

NRDC's Recommendation: NRCS should eliminate the per-acre cap as promulgated in the IFR and cap payments to individual producers participating in the CSP at the levels set by Congress.

**5. NRCS should ensure that its resource quality criteria (also called 'minimum level of treatment') attain a non-degradation level of performance as intended by Congress.**

In commenting on NRCS' CSP Proposed Rule issued in January of 2004, NRDC requested that NRCS apply a "non-degradation" standard in determining eligibility for each Tier of the program. NRDC comments on CSP Proposed Rule, March 2, 2004. In its prefatory comments to the IFR, NRCS responded to this concern, stating that its resource quality criteria, as provided in Field Office Technical Guides (FOTGs), are the functional equivalent to the non-degradation standard defined in statute. 69 Fed. Reg. 34508 (June 21, 2004). The IFR also suggests that the Secretary has authority to determine "the level of measures needed to adequately protect, and prevent degradation of natural resources..." Id. Thus, with a few stated exceptions, NRCS will generally use its existing resource quality criteria as stated in NRCS FOTGs in place of the "non-degradation standard" referenced in the CSP statute, even if the existing resource criteria do not actually achieve non-degradation.

We disagree with NRCS' interpretation of the law on this matter. The statute states: "The term 'nondegradation standard' means 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 handbooks of the Natural Resource Conservation Service." CSP § 1238(8). Thus, while the Secretary may have discretion in identifying the level of performance that achieves resource protection and non-degradation, the Secretary is not authorized to set the standard at a level does not adequately protect the resource or that allows degradation of the resource. As we mentioned in our previous comments, some resource criteria in current FOTGs only require the producer to "minimize" an adverse impact. For example, the national resource criteria to protect water

quality from temperature is attained when the “[u]se and management of land and water are coordinated to minimize impacts on surface water temperatures.” Resource Quality Criteria, Water, NRCS, Davis, California, August 15, 2003. Surely, the Secretary cannot in good faith determine that this criterion will achieve non-degradation of the resource when the standard only requires degradation to be “minimized.”

NRDC Recommendation: NRCS should review its existing resource quality criteria and determine which criteria will actually achieve the standard set by Congress -- to adequately protect and prevent the degradation of the resource in question. Only those criteria that meet this test should be applicable to the CSP.

**6. To make CSP work on the ground, NRCS should develop guidelines for measuring compliance with NRCS quality criteria for specific resource considerations.**

The IFR requires producers to achieve compliance with minimum treatment standards for soil and water quality as condition of being eligible for Tier I and II of the CSP. IFR § 1469.5(e). Compliance with quality criteria for soil is determined to be achieved if the grower’s Soil Conditioning Index value is positive. IFR § 1469.5(e)(2)(i). For water quality, however, the IFR states only that the grower must meet or exceed quality criteria contained in NRCS technical guides for protecting surface water from pesticides, nutrients, salinity and sediment and for protecting groundwater from salinity. IFR § 1469.5(e)(2)(ii).

A cursory review of NRCS’ quality criteria or standards as contained in on-line Field Office Technical Guides indicates that some standards are only vaguely defined. As stated above, the national quality criteria for water include many instances where the standard is merely to “minimize” an impact. How will NRCS staff determine that a producer has attained this standard? For pesticides, nutrients and salts, the water quality standard is simply to apply, store, dispose of, or otherwise manage the material “so that surface water uses are not adversely affected.” Resource Quality Criteria, Water, NRCS, Davis, California, August 15, 2003. How will the producers or NRCS staffer know if surface water uses will be adversely affected by the practices approved in a conservation security contract? In such instances, the existing criteria are inadequate for use in evaluating a conservation security plan under the program.

NRDC Recommendation: We urge NRCS to develop more specific guidance for determining when a conservation security plan is in compliance with NRCS standards. To the extent practicable, this should include monitoring and reporting elements to field test the actual environmental performance of plan implementation. Once again, offering enhancement payments for demonstration and outreach projects will go a long way in helping NRCS demonstrate the environmental performance of specific practices and contracts.

**7. NRDC supports use of “enhancement payments” to promote on-farm demonstration projects and target CSP funds to state priorities**

While Congress tasked NRCS to make the CSP widely available to producers around the nation, it provided NRCS with flexibility in determining how “enhancement” payments might be used to reward specific practices. CSP § 1238C(b)(1)(C)(iii). The IFR states that NRCS may pay an enhancement payment to producers under a variety of circumstances, including, but limited to participation in on-farm conservation research, demonstration or pilot project or meeting a need identified by the State Conservationist, with advice from the State Technical Advisory Committee, that has been submitted to the Chief for concurrence. IFR § 1469.23(d)

In contrast with funding individual producers to implement conservation plans, on-farm demonstration projects by individual producers or groups of producers yield: 1) urgently needed contributions to our knowledge about the cost and efficacy of specific conservation practices; 2) increased likelihood that other producers will adopt effective conservation practices; and 3) greater accountability to taxpayers who will otherwise be funding conservation programs that get implemented in obscurity, resulting from NRCS’ confidentiality policies for individual conservation plans. In California, University of California researchers have partnered with growers to demonstrate Biologically Integrated Farming Systems on working farms to demonstrate alternative systems in almonds, apples, pears, rice, walnuts, wine grapes and other commodities. See <http://www.sarep.ucdavis.edu/>. These projects typically farm alternative systems next to conventionally farmed blocks so that direct comparisons can be made. Comprising only a handful of projects in a few commodities, these efforts have played a significant role in influencing California producers within specific commodities about more sustainable practices.

NRDC strongly supports the IFR’s provision enabling State Conservationists to develop additional criteria and funding levels for enhancement payments. We urge NRCS to delegate this decision-making function to the State Conservationist.

NRDC Recommendation: NRCS should make every effort to leverage CSP funds to promote on-farm demonstration of high-potential conservation practices and state plainly that enhancement payments *will* be available for such activities.

**8. NRCS should allow a broad array of conservation practices and must, at a minimum, include specific practices authorized by the 2002 Farm Bill.**

The IFR stipulates that the Chief will develop and make available to the public a list of eligible conservation practices and activities for each CSP payment component. IFR § 1469.8. In May of 2004, NRCS posted allowable practice standards and activities that are specific to the categories promulgated for CSP program implementation in FY 2004. 69 Fed. Reg. 24564 (May 4, 2004). For the top category for cropland, for example, producers were required to choose six out of eight required practices and activities from the subset of designated CSP “Stewardship” practices and activities. Id. This approach will greatly reduce the number and type of allowable practices eligible for CSP funding.

As noted above, the 2002 Farm Bill clearly identifies a broad list of 18 “practices that may be implemented by a producer under a conservation security contract.” CSP § 1238A(d)(4). These are broadly described and include practices that address air, water, soil, habitat and

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energy resources among others. The Secretary is authorized to add to this list or substitute practices with those that are “comparable,” but no authority is given to eliminate the types of practices so identified. CSP § 1238A(d)(4)(S).

In addition, the statute explicitly states that the Secretary may approve conservation security plans that include on farm conservation research and demonstration activities and pilot testing of new technologies. CSP § 1238A(d)(2). Unfortunately, the provision of the IFR describing allowable practices and NRCS’ plan to post new listings in the future fails to mention the acceptability of these activities.

In our comments on NRCS’ CSP Proposed Rule published in January of this year, we recommended that the final rule allow the full range of NRCS-approved practices to be eligible for CSP conservation plans (though we stipulated that they must achieve compliance with the non-degradation standard defined by statute, as discussed above). However, after comparing NRCS’ official “practices” with other stewardship activities, as differentiated in the May rule-making, we support replacing some NRCS practices with more progressive activities that may provide greater environmental benefit. 69 Fed. Reg. 24564 (May 4, 2004). For example, NRCS’ official Pest Management practice standard requires little effort by the grower to reduce pesticide use or switch to least-toxic alternative materials. This practice is properly replaced with activities that describe integrated pest management, use of beneficial insects, reducing the use of high-risk materials, etc, as promulgated in the list of CSP Stewardship “activities” in the May rulemaking. Where NRCS’ official practices are not adequate to assure environmental performance, we urge NRCS to revise them accordingly.

NRDC Recommendation: The final rule should allow a wide range of NRCS-approved practices, as well as progressive activities that may provide greater environmental benefit, to be eligible for CSP. However, livestock waste management practices and heavy equipment practices explicitly excluded in the statute should not be eligible for consideration in CSP conservation plans. At a minimum, this list should include the types of practices listed by statute and should explicitly authorize the inclusion and funding of on-farm demonstration and pilot testing of innovative practices. While there may eventually be a number of conservation practices that stand out as commonalities across CSP plans, having NRCS pick the “winners” upfront unnecessarily restricts flexibility and innovation.

**9. NRCS should implement CSP on a rolling basis, rather than through an annual sign-up.**

The IFR envisions infrequent, limited duration CSP enrollment periods, rather than the continuous sign-up process envisioned during congressional debate on the farm bill. IFR § 1469.20. This could make it difficult for farmers to sign-up if the limited period falls within planting and growing seasons. It would also concentrate requests for NRCS technical assistance in a limited period rather than spread out over the course of a full year.

NRDC Recommendation: The rule should provide for a predictable, continuous, nationwide signup process.

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Thank you for considering our comments. If you would like to discuss any of our recommendations further, please contact us. We look forward to working with NRCS at both the national and state level to implement CSP.

Sincerely,

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