

Wetlands Reserve Program Issues

DRAFT -- March 3, 2009

Change in Valuation Method and Payment Options

The USDA's adoption of the "Yellow Book" method for estimating the value of easements for Wetlands Reserve Program purposes caused problems in some states. As NRCS describes it, the (old) Yellow Book method estimated the impact of the easement on the landowner's properties as a whole; the (new/restored) USPAP assessment method only looks at the impact of the easement on the land parcel being put under easement. The two methods can result in very different estimates of residual recreation value in some circumstances.

The new law says the easement value cannot be greater than the market value of the land using the USPAP assessment value or an area-wide market analysis; the geographic cap set by the secretary; or the offer made by the landowner (Sec. 2205).

The proposed rule (Sec. 1467.8):

- * allows the State Conservationist to set area rate caps, with approval from the Chief (the area rate caps are already speeding up easements by eliminating the time and cost of a separate easement valuation);

- * Retains the payment rate for 30-year easements/contracts at 75% of the value of a permanent easement;

- * Provides for easements valued at more than \$500,000, that NRCS may provide a single payment (rather than annual payments) if it would "further the purposes of the program" as determined by the Chief. In the explanation, but not the rule, NRCS explains that for administrative efficiency it will make single payments unless the landowner requests installment payments.

SUGGESTIONS:

- O Address the fear that a State Conservationist could pick an area rate cap that is artificially low (and thus discourages enrollment), by suggesting a floor on the cap (e.g., at 75% of the land's value).

- O USDA to track and review offers and enrollment by state, and report on any substantial drops in these measures of participation, which would trigger a review of payments.

- O USDA to undertake a study of why WRP seems to be underutilized in some states, provide some recommendations for boosting utilization.

7-Year Ownership Criteria

The new law (Sec. 2203(b)) changes existing law to prohibit someone who has owned the land less than 7 years from enrolling, unless it was acquired through a will or succession, certain foreclosures, or where "the Secretary determines that the land was acquired under circumstances that give adequate assurances that such land was not acquired for the purposes of placing it in the program established by this subpart."

The proposed rule (Sec. 1467.4(c)) uses similar language, but leaves it to the State Conservationist to determine if the land is eligible, and adds descriptive language that says "such as the demonstration of status as a beginning farmer or rancher." This leaves the State Conservationists with lots of discretion, and does not indicate what other kinds of assurances could be appropriate (e.g., signed statements by the purchaser, the specific facts surrounding the

acquisition). In the field, NRCS employees are already using shorthand that implies that people need to have owned the land for 7 years to be eligible.

SUGGESTIONS:

O We need to provide an alternative, some language that gives state and local offices specific criteria that could establish eligibility, including: signed statements by buyer/seller, demonstrating that you are farming a substantial portion of the land you purchased; that you are a working farmer; that you own continuous land; that the circumstances of the sale indicate the purpose was not simply WRP enrollment. In addition, could provide a specific ‘de minimus’ test so if you are enrolling half or less of the land acquired when the purchase was made, you would be presumed to be eligible.

O Also need to emphasize the need for clarity in outreach to state and local NRCS offices and to landowners, so people don’t (wrongly) assume they are not eligible. State that landowner “may be ineligible” if they have held the land for less than 7 years.

Support for Maintenance

Congress allowed NRCS to pay for “necessary maintenance activities” as part of WRP agreements (Sec. 2207(a)). The proposed rule:

- * Includes “ensuring proper management or maintenance” as an “activity” under the definitions in 1467.3,

- * Provides for 75-100% cost-share assistance for “conservation practices or activities” for land enrolled in permanent easements (Sec. 1467.10(a)(1));

- * Provides for 50-75% cost-share for conservation practices or activities for land enrolled in 30-year contracts, non-permanent easements, or restoration cost-share agreements (Sec. 1467(a)(2);

QUESTION: Is it clear whether people with existing WRP easements could go in and ask for a revised WRPO, add maintenance activities that benefit the wetland, and collect maintenance payments?

Wetlands Reserve Enhancement Program

The new law (Sec. 2206) allows NRCS to enter into WREP agreements with a state, political subdivision, non-government organization, or Tribe. NRCS is already using WREP agreements, and it does not appear that the law puts restrictions or requirements on those.

The proposed rule (Sec. 1467.9) outlines NRCS procedures for selecting WREP projects, through an announcement in the Federal Register. The details on how NRCS will prioritize and rank applications, matching funding requirements, etc. are left for the annual announcement.

SUGGESTION:

O Provide some suggestions to USDA on how their WREP RFP should be written, what priorities and ranking provisions should be, etc. E.g., perhaps WREP’s should address some national or regional priority that isn’t necessarily met through state ranking.

O Suggest they replace an annual RFP (which could give people very little time) with a single RFP announcement that would be good for the duration of the Farm Bill, and then let states develop and submit WREP proposals as they are completed.

QUESTION: Does the new law or rule allow USDA to waive any restrictions or eligibility criteria that would otherwise apply to WRP?

Reserved Grazing Rights Pilot

The new law (Sec.2206) authorizes USDA to carry out a WREP pilot program involving reserved grazing rights, where those are compatible with the land subject to the easement, consistent with long-term wetland protection, and complies with a conservation plan.

The proposed rule (Sec. 1467(9)(b)) describes how NRCS will carry out the pilot:

* The language of the rule does not appear clear whether NRCS contemplates a single reserved rights pilot program WREP selected through the WREP process described above, or whether NRCS intends to offer the reserved grazing right option generally throughout the country (as part of a nationwide “pilot”?)

* The rule seems clear that the value of the reserved grazing right would be considered (and subtracted from) the WRP easement payment to the landowner.

SUGGESTION:

O Make it clear in the rule that USDA will carry out the pilot in a single geographic area, not nationwide.

O Provide a requirement that to approve reserved grazing rights, the grazing must promote wetland biological functions and provide habitat benefits, not just be a compatible use.

Hunting and Fishing Rights

The new law makes no mention of hunting or fishing rights.

The proposed rule (Sec. 1467(11)) requires that a WRP easement grant to the NRCS the right to permit compatible uses of the land, “including such activities as hunting and fishing, managed timber harvest,...” (this is similar to language in the Healthy Forests Reserve Program proposed rule). Traditionally, hunting and fishing rights have been reserved to the landowner, subject to state fish and wildlife agency regulation as necessary. There does not appear to be a need for the federal government to reserve hunting and fishing rights on WRP land.

SUGGESTION:

O Rather than restrict hunting/fishing rights, USDA should be promoting public access to the restored wetlands, and the local economic benefits that follow.

\$50,000 Limit on Restoration Cost-Share

The new law (Section 2205) limits cost-share to \$50,000 for restoration cost-share agreements. The rule (Section 1467.10):

* Says payment “for one or more restoration cost-share agreements, for any year, may not exceed \$50,000”;

* Does not appear to apply that payment limit to cost-share under the other enrollment methods (easements or 30-year Tribal contracts).

SUGGESTION:

We should offer support for this approach.

WRP on Semi-Public or Public Land

The new law restricts the purpose of the WRP to “restore, protect, or enhance wetlands on private or tribal lands...” (Sec. 2201). The proposed rule:

* (Sec. 1467.3) defines “private land” as land “that is not owned by a governmental entity, and includes acreage owned by Indian Tribes, as defined in this Part.” “Indian Tribe” includes any Tribe recognized “as eligible for the special programs and services provided by the United States to Indians...”

* The landowner must apply for the WRP under Sec. 1467.4(c), and the Adjusted Gross Income Limitation applies to all but Tribal applications. That would seem to preclude most semi-government agencies (e.g., public power districts) from participating.

* The proposed rule (Sec. 1467(10)(e)) also restricts the payments USDA can make to entities that acquire land with a WRP easement or contract but that are not eligible for WRP payments (e.g., a government entity acquiring WRP land). The original landowner would remain responsible for completing the restoration work and activities; or the new entity would need to agree to complete the work without payments from NRCS; or NRCS would seek a refund of payments from the original landowner.

SUGGESTION:

○ The rules appear to go too far to restrict the transfer of property once an easement or agreement is in place, which could scare away potential participants. May be a mis-reading of recent court decisions.

○ The rules are not clear about how an organization like a cooperative would be treated under the AGI limits. Sometimes those agencies/organizations are in a better position to maintain the ecological value of the wetland long term. The rules are also not clear about what, if anything, would happen if an easement holder has a good year and bounced above the AGI limit.

Ecosystem Service Credits

The new law does not appear to mention ecosystem service credits in the WRP section. (Sec. 2709 requires USDA to establish guidelines for valuing environmental service benefits).

The proposed rule (Sec. 1467.20(b):

* Recognizes that the practices and activities funded under a WRP agreement could produce ecosystem service credits (e.g., carbon credits);

* Asserts no direct interest on the part of NRCS in those credits;

* Retains authority for NRCS to ensure that the WRP plan is carried out, and encourages landowners to request a compatibility assessment from NRCS before entering into agreements for environmental credits.

SUGGESTION:

○ USDA should set the last paragraph apart, so it is not buried in the ecosystem services section. USDA should also expand the language in that paragraph, so it does not just refer to the inability to use WRP agreements to mitigate USDA conservation requirements, but also notes that such agreements cannot be used to offset other federal mitigation requirements (e.g., Corps of Engineers permits or requirements).

Waiver of Acreage Cap

The rule does not appear to provide waiver authority for USDA to waive the cap on acres of WRP that can be enrolled in a county. Is that because of a change in statutory language?

Enrollment of Riparian Areas

The rule appears to have actually made it harder (not easier) to enroll riparian areas. The rules do not appear to have made the change alluded to in the Managers Explanation. And, the rule was changed to permit riparian lands only if they are incidental to the enrollment of other lands that are eligible for the WRP.

SUGGESTION

O The rules should be rewritten to restore the eligibility of riparian land, even if not incidental to the enrollment of wetland acres, and the rules should be changed to reflect the intent of the Managers Explanation to make riparian lands eligible for WRP.

Setting Priorities

Section 1467.6 provides new language with respect to setting priorities for WRP enrollment.

SUGGESTION:

The rule should not have language in it that ‘takes into account future food needs’ when determining WRP easement priorities. The purpose of the program is to restore wetlands.

Flooded Farmland

The new law adds certain flooded farm land to the eligibility criteria for WRP. The rule includes a definition that limits the wetland to not more than 6.5 feet deep.

SUGGESTION:

The rule should further limit the eligibility to areas that are restorable to wetland functions and habitat, and they should include a requirement for planting appropriate wetland vegetation in these areas.

Contract Modifications

SUGGESTION

We should support the language in the rule that allows for contract modifications only where the modification provides more economic and ecosystem benefits to the government.

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