



# Conservation<sup>1</sup>

## INTRODUCTION

The farm bill attempts to address a variety of national environmental challenges associated with agriculture. Title II of the 2014 Farm Bill, the Conservation Title, provides billions of dollars to support voluntary conservation through an array of voluntary programs, as well as mandatory protections for soil and wetlands known as *conservation compliance*.<sup>2</sup>

Environmentalists, public health advocates and rural leaders worry that America's agricultural policies have contributed to widespread depreciation and misuse of natural resources, levying local tolls on natural resources while threatening the country's ability to ensure a robust and sustainable food system into the future.<sup>3</sup> Others note that agriculture policy largely ignores changes to the climate, including agriculture's role in mitigation and need for adaptation.<sup>4</sup> Although they often disagree around specifics, many observers agree that reform of farm bill conservation policy and implementation could result in significant improvements in soil, air, water and biodiversity.<sup>5</sup> For example, changes to the existing conservation compliance regime could address a range of challenges from rural development, soil health, agricultural resilience to the effects of climate change, and public health.

The first section of this backgrounder surveys the history and evolution of farm bill conservation programs since the 1930s. Section II provides an overview of the Conservation Title of the 2014 Farm Bill. The final section outlines and identifies several key issues that will inform debate as Congress considers conservation reform in the next farm bill.

## I. HISTORY

Since its inception, the farm bill has contemplated the important balance between agricultural use and conservation of the nation's natural resources. While early programs focused on maintaining the quality of resources necessary for agricultural production (such as soil), the modern regime reaches beyond *working lands*—acres under active agricultural production—to include wetlands and wildlife habitats.<sup>6</sup> In the past three decades, farm bill conservation programs expanded in both scope and funding.

### A. *The Inception and Early Years*

Responding to the Dust Bowl in the 1930's, Congress created the Soil Conservation Service—now the Natural Resources Conservation Service (NRCS)—as a permanent agency within the United States Department of Agriculture (USDA) for the purpose of conserving natural resources that underpin

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<sup>2</sup> *Conservation: Title II and Title XI (Crop Insurance)*, ECON. RESEARCH SERV., U.S. DEP'T. OF AGRIC., <https://www.ers.usda.gov/agricultural-act-of-2014-highlights-and-implications/conservation>.

<sup>3</sup> See Laurie Ristino and Gabriela Steier, *Losing Ground: a Clarion Call for Farm Bill Reform to Ensure a Food Secure Future*, 42 COLUM. J. ENVTL. L. 1, Fig. 2 at 67 (2016) Electronic copy available at: <https://ssrn.com/abstract=2887584>; see also J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 274 (2000).

<sup>4</sup> J.P. Reganold et al., *Transforming U.S. Agriculture*, 332 SCIENCE 670, 670-71 (2011) Electronic copy available at: <http://science.sciencemag.org/content/332/6030/670.full>.

<sup>5</sup> MEGAN STUBBS, CONG. RESEARCH SERV., R42093, AGRICULTURE CONSERVATION AND THE NEXT FARM BILL 5 (2012) <https://www.fas.org/sgp/crs/misc/R42093.pdf>.

<sup>6</sup> *A Short History and Summary of the Farm Bill*, FARM POLICY FACTS, <https://www.farmpolicyfacts.org/farm-policy-history>.



American agriculture, especially soil.<sup>7</sup> Programs from this era, including the Agricultural Conservation Program, paid farmers to shift production from soil-depleting crops to soil-conserving crops.<sup>8</sup> These programs provided technical support administered through newly created county-level Soil Conservation Districts. The Districts, which have endured, provided localized technical support to farmers.<sup>9</sup>

Farm bill conservation provisions expanded in 1956 with the creation of the Soil Bank, which USDA used to pay farmers who took land out of production.<sup>10</sup> From the beginning, the program was criticized for harming local economies, failing to restrict activities on non-enrolled farmland, and disproportionately benefitting large farms.<sup>11</sup> The original Soil Bank Program, which included both the Acreage Reserve Program and the Conservation Reserve Program (CRP), was phased out in the 1970s. The CRP survived with modifications designed to address many of the criticisms of the soil bank, and has continued to be an active conservation program through the 2014 Farm Bill.<sup>12</sup>

### *B. An Increased Focus on Conservation*

As Congress passed sweeping environmental legislation in the 1970s, including the modern Clean Air Act (1970), the Clean Water Act (1972), and the Endangered Species Act (1973), farm bill conservation programs focused on technical and financial assistance to farmers in order to meet conservation objectives.<sup>13</sup> Congress and the USDA also created new accountability and oversight authorities in order to demonstrate the effectiveness of these conservation programs.<sup>14</sup>

In 1985 conservation became a standalone title in the farm bill, as Congress recognized that conservation had benefits beyond increased agricultural productivity.<sup>15</sup> For the first time, legislators attempted to address natural resource concerns by conditioning participation in certain farm bill programs upon the fulfillment of environmental stewardship requirements.<sup>16</sup> In particular, farmers risked losing significant agricultural subsidies unless they complied with highly erodible land conservation (“sodbuster”) and

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<sup>7</sup> *History of NRCS*, NAT. RES. CONSERVATION SERV., U.S. DEP’T. OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/about/history>.

<sup>8</sup> USDA, ECON. RESEARCH SERV., HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS 1933-84, at 11 (1984), <https://naldc.nal.usda.gov/download/CAT10842840/PDF>.

<sup>9</sup> Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES (4th quarter 2004); *80 Years of Helping People Help the Land: A Brief History of the NRCS*, NAT. RES. CONSERVATION SERV., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143\\_021392](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392) (last visited Dec. 10, 2016).

<sup>10</sup> Agricultural Act of 1956, Pub. L. 84-540, 70 Stat. 188, <http://nationalaglawcenter.org/wp-content/uploads/assets/farmbills/1956.pdf>; Lichtenberg, *supra* note 1; J. DOUGLAS HELMS, NAT. RES. CONSERVATION SERV., BRIEF HISTORY OF THE USDA SOIL BANK PROGRAM 1-2 (1985), [https://nitcnrcsbase-www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1045666.pdf](https://nitcnrcsbase-www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045666.pdf).

<sup>11</sup> J. DOUGLAS HELMS, NAT. RESOURCES CONSERVATION SERV., U.S. DEP’T OF AGRIC., BRIEF HISTORY OF THE USDA SOIL BANK PROGRAM 1-2 (1985), [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/stelprdb1045666.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1045666.pdf).

<sup>12</sup> PATRICK SULLIVAN ET AL., USDA, THE CONSERVATION RESERVE PROGRAM: ECONOMIC IMPLICATIONS FOR RURAL AMERICA 3 (2004), <https://naldc.nal.usda.gov/download/34810/PDF>.

<sup>13</sup> J. DOUGLAS HELMS, NAT. RESOURCES CONSERVATION SERV., U.S. DEP’T OF AGRIC., TECHNICAL ASSISTANCE – THE ENGINE OF CONSERVATION (2005), [https://www.nrcs.usda.gov/Internet/FSE\\_DOCUMENTS/nrcs143\\_021142.pdf](https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021142.pdf)

<sup>14</sup> *Id.*

<sup>15</sup> Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES (4th quarter 2004); *80 Years of Helping People Help the Land: A Brief History of the NRCS*, NAT. RES. CONSERVATION SERV., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143\\_021392](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/about/history/?cid=nrcs143_021392) (last visited Dec. 10, 2016).

<sup>16</sup> Ristino & Steier, *supra* note 3, at 88 (citing STUBBS, *supra* note 5, at 1).



wetland conservation (“swampbuster) requirements,”<sup>17</sup> which together comprised *conservation compliance*.<sup>18</sup>

The Sodbuster provisions applied only to highly erodible land (HEL),<sup>19</sup> as designated by NRCS. Farmers may still cultivate HEL without losing program benefits if they follow an NRCS-approved conservation plan designed to reduce soil erosion.<sup>20</sup> Similarly, the Swampbuster or wetland conservation compliance provision prohibited the conversion of wetlands by producers for the purposes of producing a crop.<sup>21</sup> Since their introduction 1985, conservation compliance requirements have been amended in each successive farm bill, including in 2014.<sup>22</sup>

In addition to conservation compliance, the other conservation legacy of the 1985 Farm Bill was the creation of the Conservation Reserve Program (CRP). Shortly thereafter the 1990 Farm Bill created the Wetlands Reserve Program (WRP). Together, CRP and WRP payed farmers to take environmentally sensitive land out of agricultural production and dedicate such areas to long-term conservation.<sup>23</sup>

In 1996, the Conservation Title added the Environmental Quality Incentives Program (EQIP) and the Wildlife Habitat Incentives Program (WHIP), which initiated a shift toward cost-share assistance on working lands.<sup>24</sup>

### C. *The Contemporary Conservation Title*

Since its inception in 1985, the Conservation Title has grown in successive farm bills to include new programs and a larger budget. By 2008 the Conservation Title accounted for about 9 percent of total mandatory farm bill spending, or approximately \$8 billion in annual funding.<sup>25</sup> These funds supported a wide variety of programs, from financial assistance for farmers engaged in conservation efforts to watershed rehabilitation efforts led by states or conservation organizations.<sup>26</sup>

When Congress reauthorized the farm bill in 2014, however, Title II's growth trend ceased. Congress cut or consolidated a number of programs and reduced overall funding in the face of tightening fiscal policy.<sup>27</sup> Currently, the Conservation Title accounts for about 6 percent of expected farm bill spending, or

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<sup>17</sup> MEGAN STUBBS, CONG. RESEARCH SERV., R43504, CONSERVATION PROVISIONS IN THE 2014 FARM BILL (P.L. 113-79), 13 (2014), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43504.pdf>.

<sup>18</sup> Food Security Act of 1985, Pub. L. No. 99-198, 99 Stat. 1354 (1985) (currently codified in relevant part at 16 U.S.C. § 3831 (2012 & Supp. III 2015) (CRP); *id.* §§ 3811, 3821 (Sodbuster and Swampbuster)); *see* RISTINO & STEIER, *supra* note 3, at 89.

<sup>19</sup> “Sodbuster” technically refers to land not in cultivation prior to passage of the 1985 Farm Bill and the associated conservation requirements, and HEL compliance refers to compliance requirements for those highly erodible lands in production prior to 1985.

<sup>20</sup> STUBBS, *supra* note 17, at 13-14.

<sup>21</sup> The Swampbuster provision prohibits agricultural production on wetlands converted after December 23, 1985 and prohibits converting a wetland after November 28, 1990 in order to produce agricultural commodities (16 U.S.C. §3821 (2014)).

<sup>22</sup> For a more detailed summary of the succession of legislative changes to conservation compliance since 1985, *see* MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY, 14 (2016), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42459.pdf>.

<sup>23</sup> Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES (4th quarter 2004).

<sup>24</sup> JANIE SIMMS HIPPE & COLBY D. DUREN, REGAINING OUR FUTURE: AN ASSESSMENT OF RISKS AND OPPORTUNITIES FOR NATIVE COMMUNITIES IN THE 2018 FARM BILL 33 (2017), [http://seedsofnativehealth.org/wp-content/uploads/2017/06/Farm-Bill-Report\\_WEB.pdf](http://seedsofnativehealth.org/wp-content/uploads/2017/06/Farm-Bill-Report_WEB.pdf).

<sup>25</sup> JIM MONKE & RENEE JOHNSON, ACTUAL FARM BILL SPENDING AND COST ESTIMATES 3 (2010), <http://www.farmpolicy.com/wp-content/uploads/2010/10/CRSFrmBillSpending10Oct7.pdf>.

<sup>26</sup> 2008 Farm Bill Archive, NAT. RES. CONSERVATION SERV., U.S. DEP'T. OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/farmbill/archived/>

<sup>27</sup> *See* Food, Conservation, and Energy Act of 2014, Pub. L. 113-79, 128 Stat. 649; *see also* STUBBS, *supra* note 17, at 1.



\$58 billion of the total \$956 billion authorized over the 10-year period starting in 2014 (roughly \$5 billion per year).<sup>28</sup>

## II. 2014 FARM BILL

Like its predecessors, the Conservation Title of the 2014 Farm Bill includes both required and voluntary conservation programs. The 2014 Farm Bill did little to change how conservation compliance is determined or the scope of lands covered by its requirements, although the Crop Insurance Title did make so-called sodsaver provisions mandatory in six states, where planting into native sod now reduces benefits under both the federal crop insurance and noninsured crop disaster assistance programs.<sup>29</sup> In addition, the 2014 Farm Bill made one significant change to conservation compliance by altering the list of program benefits threatened by non-compliance. Specifically, Congress re-linked conservation compliance to the receipt of federal crop insurance subsidies at the same time that it dramatically expanded the federal crop insurance program.<sup>30</sup> With the re-linking of baseline conservation measures and crop insurance subsidies—the two were previously linked until the 1996 Farm Bill—the current list of programs requiring compliance grew to include crop insurance, commodity support payments, disaster payments, voluntary conservation programs, and farm loans.<sup>31</sup>

In contrast to the moderate changes made to conservation compliance, the 2014 Farm Bill made some sweeping changes to Title II's suite of *voluntary* conservation programs. Consequently, 12 of the more than 20 preexisting conservation programs were either repealed or consolidated.<sup>32</sup> Current programs fit into one of three general categories: 1) land retirement programs, 2) working lands programs, and 3) easement programs. The 2014 Farm Bill continued the trend of shifting funding away from land retirement and easement programs, such as CRP, and toward working lands programs.<sup>33</sup> There are also several smaller programs that do not fit easily under any of these broad categories. Each is discussed in more detail below.

### A. Land Retirement Programs

Land retirement programs pay producers to temporarily remove environmentally sensitive farmland from production through 10-15 year contracts.<sup>34</sup> The modern Conservation Reserve Program (CRP)<sup>35</sup> dates to the 1985 Farm Bill and is by far the largest land retirement program.<sup>36</sup> In the 2014 Farm Bill, total enrollment is capped and will be reduced to 24 million acres by 2018. This represents a decrease from the 32 million acre target in the 2008 Farm Bill.<sup>37</sup> Reduced total CRP enrollment availability combined with persistently low commodity prices increases competition to enroll in CRP, as some farmers can receive higher and more stable payments through conservation programs than through crop production.<sup>38</sup> This

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<sup>28</sup> RALPH M. CHITE, CONG. RESEARCH SERV., THE 2014 FARM BILL (P.L. 113-79): SUMMARY AND SIDE-BY-SIDE 8 (2014), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R43076.pdf>

<sup>29</sup> MEGAN STUBBS, CONG. RESEARCH SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY, 17 (2016), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42459.pdf>.

<sup>30</sup> 16 U.S.C. §3811(A)(1)(E).

<sup>31</sup> STUBBS, *supra* note 29, AT 6.

<sup>32</sup> STUBBS, *supra* note 17, at 5.

<sup>33</sup> *Id.* at 3.

<sup>34</sup> *Id.*

<sup>35</sup> 16 U.S.C. § 3831. Contracts under the CRP range from 10 to 15 years.

<sup>36</sup> STUBBS, *supra* note 17, at 9.

<sup>37</sup> See 16 U.S.C. § 3831(d); *Id.*

<sup>38</sup> Christopher Doering, *CRP attracting record number of farmers*, DES MOINES REGISTER, May 5, 2016, <http://www.desmoinesregister.com/story/money/agriculture/2016/05/05/crp-attracting-record-number-farmers/83935048>.



scenario played out in 2015 when volatile commodity prices and CRP acreage caps led to the most competitive enrollment period in the CRP's 30-year history.<sup>39</sup> The CRP contains a number of subprograms: the Conservation Reserve Enhancement Program (CREP), in which states partner with USDA to address local and state priority issues; and the Farmable Wetlands (FW) program, which pays farmers to restore wetland habitat previously under cultivation. Additionally, grassland contracts, reminiscent of the discontinued Grassland Reserve Program, are now included in the CRP.<sup>40</sup>

### *B. Working Lands Programs*

Working lands programs offer financial incentives for producers to adopt resource-conserving practices on land that is under active production.<sup>41</sup> There are three working lands programs: the Conservation Stewardship Program (CSP),<sup>42</sup> the Environmental Quality Incentives Program (EQIP),<sup>43</sup> and the Agricultural Management Assistance program (AMA),<sup>44</sup> the first two of which are authorized under Title II and receive significant funding.

CSP “provides comprehensive conservation assistance to whole farms and working lands to resolve particular resource concerns in a given location.”<sup>45</sup> Through 5-year contracts, the NRCS pays producers “to address priority resource concerns and improve and conserve the quality and condition of natural resources in a comprehensive manner by undertaking additional conservation activities; and by improving, maintaining, and managing existing conservation activities.”<sup>46</sup> These activities include cover cropping, resource-conserving crop rotations, and alternative tillage systems, among hundreds of others.<sup>47</sup> The CSP is competitive, and applicants must meet a “conservation stewardship threshold”<sup>48</sup> for at least two priority resource concerns,<sup>49</sup> such as air quality, soil erosion, and soil and water quality.<sup>50</sup> Applications are ranked on a point-based system, according to five factors related to conservation performance.<sup>51</sup> The NRCS scores the CSP's various conservation practices and “enhancements” — both

<sup>39</sup> FARM BUREAU, WHAT IS THE CONSERVATION RESERVE PROGRAM AND HOW IS IT WORKING? (2016), [http://www.fb.org/files/2018FarmBill/CRP\\_and\\_How\\_is\\_it\\_Working.pdf](http://www.fb.org/files/2018FarmBill/CRP_and_How_is_it_Working.pdf).

<sup>40</sup> 16 U.S.C. § 3831(b)(3). The Grassland Reserve Program was an easement program and was consolidated into the CRP. Other easement programs, including the Farmland Protection Program (FPP) and Wetland Reserve Program (WRP), were consolidated into the Agricultural Conservation Easement Program. Unlike FPP and WRP, however, which continue as easements, grasslands are now treated through land retirement.

<sup>41</sup> STUBBS, *supra* note 17, at 3.

<sup>42</sup> 16 U.S.C. § 3838e.

<sup>43</sup> 16 U.S.C. § 3838.

<sup>44</sup> 7 U.S.C. § 1524(b). The AMA is generally considered a conservation program, but it is located in Title XI (crop insurance).

<sup>45</sup> NAT'L SUSTAINABLE AG. COAL., FARMERS' GUIDE TO THE CONSERVATION STEWARDSHIP PROGRAM 2 (2015), <http://sustainableagriculture.net/wp-content/uploads/2015/02/CSP-Farmers-Guide-2015-final.pdf>.

<sup>46</sup> 16 U.S.C. § 3838e(a). Priority resource concerns can be developed at the federal, state, or even local level. *See* 16 U.S.C. § 3838d(5). “Each NRCS State Conservationist . . . identifies priority resource concerns that are specific to the state, area of the state, or individual watersheds within the state.” SUSTAINABLE AG. COAL., *supra* note 45; *see also* 7 C.F.R. § 610.24 (2016).

<sup>47</sup> NAT. RESOURCES CONSERVATION SERV., U.S. DEP'T OF AGRIC., CONSERVATION STEWARDSHIP PROGRAM CONSERVATION ACTIVITY LIST (2015), available at:

[https://www.nrcs.usda.gov/wps/pa\\_NRCSConsumption/download?cid=stelprdb1268673&ext=pdf](https://www.nrcs.usda.gov/wps/pa_NRCSConsumption/download?cid=stelprdb1268673&ext=pdf).

<sup>48</sup> “The term ‘stewardship threshold’ means the level of management required, as determined by the Secretary, to conserve and improve the quality and condition of a natural resource.” 16 U.S.C. § 3838d(7).

<sup>49</sup> 16 U.S.C. § 3838f(a), (b).

<sup>50</sup> *CSP 2011 Priority Resource Concerns and Ranking Pools*, NAT. RESOURCES CONSERVATION SERV. (KANSAS), U.S. DEP'T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ks/programs/financial/csp/?cid=nrcs142p2\\_032895](https://www.nrcs.usda.gov/wps/portal/nrcs/detail/ks/programs/financial/csp/?cid=nrcs142p2_032895).

<sup>51</sup> *CMT Scoring Process One Pager*, NAT. RESOURCES CONSERVATION SERV., U.S. DEP'T OF AGRIC., [https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcs143\\_008316](https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcs143_008316);

*Conservation Stewardship Program – Payment for Performance*, NAT. RES. CONSERVATION SERV., [https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcs143\\_008316](https://www.nrcs.usda.gov/wps/portal/nrcs/detailfull/national/programs/financial/csp/?cid=nrcs143_008316) (last visited Dec. 18,



individual enhancements and bundles of enhancements.<sup>52</sup> The bundles are grouped around likely farm setups: for instance, bundles exist for crop technology, pasture grazing, and range grazing.<sup>53</sup> Accordingly, “[a]pplicants who choose to implement a bundle of enhancements will receive an increase in ranking points and payments compared to those who employ individual enhancements.”<sup>54</sup>

Whereas CSP prioritizes conservation activities, EQIP prioritizes capital investments in conservation. The program offers funds for a wide variety of environmental improvements and efforts to meet clean air and clean water regulations.<sup>55</sup> EQIP contracts, which provide cost-share funds to producers, run as long as 10 years. As of the 2014 Farm Bill, 60 percent of EQIP funding must go to the livestock industry, and at least 5% of EQIP funds must be targeted for the “restoration, development, protection, and improvement of wildlife habitat[s].”<sup>57</sup>

### C. Easement Programs

A conservation easement “impose[s] a permanent land-use restriction that is voluntarily placed on the land in exchange for a government payment.”<sup>56</sup> There are two farm bill easement programs: the Agricultural Conservation Easement Program (ACEP)<sup>57</sup> and the Healthy Forests Reserve Program (HFRP).<sup>58</sup> ACEP is a new program resulting from the consolidation of three prior programs: the Wetlands Reserve Program, the Grasslands Reserve Program, and the Farmland Protection Program.<sup>59</sup> The ACEP creates two easements: agricultural land easements, which require land to be used for agricultural purposes, and wetland reserve easements, which require protection and restoration of wetlands.<sup>60</sup> The HFRP creates long-term easements “to promote the recovery of threatened and endangered species, to improve biodiversity, and to enhance carbon sequestration.”<sup>61</sup>

### D. Other Programs

There are other programs that do not fit easily into the above categories. For instance, the Regional Conservation Partnership Program (RCPP)<sup>62</sup> facilitates partnerships with “state and local governments,

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2016). Currently, the NRCS scores applications with the Conservation Management Tool; however, beginning in 2017, it will use a similar but different scoring tool called the Application Evaluation and Ranking Tool. *See* NB 300-16-19 LTP – Development of Local Ranking Questions for Conservation Stewardship Program (CSP) Application Evaluation and Ranking Tool, Apr. 12, 2016, [https://www.nrcs.usda.gov/wps/PA\\_NRCSCconsumption/download?cid=nrcseprd1292027&ext=pdf](https://www.nrcs.usda.gov/wps/PA_NRCSCconsumption/download?cid=nrcseprd1292027&ext=pdf).

<sup>52</sup> *See* NAT. SUSTAINABLE AG. COAL., 2015 CONSERVATION STEWARDSHIP PROGRAM SIGN-UP: INFORMATION ALERT 10 (2015), [http://sustainableagriculture.net/wp-content/uploads/2015/02/2015\\_2-CSP-Information-Alert-v2-with-ranking-and-extension-FINAL.pdf](http://sustainableagriculture.net/wp-content/uploads/2015/02/2015_2-CSP-Information-Alert-v2-with-ranking-and-extension-FINAL.pdf); *see also* 2016 Enhancement Activity Job Sheets, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/financial/csp/?cid=nrcseprd421806> (last visited Nov. 29, 2016); NAT. SUSTAINABLE AG. COAL., *supra* note 45, at 23, 26.

<sup>53</sup> NAT’L SUSTAINABLE AG. COAL., *supra* note 45, at 23.

<sup>54</sup> *Id.*

<sup>55</sup> NAT. RESOURCES CONSERVATION SERV., U.S. DEP’T OF AGRIC., ENVIRONMENTAL QUALITY INCENTIVES PROGRAM (2017), available at: <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/>.

<sup>56</sup> DANIEL IMHOFF, FOOD FIGHT: THE CITIZEN’S GUIDE TO THE NEXT FOOD AND FARM BILL 58 (2012); *see* 16 U.S.C. § 3839aa; *see also* Environmental Quality Incentives Program, NAT’L SUSTAINABLE AG. COAL., <http://sustainableagriculture.net/publications/grassrootsguide/conservation-environment/environmental-quality-incentives-program/> (last visited Nov. 29, 2016); FARM BUREAU, WHAT IS THE ENVIRONMENTAL QUALITY INCENTIVES PROGRAM AND HOW IS IT WORKING? (2016), <http://www.fb.org/farmbillworkinggroup/docs/Environmental%20Quality%20Incentives%20Program.pdf>.

<sup>57</sup> 16 U.S.C. § 3865.

<sup>58</sup> 16 U.S.C. §§ 6571–6578.

<sup>59</sup> STUBBS, *supra* note 17, AT 10.

<sup>60</sup> *See* 16 U.S.C. §§ 3865a–3865c.

<sup>61</sup> 16 U.S.C. § 6571(a).

<sup>62</sup> 16 U.S.C. § 3871b.



Indian tribes, cooperatives, and other organizations for conservation on a regional or watershed scale.”<sup>63</sup> RCPP’s hundreds of millions of dollars in mandatory federal funding is further leveraged by requiring significant investment by local, state and other partners.

Additionally, the Voluntary Public Access and Habitat Incentive Program (VPAHIP) creates a system of “grants to encourage owners and operators of privately-held farm, ranch, and forest land to voluntarily make that land available for access by the public for wildlife-dependent recreation, including hunting or fishing.”<sup>64</sup> Finally, the Conservation Innovation Grants program (CIG) offers payments to conduct research into innovative conservation practices and technologies.<sup>65</sup>

### III. KEY ISSUES

The Conservation Title's programs and budget provide significant opportunities to address a variety of natural resource management challenges. As Congress considers how to effectuate its conservation agenda through farm bill legislation, there are a number of key issues that perennially surface with respect to Title II programs. This section surveys some of these key issues.

#### A. Conservation Compliance and Soil Health

Despite decades of efforts to decrease soil erosion through Title II's conservation compliance requirements, many have noted that poor soil health remains a significant issue on U.S. farm- and rangelands.<sup>66</sup> In particular, critics point to numerous exemptions in the Sodbuster and Swampbuster standards (such as size and good faith provisions<sup>67</sup>) that undermine the effectiveness of these programs to preserve soil health on agricultural lands.<sup>68</sup>

Conservation compliance has also been criticized for allowing high acceptable erosion rates. In particular, producers may receive conservation payments even when soils are eroding at unsustainable rates.<sup>69</sup> In implementing the 1985 Farm Bill highly erodible land (HEL) requirements, NRCS established soil reduction requirements in the form of tolerance (“T”) rates.<sup>70</sup> NRCS set a 2T on HEL lands, meaning that even on lands classified as highly susceptible to erosion, an erosion rate occurring twice as fast as replenishing rates are considered acceptable.<sup>71</sup> Such a standard explicitly allows for a net loss of soils. Thus, while the 2014 Farm Bill “re-established the applicability of the Highly Erodible Land Conservation and Wetland Conservation provisions to crop insurance subsidies,” some researchers have argued that these efforts to improve soil quality were largely undercut as there was no change to the underlying determinations of HEL.<sup>72</sup>

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<sup>63</sup> RENÉE JOHNSON & JIM MONKE, CONG. RESEARCH SERV., WHAT IS THE FARM BILL? (RPT. RS22131) (2016), <https://fas.org/sgp/crs/misc/RS22131.pdf>.

<sup>64</sup> 16 U.S.C. § 3839bb-5(a).

<sup>65</sup> 16 U.S.C § 3939aa-8. CIG is technically a subprogram of EQIP but is routinely classified as an “other” program. *See* STUBBS, *supra* note 17, AT 13.

<sup>66</sup> Ristino & Steier, *supra* note 3, at 67.

<sup>67</sup> Jonathan Coppess, REVIEWING USDA'S REVISED CONSERVATION COMPLIANCE, FARMDOCDAILY (5):80 (2015), <http://farmdocdaily.illinois.edu/2015/05/reviewing-usda-revised-conservation.html> (last visited Jul 11, 2017).

<sup>68</sup> STUBBS, *supra* note 17, AT 13-14; *see also* 16 U.S.C § 3822(b) (2014).

<sup>69</sup> 7 C.F.R. § 12.20-23 (2015).

<sup>70</sup> *Erosion*, NAT. RES. CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/crops/erosion> [<https://perma.cc/CGY4-49YE>].

<sup>71</sup> 7 C.F.R. § 12.20-23 (2015).

<sup>72</sup> *2014 Farm Bill -- Conservation Compliance*, NAT. RES. CONSERVATION SERV., U.S. DEP’T. OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/programs/farmbill/?cid=stelprdb1257899>



Additionally, some have pointed out that conservation compliance also fails to account for the great deal of soil erosion that occurs on lands not classified as highly erodible.<sup>73</sup> For example, in 2007, 45 million acres of land that were not classified HEL were losing soil above set T rates (compared to 53 million acres of HEL cropland).<sup>74</sup> Some have suggested that because these policies ignore the non-HEL erosion to focus on HEL erosion, conservation compliance falls short of its goals to protect soils.<sup>75</sup>

However, others have argued that conservation compliance regime is already too onerous. In particular, more than 30 farmer associations wrote a letter to then-Senate Agriculture Committee Chairwoman Debbie Stabenow in 2012 calling for Stabenow to maintain de-coupled crop insurance eligibility and conservation compliance requirements.<sup>76</sup> These groups asserted that farmers will voluntarily conserve their land as good stewards who "want to take care of their land," and should not face the potential loss of the critical crop insurance safety net based on conservation goals.<sup>77</sup>

### *B. The Conservation Title and Climate Change*

In recent years, America's farmers and ranchers have faced more frequent and more severe droughts.<sup>78</sup> In the West, temperature increases associated with climate change have reduced snowpack, which has in turn decreased streamflow and has made year-to-year water availability more unpredictable.<sup>79</sup> Both water quality and availability are especially important for growers, as irrigated agriculture accounts for 80 to 90 percent of consumptive water use in the United States.<sup>80</sup> Yet, advocates note, Congress has done little to ensure that the Conservation Title supports programs that seek to mitigate or adapt to climate change.<sup>81</sup>

In particular, critics point out that even Conservation Title programs that may be helpful in addressing the impacts of climate change, such as the Regional Conservation Partnership Program (RCPP), EQIP, and CSP, were not specifically authorized to help producers address climate change in the 2014 Farm Bill.<sup>82</sup> Some have also pointed out that USDA has done little to address possible adverse incentives created by the Conservation Title. For example, it is argued that conservation programs actually cause *increased* water consumption by indirectly encouraging farmers and ranchers to expand.<sup>83</sup>

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<sup>73</sup> NAT. RES. CONSERVATION SERV., *supra* note 70.

<sup>74</sup> *National Soil Erosion Results Table*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/entsc/?cid=stelprdb1041678>.

<sup>75</sup> KEITH DANIEL WIEBE & NOEL RAY GOLLEHON, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 125-126 (2007).

<sup>76</sup> *Ag groups oppose linking conservation compliance to crop insurance*, AGRI-PULSE, Apr. 20, 2012, <https://www.agripulse.com/articles/1728-ag-groups-oppose-linking-conservation-compliance-to-crop-insurance>.

<sup>77</sup> *Ag groups oppose linking conservation compliance to crop insurance*, AGRI-PULSE, Apr. 20, 2012, <https://www.agripulse.com/articles/1728-ag-groups-oppose-linking-conservation-compliance-to-crop-insurance>.

<sup>78</sup> See P.A. WHITE, NAT'L WILDLIFE FED'N, CAN SOIL SAVE US? MAKING THE CASE FOR COVER CROPS AS EXTREME WEATHER MANAGEMENT 19 (2015), <http://www.nwf.org/~media/PDFs/Water/2015/Drought-and-Flood-Report-Final.pdf>.

<sup>79</sup> See Philip W. Mote et al., *Declining Mountain Snowpack in Western North America*, 86 BULL. AM. METEOROLOGICAL SOC'Y 39, 47-48 (Jan. 2005),

[http://www.sfu.ca/biology/faculty/jwmoore/teaching/REM475/Mote\\_DecliningSnowpackWestNA\\_2005.pdf](http://www.sfu.ca/biology/faculty/jwmoore/teaching/REM475/Mote_DecliningSnowpackWestNA_2005.pdf).

<sup>80</sup> GLENN D. SCHAIBLE & MARCEL P. AILLERY, USDA, WATER CONSUMPTION IN IRRIGATED AGRICULTURE: TRENDS AND CHALLENGES IN THE FACE OF EMERGING DEMANDS (2012), <https://perma.cc/4MPP-5LQY>.

<sup>81</sup> *2014 Farm Bill Drill Down: Conservation-- Working Lands Programs*, NSAC'S BLOG, NATIONAL SUSTAINABLE AGRICULTURE COALITION, <http://sustainableagriculture.net/blog/2014-farm-bill-working-lands>.

<sup>82</sup> *Id.*

<sup>83</sup> See Danielle Wolfson, Note, *Come Hell or No Water: The Need to Reform the Farm Bill's Water Conservation Subsidies*, 45 TEX. ENVTL. L.J. 245, 249-51 (2015);

Frank A. Ward & Manuel Pulido-Velazquez, *Water Conservation in Irrigation Can Increase Water Use*, 105 PROC. OF THE NAT'L ACAD. OF SCI. 18,215, 18,215 (2008), <http://www.pnas.org/content/105/47/18215.full.pdf>.





### C. Conservation Programs and Water Quality

Downstream water quality suffers when nutrients and pollutants run off of fields and into waterways. Critics argue that the Conservation Title does not go far enough in protecting water quality downstream from agricultural operations. For instance, while both CRP and CSP pay farmers to install vegetated buffer strips to absorb potential pollutants before they can reach waterways, there are few regulations limiting the pollutants that flow off of fields and into drinking water sources.<sup>84</sup>

The farm bill also facilitates the protection of water quality through the Grassroots Source Water Protection Program (SWPP).<sup>85</sup> SWPP provides \$20 million annually to provide technical assistance for farmers and ranchers taking voluntary actions to prevent source water pollution, but this program also fails to consider the human-consumption aspects of water quality.<sup>86</sup> Finally, some note that while NRCS is able to prioritize drinking water protection through CSP contracts, they have failed to do so.<sup>87</sup>

### D. Conservation Programs and Effective Administration

#### i. Incentives

Although farm bill conservation programs generate a wide range of benefits beyond environmental protection, they also face numerous administrative challenges. Some critics have noted potentially perverse incentives created by conservation programs,<sup>88</sup> including a pair of problems—slippage and additionality.<sup>89</sup> “Slippage” is the term given to the “incentives for farmers to expand their operations in ways that, at least partially, offset any pollution reductions.”<sup>90</sup> “Additionality” is the concern of obtaining environmental protections “above and beyond what farmers would have done” in the absence of new incentives.<sup>91</sup>

CSP and EQIP demonstrate how questions of slippage and additionality arise in voluntary conservation programs. CSP, for example, targets additional improvements, providing annual payments for “installing and adopting additional conservation activities” and “improving, maintaining, and managing conservation activities in place at the agricultural operation of the producer at the time the contract offer is accepted.”<sup>92</sup> If CSP rewards conservation practices the producers would already implement, CSP will not achieve maximum effect.<sup>93</sup> One agricultural economist argues that the issue of additionality stems from a lack of NRCS oversight.<sup>94</sup>

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<sup>84</sup> NAT’L YOUNG FARMERS COAL., CONSERVATION GENERATION: HOW YOUNG FARMERS ARE ESSENTIAL TO TACKLING WATER SCARCITY IN THE ARID WEST 6 (2016), [http://www.youngfarmers.org/wp-content/uploads/2016/02/NYFC15\\_water-report\\_Feb3\\_low.pdf](http://www.youngfarmers.org/wp-content/uploads/2016/02/NYFC15_water-report_Feb3_low.pdf).

<sup>85</sup> 16 U.S.C. § 3839bb-2.

<sup>86</sup> “Grassroots” Source Water Protection Program, USDA FARM SERV. AGENCY, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/source-water-protection/index> (last visited Nov. 29, 2016).

<sup>87</sup> See Margot J. Pollans, *Drinking Water Protection and Agricultural Exceptionalism*, Ohio State L.J. 60–64, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2810775](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2810775).

<sup>88</sup> See Kelly Kennedy, Comment, *19th Century Farming and 21st Century Technology: The Path to Cleaner Water*, 47 ARIZ. ST. L.J. 1385, 1397-98 (2015).

<sup>89</sup> Erik Lichtenberg, *Conservation, the Farm Bill, and U.S. Agri-Environmental Policy*, CHOICES (3d quarter 2014), <http://www.choicesmagazine.org/choices-magazine/theme-articles/3rd-quarter-2014/conservation-the-farm-bill-and-us-agri-environmental-policy>.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.*

<sup>92</sup> 16 U.S.C. § 3838g(d)(1).

<sup>93</sup> Lichtenberg, *supra* note 89.

<sup>94</sup> *Id.*



Similar to issues of slippage, the benefits of some conservation programs can be reduced or entirely undone if land is not strategically returned to agricultural use after CRP contracts end. While conservation programs such as CRP and CSP can lead to long-term land cover that sequesters carbon, tillage or re-introduction into agricultural use undo years of carbon sequestration that build up during the conservation period.<sup>95</sup> Each year nearly 19 million tons of carbon dioxide are estimated lost due to cultivation or tillage of previously-conserved lands.<sup>96</sup> Thus, critics call for conservation programs that incorporate standards that are mindful of long-term consequences of conserved land's reintroduction into agricultural use.<sup>97</sup>

## *ii. Enforcement*

A major issue is the lack of enforcement in conservation programs. In particular, the United States Government Accountability Office (GAO), a nonpartisan agency that investigates how the federal government spends its money,<sup>98</sup> has repeatedly criticized NRCS's poor enforcement of HEL compliance.<sup>99</sup> A 2003 GAO report evaluating NRCS performance in enforcing conservation compliance found that the agency "has not consistently implemented the 1985 Food Security Act's conservation provisions."<sup>100</sup> When conservation provisions are not consistently implemented, some farmers receive conservation payments even though their soil erosion rates exceed the set limits or they are inappropriately converting wetlands to croplands.<sup>101</sup>

The GAO report also included a nationwide survey, which reflected that nearly half of NRCS field offices fail to implement required conservation provisions due to a lack of staff, a lack of managerial emphasis on conservation, or because agents are uncomfortable acting in the role of enforcer.<sup>102</sup> For example, the GAO noted that NRCS field agents do not consistently find farmers in violation for failing to implement certain conservation practices – such as crop rotation – and do not always engage in continued monitoring to see whether the failure has been corrected.<sup>103</sup> The same report also found that NRCS agents do not consistently monitor for wetlands violations.<sup>104</sup>

These implementation problems persisted for decades, as determined by a 2012 USDA Office of Inspector General (OIG) audit.<sup>105</sup> The OIG concluded that NRCS required increased efforts to improve compliance with conservation programs and recommended reorganizing the agency's structure so that a single person or entity was responsible solely for overseeing compliance.<sup>106</sup>

## **CONCLUSION**

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<sup>95</sup> *Farm Bill Conservation Programs Vital to Addressing Agriculture's Environmental Impacts*, NAT WILDLIFE FEDERATION, <https://www.nwf.org/What-We-Do/Protect-Habitat/Healthy-Forests-and-Farms/Farm-Bill/Farm-Bill-Need-for-Conservation.aspx>.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.*

<sup>98</sup> *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html>.

<sup>99</sup> U.S. GEN. ACCOUNTING OFFICE, GAO-01-325, WETLANDS PROTECTION: ASSESSMENTS NEEDED TO DETERMINE EFFECTIVENESS OF IN-LIEU-FEE MITIGATION 1 (2001), 42 <http://www.gao.gov/assets/240/231490.pdf>.

<sup>100</sup> *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-418, AGRICULTURE CONSERVATION: USDA NEEDS TO BETTER ENSURE PROTECTION OF HIGHLY ERODIBLE CROP LANDS AND WETLANDS 42 (2003).

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> U.S. DEP'T. OF AGRIC., AUDIT REP. 10601-0001-22, NATURAL RESOURCES CONSERVATION SERVICE'S OVERSIGHT AND COMPLIANCE ACTIVITIES (2013), <http://www.usda.gov/oig/webdocs/10601-0001-22.pdf>.

<sup>106</sup> *Id.*



America’s future food security is dependent on healthy soils, climate-readiness, rural development, and community health. The Conservation Title supports programs that address these varied yet overlapping issues. And Congress has decreased Title II funding in recent years, its history has been marked by constant expansion and continuous evolution as conservation has been increasingly recognized as a central pillar of U.S. agriculture. Yet, critics identify many key issues for Congress to take up in future farm bills.