



Conservation¹

INTRODUCTION

The farm bill attempts to address a variety of national environmental challenges associated with agriculture. Title II of the 2018 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*.²

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.³ Others note that agriculture policy largely ignores changes to the climate, including agriculture's role in mitigation and need for adaptation.⁴ 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.⁵ 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 background survey the history and evolution of farm bill conservation programs since the 1930s. Section II provides an overview of the Conservation Title of the 2014 & 2018 Farm Bills. 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.⁶ 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 American

¹ The following people contributed to this report: Laurie Ristino (Center for Agriculture and Food Systems, Vermont Law School), Margot Pollans (Food Law Initiative, Pace University Elisabeth Haub School of Law), Renner Walker (Food Law Initiative, Pace University Elisabeth Haub School of Law), Andrew Norkiewicz (Summer Intern, Harvard Law School Food Law and Policy Clinic), Danielle Haley (Harvard Law School), and Tala M. DiBenedetto (Food Law Initiative, Pace University Elisabeth Haub School of Law).

² CONG. RSCH. SERV., 2018 FARM BILL PRIMER: TITLE II CONSERVATION PROGRAMS (2019) <https://fas.org/sgp/crs/misc/IF11199.pdf>.

³ See Laurie Ristino & 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), <https://ssrn.com/abstract=2887584>; see also J.B. Ruhl, *Farms, Their Environmental Harms, and Environmental Law*, 27 ECOLOGY L.Q. 263, 274 (2000).

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

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

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



agriculture, especially soil.⁷ Programs from this era, including the Agricultural Conservation Program, paid farmers to shift production from soil-depleting crops to soil-conserving crops.⁸ 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.⁹

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.¹⁰ From the beginning, the program was criticized for harming local economies, failing to restrict activities on non-enrolled farmland, and disproportionately benefitting large farms.¹¹ 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 2018 Farm Bill.¹²

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.¹³ Congress and the USDA also created new accountability and oversight authorities in order to demonstrate the effectiveness of these conservation programs.¹⁴

In 1985 conservation became a standalone title in the farm bill, as Congress recognized that conservation had benefits beyond increased agricultural productivity.¹⁵ 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.¹⁶ In particular, farmers risked losing significant agricultural subsidies unless they complied with highly erodible land conservation (“sodbuster”) and wetland conservation (“swampbuster”) requirements,¹⁷ which together comprised *conservation compliance*.¹⁸

⁷ *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>.

⁸ U.S. DEP’T. OF AGRIC., ECON. RESEARCH SERV., *HISTORY OF AGRICULTURAL PRICE-SUPPORT AND ADJUSTMENT PROGRAMS 1933-84*, at 11 (1984), <https://naldc.nal.usda.gov/download/CAT10842840/PDF>.

⁹ Zachary Cain & Stephen Lovejoy, *History and Outlook for Farm Bill Conservation Programs*, CHOICES (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 (last visited Dec. 10, 2016).

¹⁰ Agricultural Act of 1956, Pub. L. 84-540, 70 Stat. 188, <http://nationalaglawcenter.org/wp-content/uploads/assets/farmbills/1956.pdf>; 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.

¹¹ HELMS, *BRIEF HISTORY OF THE USDA SOIL BANK PROGRAM*, *supra* note 10.

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

¹³ J. DOUGLAS HELMS, U.S. DEP’T OF AGRIC., *TECHNICAL ASSISTANCE – THE ENGINE OF CONSERVATION* (2005), https://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/nrcs143_021142.pdf

¹⁴ *Id.*

¹⁵ 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 (last visited Dec. 10, 2016).

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

¹⁷ MEGAN STUBBS, CONG. RSCH. 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>.

¹⁸ 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.



The Sodbuster provisions applied only to highly erodible land (HEL),¹⁹ 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.²⁰ Similarly, the Swampbuster or wetland conservation compliance provision prohibited the conversion of wetlands by producers for the purposes of producing a crop.²¹ Since their introduction 1985, conservation compliance requirements have been amended in each successive farm bill, including in 2014.²²

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.²³

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.²⁴

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.²⁵ 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.²⁶

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.²⁷ The Conservation Title was projected to account for about 6 percent of expected farm bill spending, or \$58 billion of the total \$956 billion authorized over the 10-year period starting in 2014 (roughly \$5 billion per year).²⁸ The Congressional Budget Office put the 2018 Conservation Title at seven percent of the bill's total projected mandatory spending over 10 years, amounting to \$60 billion of the total \$867 billion.²⁹

¹⁹ "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.

²⁰ STUBBS, *supra* note 17, at 13-14.

²¹ 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)).

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

²³ Cain & Lovejoy, *supra* note 9.

²⁴ 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.

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

²⁶ 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/>.

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

²⁸ RALPH M. CHITE, CONG. RSCH. 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>

²⁹ CONG. RSCH. SERV., 2018 FARM BILL PRIMER: TITLE II CONSERVATION PROGRAMS (2019), <https://fas.org/sgp/crs/misc/IF11199.pdf>.



II. 2018 & 2014 FARM BILLS

Like its predecessors, the Conservation Title of the 2018 Farm Bill includes both required and voluntary conservation programs. The 2014 and 2018 Farm Bills did little to change how conservation compliance—the farm bill’s *required* conservation measures—is determined or the scope of lands covered by its requirements, although the 2014 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.³⁰ In addition, the 2014 Farm Bill 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.³¹ 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.³²

In contrast to the moderate changes made to conservation compliance, both bills made changes to Title II’s suite of *voluntary* conservation programs. In 2014, 12 of the more than 20 preexisting conservation programs were either repealed or consolidated.³³ Current programs fit into one of three general categories: 1) land retirement programs, 2) working lands programs, and 3) easement programs. The bills continued the trend of shifting funding away from land retirement and easement programs, such as CRP, and toward working lands programs.³⁴

A. Land Retirement Programs

Land retirement programs pay producers to temporarily remove environmentally sensitive farmland from production through 10-15 year contracts.³⁵ The modern Conservation Reserve Program (CRP)³⁶ dates to the 1985 Farm Bill and is by far the largest land retirement program.³⁷ The 2014 Farm Bill capped total enrollment and reduced enrollment to 24 million acres by 2018. The 2018 Farm Bill incrementally increases this cap back up to 27 million by 2023.³⁸ However, this still falls short of the 32 million acre target in the 2008 Farm Bill.³⁹ Further, the 2018 law reduced payment levels to balance the increased acreage.⁴⁰ 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.⁴¹ This 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.⁴²

³⁰ MEGAN STUBBS, CONG. RSCH. SERV., R42459, CONSERVATION COMPLIANCE AND U.S. FARM POLICY 17 (2016), <http://nationalaglawcenter.org/wp-content/uploads/assets/crs/R42459.pdf>.

³¹ 16 U.S.C. § 3811(A)(1)(E).

³² FARM BILL PRIMER, *supra* note 30, at 6.

³³ STUBBS, *supra* note 17, at 5.

³⁴ *Id.* at 3.

³⁵ *Id.*

³⁶ 16 U.S.C. § 3831. Contracts under the CRP range from 10 to 15 years.

³⁷ STUBBS, *supra* note 17, at 9.

³⁸ 16 U.S.C. § 3831(d).

³⁹ *See* 16 U.S.C. § 3831(d); *Id.*

⁴⁰ MARK A. MCMINIMY ET AL., CONG. RSCH. SERV., R45525, THE 2018 FARM BILL (P.L. 115-334): SUMMARY AND SIDE-BY-SIDE COMPARISON 18 (2019), <https://fas.org/sgp/crs/misc/R45525.pdf>.

⁴¹ 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>.

⁴² 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.



CRP contains a number of subprograms. These include 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. Grassland contracts, reminiscent of the discontinued Grassland Reserve Program, are included in CRP, with a 2 million acres enrollment requirement by 2023.⁴³ The 2018 Farm Bill also establishes the Clean Lakes, Estuaries, and Rivers (CLEAR) initiative within the CRP.⁴⁴ This program reserves forty percent of total continuous CRP acreage for water quality beneficial conservation buffer practices in order to reduce sediment loadings, nutrient loadings, and harmful algal blooms.⁴⁵

The 2018 Farm Bill also makes a few notable changes regarding land transitioning out of CRP. First, it increases funding for CRP – Transition Incentives Program (CRP-TIP).⁴⁶ This program offers an incentive of two years of extra CRP rental payments to owners of land transitioning from CRP back into production who rent or sell their land to underserved producers who commit to using sustainable grazing practices, resource-conserving cropping systems, or transitioning to organic production.⁴⁷ Eligible producers include beginning, veteran, or socially disadvantaged farmers and ranchers.⁴⁸ Congress created CRP-TIP in the 2008 Farm Bill and provided \$25 million over five years to fund the program.⁴⁹ The 2014 Farm Bill increased the mandatory funding level to \$33 million over five years,⁵⁰ and the 2018 Bill increased the amount to \$50 million through 2023, including \$5 million dedicated outreach to connect retiring farmers with eligible recipients.⁵¹ The recent bill expands eligibility to all CRP contract holders with expiring contracts, not just retiring farmers.⁵² It also allows participating farmers to get a two-year head start on certifying land coming out of CRP into organic production by counting the last two years of the expiring CRP towards the three years required for organic certification.⁵³

B. Working Lands Programs

Working lands programs offer financial incentives for producers to adopt resource-conserving practices on land that is under active production.⁵⁴ There are three working lands programs: the Conservation Stewardship Program (CSP),⁵⁵ the Environmental Quality Incentives Program (EQIP),⁵⁶ and the Agricultural Management Assistance program (AMA),⁵⁷ the first two of which are authorized under Title II and receive significant funding.

⁴³ 16 U.S.C. § 3831(b)(3), (d)(2). 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.

⁴⁴ 16 U.S.C. § 3831(d)(3).

⁴⁵ *Id.*

⁴⁶ 16 U.S.C. § 3841(a)(1)(B).

⁴⁷ 7 C.F.R. § 1410.64.

⁴⁸ 16 U.S.C. § 3835(f)(1).

⁴⁹ Food, Conservation, and Energy Act of 2008, P.L. 110–234, § 2111 (June 18, 2008).

⁵⁰ *CRP Transition Incentives Program*, NAT'L SUSTAINABLE AGRIC. COAL., <https://sustainableagriculture.net/publications/grassrootsguide/farming-opportunities/crp-transition-option/> (last visited Jan 20, 2020).

⁵¹ 16 U.S.C. § 3841(a)(1)(B).

⁵² *Id.*

⁵³ 16 U.S.C. § 3835(f)(1)(A)(ii).

⁵⁴ STUBBS, *supra* note 17, at 3.

⁵⁵ 16 U.S.C. § 3838e.

⁵⁶ 16 U.S.C. § 3838.

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



CSP “provides comprehensive conservation assistance to whole farms and working lands to resolve particular resource concerns in a given location.”⁵⁸ 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.”⁵⁹ These activities include cover cropping, resource-conserving crop rotations, and alternative tillage systems, among hundreds of others.⁶⁰ The CSP is competitive, and applicants must meet a “conservation stewardship threshold”⁶¹ for at least two priority resource concerns,⁶² such as air quality, soil erosion, and soil and water quality.⁶³ Applications are ranked on a point-based system, according to five factors related to conservation performance.⁶⁴ The NRCS scores the CSP’s various conservation practices and “enhancements”—both individual enhancements and bundles of enhancements.⁶⁵ The bundles are grouped around likely farm setups: for instance, bundles exist for crop technology, pasture grazing, and range grazing.⁶⁶ 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.”⁶⁷

While the 2018 Farm Bill maintained CSP, it imposed a new funding cap of that’s projected to decrease program spending by \$12.4 billion over 10 years.⁶⁸ Other changes include a new incentives to implement the planting of cover crops, resource conserving crop rotations, and management-intensive rotational grazing.⁶⁹

⁵⁸ NAT’L SUSTAINABLE AGRIC. COAL., FARMERS’ GUIDE TO THE CONSERVATION STEWARDSHIP PROGRAM 2 (2015), <http://sustainableagriculture.net/wp-content/uploads/2015/02/CSP-Farmers-Guide-2015-final.pdf>.

⁵⁹ 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.” NAT’L SUSTAINABLE AGRIC. COAL., *supra* note 58; *see also* 7 C.F.R. § 610.24 (2016).

⁶⁰ NAT. RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC., CONSERVATION STEWARDSHIP PROGRAM CONSERVATION ACTIVITY LIST (2015), https://www.nrcs.usda.gov/wps/PA_NRCSCconsumption/download?cid=stelprdb1268673&ext=pdf.

⁶¹ “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).

⁶² 16 U.S.C. § 3838f (a), (b).

⁶³ *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.

⁶⁴ *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; *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 (last visited Dec. 18, 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 (2016), https://www.nrcs.usda.gov/wps/PA_NRCSCconsumption/download?cid=nrcseprd1292027&ext=pdf.

⁶⁵ *See* NAT. SUSTAINABLE AGRIC. 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; *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’L SUSTAINABLE AGRIC. COAL., *supra* note 58, at 23, 26.

⁶⁶ NAT’L SUSTAINABLE AGRIC. COAL., *supra* note 58, at 23.

⁶⁷ *Id.*

⁶⁸ CONG. RSCH. SERV., AGRICULTURAL CONSERVATION IN THE 2018 FARM BILL 6 (2019), <https://crsreports.congress.gov/product/pdf/R/R45698>.

⁶⁹ 16 U.S.C. § 3839aa-24(d).



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.⁷⁰ EQIP contracts, which provide cost-share funds to producers, run as long as 10 years. As of the 2018 Farm Bill, 50 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].”⁷¹ The recent bill also expanded funding eligibility to certain public entities to improve irrigation structures and help conserve water resources through watershed-wide projects.⁷²

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.”⁷³ There are two farm bill easement programs: the Agricultural Conservation Easement Program (ACEP)⁷⁴ and the Healthy Forests Reserve Program (HFRP).⁷⁵ The 2014 Farm Bill established ACEP by consolidating three prior programs: the Wetlands Reserve Program, the Grasslands Reserve Program, and the Farmland Protection Program.⁷⁶ 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.⁷⁷ The 2018 Farm Bill reauthorizes the program with \$450 million per year through 2023.⁷⁸ The HFRP creates long-term easements “to promote the recovery of threatened and endangered species, to improve biodiversity, and to enhance carbon sequestration.”⁷⁹ The program is covered in Title VIII, the Forestry Title, rather than the Conservation Title, though it is administered by NRCS.⁸⁰

D. Other Programs

There are other programs that do not fit easily into the above categories. The Regional Conservation Partnership Program (RCPP) facilitates partnerships with “state and local governments, Indian tribes, cooperatives, and other organizations for conservation on a regional or watershed scale.”⁸¹ The 2018 Farm Bill reauthorized the program as a “stand-alone program” with its own partner contracts aimed at achieving a defined resource goal.⁸²

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

⁷⁰ *Environmental Quality Incentives Program*, NAT. RES. CONSERVATION SERV., U.S. DEP’T OF AGRIC., <https://www.nrcs.usda.gov/wps/portal/nrcs/main/national/programs/financial/eqip/>.

⁷¹ 16 U.S.C.A. § 3839aa-2(f)(2).

⁷² 16 U.S.C. § 3839aa-2(h)(2)(A).

⁷³ 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>.

⁷⁴ 16 U.S.C. § 3865.

⁷⁵ 16 U.S.C. §§ 6571–6578.

⁷⁶ STUBBS, *supra* note 17, at 10.

⁷⁷ See 16 U.S.C. §§ 3865a–3865c.

⁷⁸ 16 U.S.C. § 3841(a)(2)(F).

⁷⁹ 16 U.S.C. § 6571(a).

⁸⁰ AGRICULTURAL CONSERVATION IN THE 2018 FARM BILL, *supra* note 68, at 8.

⁸¹ 16 U.S.C. § 3871b; RENÉE JOHNSON & JIM MONKE, CONG. RSCH. SERV., RS22131, *WHAT IS THE FARM BILL?* (2016), <https://fas.org/sgp/crs/misc/RS22131.pdf>.

⁸² AGRICULTURAL CONSERVATION IN THE 2018 FARM BILL, *supra* note 68, at 9.



make that land available for access by the public for wildlife-dependent recreation, including hunting or fishing.”⁸³ Finally, the Conservation Innovation Grants program (CIG), under EQIP, offers payments to conduct research into innovative conservation practices and technologies.⁸⁴ The 2018 reauthorization includes a provision requiring a soil health demonstration trial and sets aside \$25,000,000 for on-farm conservation innovation trials.⁸⁵

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 range-lands.⁸⁶ In particular, critics point to numerous exemptions in the Sodbuster and Swampbuster standards (such as size and good faith provisions⁸⁷) that undermine the effectiveness of these programs to preserve soil health on agricultural lands.⁸⁸

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.⁸⁹ In implementing the 1985 Farm Bill highly erodible land (HEL) requirements, NRCS established soil reduction requirements in the form of tolerance (“T”) rates.⁹⁰ 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.⁹¹ Such a standard explicitly allows for a net loss of soils. Thus, while the 2014 Farm Bill expanded the applicability of conservation compliance, 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.⁹²

Additionally, some have pointed out that conservation compliance fails to account for the great deal of soil erosion that occurs on lands not classified as highly erodible.⁹³ 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

⁸³ 16 U.S.C. § 3839bb-5(a).

⁸⁴ 16 U.S.C. § 3839aa-8. While technically a subprogram of EQIP, CIG is routinely classified as an “other” program. *See* STUBBS, *supra* note 17, at 13.

⁸⁵ 16 U.S.C. § 3839aa-8

⁸⁶ Ristino & Steier, *supra* note 3, at 67.

⁸⁷ 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).

⁸⁸ STUBBS, *supra* note 17, at 13-14; *see also* 16 U.S.C. §3822(b) (2014).

⁸⁹ 7 C.F.R. § 12.20-23 (2015).

⁹⁰ *Erosion*, NAT. RES. CONSERVATION SERV., <http://www.nrcs.usda.gov/wps/portal/nrcs/main/national/landuse/crops/erosion> [<https://perma.cc/CGY4-49YE>].

⁹¹ 7 C.F.R. § 12.20-23 (2015).

⁹² *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>

⁹³ NAT. RES. CONSERVATION SERV., *supra* note 90.



cropland).⁹⁴ 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.⁹⁵

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.⁹⁶ 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.⁹⁷

B. The Conservation Title and Climate Change

In recent years, America’s farmers and ranchers have faced more frequent and more severe droughts.⁹⁸ 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.⁹⁹ 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.¹⁰⁰ Yet, advocates note, Congress has done little to ensure that the Conservation Title supports programs that seek to mitigate or adapt to climate change.¹⁰¹

In particular, critics point out that even Conservation Title programs that may be helpful in addressing the impacts of climate change, such as RCPP, EQIP, and CSP, have not been specifically authorized to help producers address climate change.¹⁰² 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.¹⁰³ In the years following the 2018 Farm Bill, additional attention has been called to agriculture’s role in fighting climate change. The House Select Committee on the Climate Crisis noted this potential,¹⁰⁴ and the Agriculture Resilience Act of 2019 included modifications to a number of farm bill programs.¹⁰⁵ These proposals will likely be a major focus of Conservation Title negotiations for the next farm bill.

⁹⁴ *National Soil Erosion Results Table*, NAT. RES. CONSERVATION SERV., <https://www.nrcs.usda.gov/wps/portal/nrcs/detail/national/entsc/?cid=stelprdb1041678>.

⁹⁵ KEITH DANIEL WIEBE & NOEL RAY GOLLEHON, AGRICULTURAL RESOURCES AND ENVIRONMENTAL INDICATORS 125-126 (2007).

⁹⁶ *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>.

⁹⁷ *Id.*

⁹⁸ 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>.

⁹⁹ 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.

¹⁰⁰ GLENN D. SCHAIBLE & MARCEL P. AILLERY, U.S. DEP’T OF AGRIC., WATER CONSUMPTION IN IRRIGATED AGRICULTURE: TRENDS AND CHALLENGES IN THE FACE OF EMERGING DEMANDS (2012), <https://perma.cc/4MPP-5LQY>.

¹⁰¹ *2014 Farm Bill Drill Down: Conservation-- Working Lands Programs*, NSAC’S BLOG, NAT’L SUSTAINABLE AGRIC. COALITION, <http://sustainableagriculture.net/blog/2014-farm-bill-working-lands>.

¹⁰² *Id.*

¹⁰³ 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>.

¹⁰⁴ HOUSE SELECT COMM. ON THE CLIMATE CRISIS, SOLVING THE CLIMATE CRISIS (2020),

<https://climatecrisis.house.gov/sites/climatecrisis.house.gov/files/Climate%20Crisis%20Action%20Plan.pdf>.

¹⁰⁵ H.R. 5861, 116th Cong. (2019).



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.¹⁰⁶

The farm bill also facilitates the protection of water quality through the Grassroots Source Water Protection Program (SWPP).¹⁰⁷ 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.¹⁰⁸ Finally, some note that while NRCS is able to prioritize drinking water protection through CSP contracts, they have failed to do so.¹⁰⁹

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,¹¹⁰ including a pair of problems—slippage and additionality.¹¹¹ “Slippage” is the term given to the “incentives for farmers to expand their operations in ways that, at least partially, offset any pollution reductions.”¹¹² “Additionality” is the concern of obtaining environmental protections “above and beyond what farmers would have done” in the absence of new incentives.¹¹³

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.”¹¹⁴ If CSP rewards conservation practices the producers would already implement, CSP will not achieve maximum effect.¹¹⁵ One agricultural economist argues that the issue of additionality stems from a lack of NRCS oversight.¹¹⁶

¹⁰⁶ 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.

¹⁰⁷ 16 U.S.C. § 3839bb-2.

¹⁰⁸ “Grassroots” Source Water Protection Program, U.S. DEP’T OF AGRIC., FARM SERV. AGENCY, <https://www.fsa.usda.gov/programs-and-services/conservation-programs/source-water-protection/index> (last visited Nov. 29, 2016).

¹⁰⁹ 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.

¹¹⁰ 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).

¹¹¹ Erik Lichtenberg, *Conservation, the Farm Bill, and U.S. Agri-Environmental Policy*, CHOICES (2014), <http://www.choicesmagazine.org/choices-magazine/theme-articles/3rd-quarter-2014/conservation-the-farm-bill-and-us-agri-environmental-policy>.

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ 16 U.S.C. § 3838g(d)(1).

¹¹⁵ Lichtenberg, *supra* note 111.

¹¹⁶ *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.¹¹⁷ Each year nearly 19 million tons of carbon dioxide are estimated lost due to cultivation or tillage of previously-conserved lands.¹¹⁸ Thus, critics call for conservation programs that incorporate standards that are mindful of long-term consequences of conserved land's reintroduction into agricultural use.¹¹⁹

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,¹²⁰ has repeatedly criticized NRCS's poor enforcement of HEL compliance.¹²¹ 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."¹²² 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.¹²³

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.¹²⁴ 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.¹²⁵ The same report also found that NRCS agents do not consistently monitor for wetlands violations.¹²⁶

These implementation problems persisted for decades, as determined by a 2012 USDA Office of Inspector General (OIG) audit.¹²⁷ 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.¹²⁸

¹¹⁷ *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>.

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ *About GAO*, U.S. GOV'T ACCOUNTABILITY OFFICE, <http://www.gao.gov/about/index.html>.

¹²¹ 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>.

¹²² *See* U.S. GEN. ACCOUNTING OFFICE, GAO-03-418, AGRICULTURE CONSERVATION: USDA NEEDS TO BETTER ENSURE PROTECTION OF HIGHLY ERODIBLE CROP LANDS & WETLANDS 42 (2003).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ 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>.

¹²⁸ *Id.*



CONCLUSION

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. While 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.