

California Resource Conservation District Comments on TSP Interim Rule

Comments have been highlighted by Stewardship America, Inc., to indicate:

Comments with which Stewardship America, Inc. strongly agrees

Comments with which Stewardship America does NOT agree

Marginal comments by Stewardship America [are in blue text and enclosed in brackets]

DRAFT Comments on Proposed Technical Service Provider Rule

Unlike other Farm Bill programs, the Natural Resources Conservation Service (NRCS) Conservation Technical Assistance (CTA) is intended to provide conservation assistance to all cooperators. In many situations, it is the only source of help available to support a farmer or rancher's efforts to practice good stewardship. **Cost-share and other financial assistance programs help offset the economic costs of providing these benefits, but it is the technical assistance—the scientific and practical knowledge and guidance on how to set standards and properly design, engineer, install and maintain conservation practices from a trusted partner—that is truly the key to getting conservation applied on the landscape.**

The California Association of Resource Conservation Districts (CARCD) strongly believes that **the use of third party public and private sector technical assistance to help implement conservation programs should be seen as an opportunity to complement and supplement - not replace - the current delivery system.** [It also should be seen as an opportunity to EXPAND and EXTEND the capabilities of the current delivery system by bringing together resources from numerous agencies, levels of government and the private sector and to coordinate programs TOGETHER so that we can move beyond the implementation of one program at a time in an agency-by-agency piecemeal approach.] **It is critical that the NRCS maintain a solid base of staffing to continue providing conservation technical support to producers. It is also crucial that the agency retain a viable, high-caliber technical capability to maintain its system, train and certify third-party vendors as well as an expanded ability to spot-check vendors' work for quality assurance.**

CARCD strongly emphasizes the need to ensure that there is adequate funding from the Farm Bill programs to support both the NRCS infrastructure and any costs related to third-party vendors of technical assistance. It will be critical to keep NRCS strong as both a front-line provider of direct technical assistance, but also as the custodian of a national voluntary program of technically sound standards and practices.

The Technical Service Provider (TSP) concept is not new to Conservation Districts. We have long been in the business of providing technical services to landowners and operators and coordinating private sector for more than 70 years. Local Conservation Districts and the NRCS utilize a unique partnership to work with private landowners and operators to deliver the technical and financial assistance needed to help them apply complex conservation treatments to control erosion and improve the quality of our soil resources; protect and improve water and air quality; enhance fish and wildlife habitat; and manage woodlands, pasturelands and rangelands.

As we move forward in getting TSP in place we have to keep in mind that many issues remain to be addressed. This is a huge undertaking - one that will likely take several years to reach its

full potential – and will suffer some bumps along the road. Many people will have to be trained and certified, which will take not only time but also financial resources that don't fully exist. Other issues will be just normal start up considerations for anything new—pricing, liability, timeliness of service and payment, quality control and interstate and regional reciprocity, for example.

Specific comments and questions follow this letter; however, there are seven key concerns with the rule as proposed that we would like to highlight:

1) Though not in the rule, USDA has stated its intention to establish in policy that it will not hire additional Federal employees unless it has first sought to meet the demand for technical services from non-Federal sources. Although this may be a laudable goal in the long run it will surely worsen the current lack of access to NRCS CTA already experienced in many parts of the country. The effects of this policy will hit California particularly hard – as well as many other western states - who have not previously subscribed heavily in traditional Farm Bill commodity programs.

2) Technical Service Providers should not have any financial interest or stake in the sale of materials, equipment, infrastructure, or inputs necessary for implementing a conservation plan. As currently written, the rule would allow fertilizer and chemical dealers, irrigation equipment salespeople and other agricultural input companies to serve as TSPs. This will undoubtedly create incentives to guide recommendations toward practices and products that provide profits to companies thus involved and compromise the integrity of the conservation plans.

3) Section 652.5 (g) of **this proposed rule absolutely must be rewritten to clearly state the limited availability of funds as well as the absolute requirement that program participant MUST have a contractual agreement PRIOR to any acquisition of technical services. This is a huge problem!** [Disagree. This comment may be fine if a landowner is going to enroll in just one program, and the landowner already knows which program he/she is going to enroll in. But many landowners – and many agency people – do not know about all the programs that are available from federal agencies, state government and private sources. To ensure a coordinated approach to the myriad programs available, and to assess needs and opportunities on a property and the landowner's willingness to participate in various programs, requires groundwork and research – and takes time. In the end, this time can be repaid many times over because resources and funding can be LEVERAGED to a significant degree. TSPs should be allowed to assist landowners early on to help landowners explore all possible options for their properties and assist them in choosing – and assembling together – the options that are the best for the property, the best for the landowner, and the ones that gives society the biggest bang for the buck.] As written, this appears to entitle anyone who is eligible for a program, regardless of how their application might rank, to obligate the services of a TSP. There must be some control mechanism to limit use of TSPs to those who are likely to really get a contract to carry out the practices in a plan. This provision, as currently worded has the potential to wreak havoc on local field offices and Conservation Districts as well create untold liabilities and misunderstandings! [See the recommendations in Stewardship America's letter, page 6, regarding MOUs and "Scopes of Services," which could provide the necessary "control mechanism," and allow TSPs to get paid for up front services that may be invested before a specific program application is submitted, but only for the services approved by NRCS, so there will be no open-ended "entitlements."]

4) Landowners and operators must have ownership and control of the content of conservation plans and the selection of the technical assistance vendor. **When using third party public and private sector vendors to develop conservation practices and plans or provide other technical services, USDA and NRCS should take steps to ensure that cooperators' conservation plans are accorded the same confidentiality protections that are provided for plans developed by NRCS or, notified on the risk of lack of confidentiality.**

5) **Conservation Districts support local decision-making as much as possible and believe that, to the maximum extent possible, the TSP effort should be tailored to suit the needs of local producers and providers. Toward that end, we believe that NRCS State Conservationists should provide leadership in fashioning TSP initiatives that reflect local needs, circumstances and priorities.** Districts can help in this measure by such actions as recruiting providers, conducting training, maintaining provider lists and marketing the initiative.

6) NRCS must ensure that all conservation plans and technical services provided are complete and meet or exceed the standards and specifications in the NRCS Field Office Technical Guide (FOTG). This basic principle needs to be stated more firmly throughout the rule.

7) **At this time we still have not seen the advertised amendment to the interim rule outlining the schedule of payment rates and reimbursement for TSPs. Given the wide variation in cost-of-living and implementation expenses throughout the nation, it is important to California that this not be designed as a one-size-fits-all arrangement. It is also important to ensure that payment rates to TSPs do not exceed the cost for NRCS to deliver comparable technical assistance.** [As noted above, I would hope that TSPs will be used to EXPAND and EXTEND the capabilities of the current delivery system. Hence, there may be costs involved for services which NRCS currently does provide and which will be a critical element in ensuring TSPs don't just repeat what's been done in the past, but can expand the scope and extent of conservation program delivery to private landowners. I agree that costs for services that NRCS does provide should not be exceeded. But in looking at these NRCS costs, it will be important to not just look at direct costs for providing services, but to look as well at all *indirect* costs for administration, overhead, etc. which TSPs also will incur.]

In closing, Conservation Districts are in a unique position to help get the TSP effort up and running. Many Districts already have trained and certified employees who deliver technical assistance to producers. Other districts have been working with and cultivating mutually beneficial relationships with private sector technical assistance providers for years and are anxious to assist in making this expanded initiative a success. Given the magnitude of the tasks before us, there's no doubt that there will be a role for every qualified provider to play.

Best Regards,

Nadine Scott, President
California Association of Resource Conservation Districts

SPECIFIC COMMENTS AND QUESTIONS ON TECHNICAL SERVICE PROVIDER RULE

Sec. 652.3 Administration

(a) This statement sounds very much like an entitlement. It is vital that language throughout the rule specify the need for contracts prior to expenditures being obligated. As policy, educational efforts must emphasize that funding is limited for this initiative.

Sec. 652.4 Technical service standards.

(c) Clarity is needed on how “low-cost alternatives” that are not currently in the FOTG might be incorporated.

(d) Add at end: “Technical service providers must provide proof of bonding or professional insurance sufficient to cover the scope of work for which they are applying to be certified.”

(e) NRCS does not implement plans; producers implement plans, with or without cost share assistance. Better wording would be: “USDA has no contractual obligation to pay for technical services that do not meet USDA standards, specifications or program requirements.”

652.5 Program participant acquisition of technical services

(a) TSPs will not be available everywhere for everything for a long time. This should not be written as an entitlement without some qualifying statement such as “if available.” [Stewardship America’s Conservation Delivery Team is being designed so it can be available everywhere for everything. The Team currently has people in almost half the states, and has people available who can travel to other locales.]

(c) Is “program agreement” another word for contract? Can a producer employ a TSP before having a contract, and then NRCS will be expected to pay for it? The first step should be to contact the local USDA Service Center and apply for the program. Then when they have a contract, then they can contact the TSP. [See comment on this on page 2, item 3.]

(g) **Very Important!** As written, this appears to entitle anyone to obligate the services of a TSP prior to any contractual agreement. There must be some control mechanism to limit use of TSPs to those who are likely to really get a contract to carry out the practices in a plan. This provision, as currently worded has the potential to wreak havoc on local field offices and Conservation Districts as well create untold liabilities and misunderstandings! [Again, see comment on this on page 2, item 3. Also see the recommendations in Stewardship America’s letter, page 6, regarding MOUs and “Scopes of Services,” which could provide the necessary “control mechanism.”]

Sec. 652.7 Quality Assurance.

(a) NRCS should be consulting with FSA only on work for FSA programs. Also, if NRCS does the quality control for FSA TSP providers, which agency sets the standards for the work and the qualifications for certification? Will the reimbursement from FSA for CRP be increased to look after related TSP work?

Subpart B, Section 652.21 Certification:

(a) Change (a) to state: **“Each NRCS state conservationist has established certification standards which include, as a minimum, that the applicant must:” (1) through (4). The standards established by the state conservationist need to be much more specific for the local needs.** [Agree. TSPs should be able to be certified in one state and have other states accept that certification, providing the TSP submits all necessary documentation to show what training, skills and knowledge it has at its disposal, and providing the TSP is willing to obtain additional training, skills and knowledge as recommended by NRCS in the other states in which the TSP wishes to work in order to address local needs and become certified in those states as well.]

- (b) Collecting fees for certification is necessary to assist in cost-recovery; however, the fee schedule must be flexible to reflect the regional variances of costs and recognize non-profit versus for-profit entities. Will there be an individual fee and a higher fee for organizations that have multiple certified providers? Will the fees collected be used by NRCS at the state level to offset the cost of certification, or be forwarded to some general fund?

Sec. 652.23 Certification process for private sector entities.

(c)(3) **implies that the entity can add “certified” individuals after the entity’s initial acceptance as a certified provider. The “new” individuals should be required to submit the same information for certification as the initial ones . . . not just an amendment to the agreement.** For large firms this could be a significant paperwork shuffle as names come and go frequently

Sec. 652.24 Certification process for public agencies.

(c)(3) Same concern for as for private agencies.

(c)(6) **This provision should be deleted or radically revised. Many Conservation Districts utilize the part-time services of resource professionals for specific grants or projects. These professionals will desire to be eligible to serve as TSPs when the District does not have adequate work for them. This provision could cause regional and multi-stakeholder efforts to lose access to highly qualified individuals that would be unable to afford the loss of private sector status for part-time work.**

Also, can public entities compete for a specific project even if they are in a Cooperative Agreement?

652.37 Period of decertification.

The maximum period of decertification is three years, regardless of the cause. There should be a process for permanent decertification for egregious violations, such as civil rights or ethics, otherwise those who engage in unacceptable behavior will be back in the revolving door. This could lead to excessive liabilities and litigation.

Other questions that need to be addressed:

1. Payment to clients for TSP services: If NRCS fails to pay a client for reimbursement of TSP services within 30 days of submission of bills or payment request, will "interest" have to be paid? If a Conservation District is involved in the transaction, what would be their liability?
2. Payments to TSPs: **Will TSPs be able to request payment for services from clients "up front", that is prior to any reimbursement from NRCS?** [I suggest that “up front” payments be governed by an MOU and a specific scope of services with NRCS, and that these payments come through NRCS, not from the landowner. Landowners often don’t have the necessary resources to hire consultants and then wait to get reimbursed. Requiring landowners to do this will greatly reduce the effectiveness of TSPs in helping critical *planning* that often must be done before programs are applied for, and in helping landowners obtain maximum *leverage* from all the programs and resources available.]
3. Payments to TSP: What are the consequences if a landowner makes a good faith payment to a TSP for services rendered and then discovers the services are not accurate or otherwise do not meet NRCS standards? How does a landowner legally recover payment for services that do not meet NRCS standards or other requirements? [This concern would be resolved by Stewardship America’s recommendation regarding MOUs and Scopes of Services; see page 6 of Stewardship America’s comments on the interim TSP rule.]

4. Payments to TSP: The rule implies that an agreement between a TSP and client is up to them to work out. Can NRCS legally provide a "standardized agreement" or "standard contract" that can be used as a model for client to obtain TSP services? If not, would NRCS have any objection to a state agency or conservation district association provided such a standardized contract or agreement. Some kind of standardized agreement/contract needs to be provided to protect both clients and TSP providers. [\[Again, this concern would be resolved by Stewardship America's recommendation regarding MOUs and Scopes of Services.\]](#)
5. TSP services: What happens if a client, unknowingly, hires a TSP who is currently going under a review to be decertified and then subsequently becomes decertified? What options does the client have to legally break the contract with the TSP? Or, how does the client request reimbursement for the TSP services when the TSP has subsequently been decertified? [\[Again, this concern would be resolved by Stewardship America's recommendation regarding MOUs and Scopes of Services.\]](#)
6. **If no new NRCS positions can be filled, what programs and services will be cut to allow NRCS staff to provide training and oversight to TSPs?**
7. **Existing licenses:** The state of California provides "licenses" for engineers and forestry related services. The State of California also provided "certifications" for other specialty services such as "rangeland managers". **Will these licenses and certifications be acceptable for TSPs? The proposed rule suggests procedures for how to accept certification by a recommending organization, but not for certifications or licenses from a state or other agency.**
8. **Project failure: The proposed rule does not address the consequences of a project failure. Who is responsible if the TSP follows NRCS standards and the installed practice is certified, but then later fails (Act of nature, etc.). If the TSP does everything correctly, who is liable for reinstallation of the practice or possible consequences for loss of life or property due to the practice failure?**
9. TSP Services: Are services from TSPs considered a program benefit to clients? If these are program benefits, then clients are subject to all agency requirements just like any other benefits? So, Food Security Act and Farmland Protection Policy Act and similar agency and departmental rules are applicable - correct? (HEL, Wetlands, AD-1006, AD-1026, NEPA, etc.) Does the TSP take responsibility to assure compliance with these agency regulations? [\[Again, another reason to pay TSPs through NRCS based on a specific Scope of Services.\]](#)
10. Malfeasance: How does the rule apply to TSP services that are determined to be malicious, incompetent, incomplete, failure to act, untimely or other malfeasance? Will provisions be added to allow for "punitive damages"? That is if the actions of the TSP cause the client to lose potential benefits or other agency program funding, what are the consequences to the TSP? Will the client have to sue for damages? [\[Again, this concern would be resolved by Stewardship America's recommendation regarding MOUs and Scopes of Services.\]](#)