

NOTE

THE 2008 FARM BILL: FRIEND OR FOE TO CONSERVATIONISTS AND WHAT IMPROVEMENTS ARE NEEDED?

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INTRODUCTION

Farming is an integral part of our society that affects not only food production but also the environment in every aspect. Agriculture impacts water, soil, and air quality.¹ Water quality is affected by possible runoff of pesticides or manure into watersheds and nearby streams. Soil quality is affected by aggressive farming techniques that lead to soil erosion and depletion of organic matter. Air quality is affected by the release of noxious gases by pesticides and nitrogen from manure.

Since the Great Depression, the federal government has provided farm subsidies to ranchers and farmers in order to supplement their farm incomes.² The original goal of farm subsidies was to provide affordable, safe food for Americans. Farm subsidies have achieved the goal of providing affordable food—of all the industrialized nations, Americans spend the least amount of money on food based on the average income.³ However, this abundant, affordable food has come at a high price, which has taxed the environment and American landscape.

This article addresses conservation concerns arising out of the latest farm bill, the Food, Conservation, and Energy Act of 2008. The purpose of this article is not to suggest an end to all farm subsidies, but to propose approaching farm subsidies in an efficient way that promotes conservation methods.

Part I of this article details the history of farm bills in general and marks major milestones. Part II examines the 2008 Farm Bill, focusing solely on the conservation provisions. Part III describes the 2008 Farm Bill's shortcomings and failures. Finally, Part IV suggests ways to improve future conservation provisions in farm bills and ways to make these provisions more effective and feasible.

I. ORIGIN OF THE FARM BILL AND ITS CONNECTIVITY TO UNITED STATES HISTORY

The Farm Bill has deep roots in United States history, growing out of historical events such as the Great Depression, the Dust Bowl, and World War II. Congress has slowly intertwined conservation efforts into the text of

1. PLANTING THE FUTURE: DEVELOPING AN AGRICULTURE THAT SUSTAINS LAND AND COMMUNITY 4 (Elizabeth Ann R. Bird et al. eds., 3d prtg. 1996) [hereinafter PLANTING THE FUTURE].

2. See Agricultural Adjustment Act, Pub. L. No. 73-10, 48 Stat. 31 (1933) (describing the origin and purpose of the Farm Bill).

3. PLANTING THE FUTURE, *supra* note 1, at 3.

the Farm Bill since 1938, when Congress added payments to farmers for soil conservation efforts. Since then, Congress has made several attempts to improve the monetary incentives for different conservation methods in subsequent farm bills. However, these small portions of the Farm Bill have never been the main focus and lack the effectiveness necessary to modify existing farming methods into truly environmentally friendly and sustainable practices.

*A. A Suppressed Market Resulted in a Need
for Government Intervention*

The first Farm Bill was passed in 1933 in an effort to stabilize the market.⁴ This bill was created in response to the struggles faced by farmers during the Great Depression and depressed commodities prices, which were created by a surplus of crops.⁵ This surplus gave buyers and distributors all the bargaining power, resulting in farmers accepting lower prices for their crops.⁶ By 1933, grain elevators did not accept any corn due to the large surplus.⁷ The disparity between the prices of agricultural and other commodities prompted Congress to act quickly and draft a bill that would provide funding to struggling farmers.⁸ Congress recognized the urgency of this situation, with markets plummeting, and deemed it a “Declaration of Emergency.”⁹

The purpose of the 1933 Farm Bill was to stabilize the market and give farmers purchasing power.¹⁰ In order to achieve this goal of stabilization, the amount of agricultural commodities produced had to be reduced to balance supply and demand and raise prices.¹¹ The government paid farmers to stop or reduce farming in order to lower supply levels of commodities.¹² The commodities included in the bill were wheat, cotton, corn, hogs, rice, tobacco, and milk.¹³ Congress appropriated a total of one hundred million

4. William S. Eubanks II, *The Sustainable Farm Bill: A Proposal for Permanent Environmental Change*, 39 ENVTL. L. REP. 10,493, 10,494 (2009).

5. *Id.*

6. *Id.*

7. *Id.*

8. Agricultural Adjustment Act, Pub. L. No. 73-10, § 1, 48 Stat. 31, 31 (1933).

9. *Id.*

10. *Id.*

11. *Id.* § 2, 48 Stat. at 32.

12. *Id.* § 6, 48 Stat. at 33–34.

13. *Id.* § 11, 48 Stat. at 38.

dollars for payments to farmers who reduced their production level or acreage level.¹⁴

B. The Evolution of the Farm Bill

Since the original Farm Bill in 1933, there have been many revisions and modifications to subsequent bills. Congress is required every five to seven years to reevaluate the current Farm Bill and make necessary changes.¹⁵ During reevaluation, Congress may revise and amend the bill to meet the changing needs of farmers.¹⁶ If Congress allows the bill to expire, the market will revert to pre-Farm Bill status and be free from government intervention, unless Congress grants a temporary extension of specific programs until it drafts and passes new legislation.¹⁷

In 1938, Congress made the first attempt at incorporating conservation methods into a farm bill. The 1938 version of the Farm Bill addressed soil conservation.¹⁸ Congress stated that “the purpose of conserving national resources, preventing the wasteful use of soil fertility, and of preserving, maintaining, and rebuilding the farm and ranch land resources is in the national public interest.”¹⁹ The Bill made payments to farmers who grew soil-building crops and implemented soil-building farming methods.²⁰ Congress attempted to combat the harmful effects of the Dust Bowl of the 1930s by providing incentives to farmers to grow crops that would deposit organic material into the soil, rather than depleting it.

The next major change occurred in 1949 when Congress included new commodities eligible for enrollment in the farm subsidies program. These “nonbasic agricultural commodities” included wool, nuts, honey, Irish potatoes, milk, butterfat, and products of milk and butterfat.²¹ Congress subsidized the sale of these products along with the traditional commodities

14. *Id.* § 12, 48 Stat. at 38.

15. *Farm Bill Study Guide*, FARM AID (May 8, 2007), <http://www.farmaid.org/site/c.q115lhNVJsE/b.2739785/apps/s/content.asp?ct=3941443> (last visited Jan. 16, 2011).

16. See RENÉE JOHNSON, CONG. RESEARCH SERV., RS 22131, WHAT IS THE “FARM BILL”? 1 (2010), available at <http://www.nationalaglawcenter.org/assets/crs/RS22131.pdf> (describing how Congress renews the farm bill).

17. See JASPER WOMACH, CONG. RESEARCH SERV., RS22695, POSSIBLE EXPIRATION OF THE 2002 FARM BILL 2 (2007), available at http://assets.opencrs.com/rpts/RS22695_20070810.pdf (detailing the consequences and the likely outcome of an expired farm bill).

18. Agricultural Adjustment Act of 1938, Pub. L. No. 75-430, ch. 30, 52 Stat. 31.

19. *Id.* § 2, 52 Stat. at 31.

20. *Id.* §§ 2, 101, 52 Stat. at 31–33.

21. Agricultural Act of 1949, Pub. L. No. 81–439, § 201, 63 Stat. 1051, 1052.

included in previous farm bills. Farmers who grew the qualifying commodities would receive price support whenever market prices dipped below a pre-set level, as determined by the Secretary of Agriculture.²²

The 1965 Farm Bill added additional incentives for farmers to take conservation efforts. Congress authorized the Secretary of Agriculture to make payments to farmers who retired their land.²³ Congress included this provision to promote “development and conservation of the Nation’s soil, water, forest, wildlife, and recreational resources.”²⁴ The producer had to enter into an agreement with the federal government that he or she would take a certain amount of acreage out of production for a specified time period.²⁵ Grazing on this land was also prohibited by the Bill if a farmer was enrolled in this program.²⁶

Large farms began taking advantage of these farm subsidies. In efforts to try to limit the amount of payments benefitting large farms, Congress put a limit on payments to farmers. In the 1970 Farm Bill, farmers could not receive government payments of more than \$55,000 per year.²⁷

C. Modern Farm Bills

No major changes occurred again until 1996. Five events influenced Congress’ efforts to draft a new Farm Bill. The first event was the release of a report stating that land idling has “retarded growth of U.S. Agriculture.”²⁸ The second event was the newly Republican controlled House and Senate.²⁹ The third event was Senator Richard Lugar’s agenda for the Farm Bill.³⁰ The fourth event was an anonymous paper suggesting that the government cease paying subsidies to farmers and providing an approach to do so.³¹ The last event was the subordination of the Senate Committee on Agriculture,

22. *Id.* § 201, 63 Stat. at 1052–53.

23. Food and Agricultural Act of 1965, Pub. L. No. 89-321, 79 Stat. 1187, 1188–90 (“[T]he Secretary determines, conservation payments shall be made to producers who divert acreage from the production of feed grains to an approved conservation use . . . to designated soil conserving crops or practices . . .”).

24. *Id.* § 602(a), 79 Stat. at 1206.

25. *Id.* § 602(b), 79 Stat. at 1207.

26. *Id.*

27. Agricultural Act of 1970, Pub. L. No. 91-524, 84 Stat. 1358, 1358.

28. Daryll E. Ray, *Impacts of the 1996 Farm Bill Including Ad Hoc Additions*, 33 J. AGRIC. & APPLIED ECON. 245, 247–48 (2001), available at <https://ageconsearch.umn.edu/bitstream/15015/1/33020245.pdf>.

29. *Id.* at 247.

30. *Id.* at 248.

31. *Id.*

Nutrition, and Forestry and the House Committee on Agriculture to the authority of the Senate.³²

The growing pressure to eliminate payments greatly influenced the 1996 Farm Bill, which ended traditional payments.³³ Instead, farmers received payments in decreasing amounts for seven years.³⁴ The markets were in a condition that farmers did not need government subsidies.³⁵ Prices of all commodities were reasonable and stable for the time being.³⁶ This farm bill was different because it promoted conservation more than any previous bill. It simplified “existing conservation programs and improve[d] their flexibility and efficiency.”³⁷ The bill allocated more than \$2.2 billion in additional funding for conservation programs.³⁸ Just as in previous efforts, the farmer had to enter into a contract with the government and abide by the conditions of the program. The Conservation Reserve Program aimed to “protect highly erodible and environmentally sensitive lands with grass, trees, and other long-term cover.”³⁹ The Environmental Quality Incentives program combined previous provisions of the Agriculture Conservation Program, Water Quality Incentives Program, Great Plains Conservation Program, and the Colorado River Basin Salinity Control Program.⁴⁰ The Wetland Reserve Program and Swampbuster program aimed to make it easier for farmers to enroll in these programs and designate acreage as wetlands.⁴¹

The 2002 Farm Bill was a drastic departure from the 1996 Farm Bill. Congress implemented three types of payments: direct payments, counter-cyclical payments, and marketing loans. Direct payments were available to farmers who enrolled in the program and entered into a contract to grow a

32. *See id.* at 247 (explaining the dynamic of the Republican controlled Senate, the changes in budget, and the Republican’s singing of the “Contract with America”). The Republicans were tasked with cutting government spending and the Farm Bill was not immune, regardless of what provisions the Senate Committee on Agriculture, Nutrition, and Forestry and the House Committee on Agriculture wanted to include. *Id.*

33. *Agriculture Law: How is the 1996 Farm Bill Different from Prior Farm Bills?*, FREEADVICE, http://real-estate-law.freeadvice.com/agricultural_law/farm_bill.htm (last visited Dec. 8, 2010).

34. *Id.*

35. Ray, *supra* note 28, at 248.

36. *Id.*

37. U.S. DEP’T AGRIC., 1996 FARM BILL: CONSERVATION PROVISIONS OVERVIEW 1 (1996), available at <http://nepis.epa.gov> (search “1996 Farm Bill”).

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 2.

certain acreage of a specified crop.⁴² The counter-cyclical payments kicked in whenever market prices were lower than the set target price.⁴³ Marketing assistance loans and loan deficiency payments (LDPs) were available to “minimize potential loan forfeitures and subsequent government accumulation of stocks.”⁴⁴ Congress made no new conservation efforts.

Given the volatility of the commodity markets and the power of Congress to revise and amend the bill often, it is difficult to draft a farm bill that has staying power. At the same time, Congress needs the flexibility to change the bill in order for it to remain viable and relevant. Congress has made efforts throughout farm bill history to implement conservation measures.⁴⁵ However, these measures have yet to gain wide-spread application and use.

II. CURRENT LEGISLATION: THE FOOD, CONSERVATION, AND ENERGY ACT OF 2008

The current Farm Bill is the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill).⁴⁶ The \$307 billion 2008 Farm Bill was originally vetoed by President Bush.⁴⁷ In a statement regarding his veto, President Bush said, “Americans sent us to Washington to achieve results and be good stewards of their hard-earned taxpayer dollars. This bill violates that fundamental commitment.”⁴⁸ President Bush vetoed the bill due to subsidies that would benefit wealthy agribusinesses and because farm incomes were already at a record high.⁴⁹ The House voted 316 to 108 to override the

42. ECON. RESEARCH SERV., U.S. DEP’T OF AGRIC., *THE 2002 FARM BILL: PROVISIONS AND ECONOMIC IMPLICATIONS* 2 (2002), available at <http://www.ers.usda.gov/Publications/AP/AP022/AP022.pdf#Title1>.

43. *Id.* at 3.

44. *Id.* at 5.

45. See Food Security Act of 1985, Pub. L. 99-198, 99 Stat. 1354 (containing conservation provisions at Title XII).

46. FARM SERV. AGENCY, U.S. DEP’T OF AGRIC., *FACT SHEET: DIRECT AND COUNTER-CYCLICAL PAYMENT (DCP) PROGRAM* 1 (2008), available at http://www.fsa.usda.gov/Internet/FSA_File/dcp2008.pdf.

47. Even though President Bush vetoed the 2008 Farm, the House and Senate voted to override the veto to approve the bill. Jonathan Weisman & Dan Morgan, *House Overrides Veto of Farm Bill: Glitch May Force Repeat of the Process*, WASH. POST, May 22, 2008, <http://www.washingtonpost.com/wp-dyn/content/article/2008/05/21/AR2008052101313.html>.

48. *Id.*

49. President Bush described the bill as “bloated, expensive, and packed with ‘a variety of gimmicks.’” David M. Herszenhorn & David Stout, *Defying President Bush, Senate Passes Farm Bill*, N.Y. TIMES, May 15, 2008, <http://www.nytimes.com/2008/05/15/washington/15end-farm.html>.

President's veto.⁵⁰ A large majority, eighty-one to fifteen, of the Senate voted the week before to approve the bill.⁵¹ While some congressional members considered the bill "wasteful,"⁵² the majority recognized the continued need to guarantee a source of affordable food. House Republican Conference Chairman Adam H. Putnam (Fla.) stated, "The principal purpose of agriculture policy in the United States is to guarantee we're not as dependent on other countries for our food as we are for our fuel"⁵³

The 2008 Farm Bill, while continuing previous programs such as direct and counter-cyclical payments, focused on conservation. The first conservation attempt renewed tax incentives from the previous Farm Bill for farmers and ranchers who donate acreage for land conservation.⁵⁴ To qualify for the incentive, the property owner has to donate a conservation easement to the federal government or a land trust.⁵⁵ In previous years this tax incentive has been somewhat successful and "has helped conserve a million or more acres of farms, ranches and natural areas."⁵⁶ Farmers and ranchers who dedicate portions of their land for conservation are not only preventing future development on this land but are also benefiting the environment in a number of ways. The secondary effects of land conservation are clean air, clean water, wildlife habitat, local food sources, and scenic beauty and landscape.⁵⁷ These conservation easements run with the land and apply to successors in interest.⁵⁸ This could arguably lower property values because it can no longer be sold to developers. This portion of the 2008 Farm Bill applies not only to farmers and ranchers, but to

President Bush proposed a bill that would exclude farmers whose annual gross income is above \$200,000. *Id.*; Weisman & Morgan, *supra* note 47.

50. Weisman & Morgan, *supra* note 47.

51. *Id.*

52. *Id.*

53. *Id.* In doing so, Congressman Putnam broke with the Republican Party including President Bush, House Minority Leader John A. Boehner (R-Ohio) and then Republican Presidential nominee Senator John McCain (Arizona), who opposed the Farm Bill. *Id.*

54. *Congress Renews Tax Incentive to Increase the Pace of Conservation*, LAND TR. ALLIANCE (May 23, 2008), <http://www.landtrustalliance.org/about-us/news/alliance-news/congress-renews-tax-incentive-to-increase-the-pace>.

55. *Id.*

56. *Id.*

57. *Id.*

58. *FAQ: Conservation Easement*, LAND TR. ALLIANCE, <http://www.landtrustalliance.org/conservation/landowners/faqs-1/faq-conservation-easement/> (last visited Dec. 8, 2010).

property owners in general.⁵⁹ Property owners who donate a conservation easement are eligible to deduct up to fifty percent of their adjusted gross income and carry forward this deduction for fifteen years.⁶⁰ Ranchers and farmers are eligible to deduct as much as one hundred percent of their adjusted gross income for a donation of conservation easements, which they can carry forward for fifteen years.⁶¹ This large tax incentive is needed to balance any reduction in property values and make this donation an economically feasible alternative to farming the land or selling it to developers.

The 2008 Farm Bill continued the Highly Erodible Land Conservation Program from the previous farm bill.⁶² This program requires producers who farmed highly erodible land before December 23, 1985, to implement certain soil conservation methods to be eligible for program benefits such as direct payments.⁶³ Another program that continued without any significant change was the Swampbuster program. If a farmer or rancher drained a wetland area to make it farmable land, the federal government could deny payments to the producer for violating the conditions of the Swampbuster program.⁶⁴

For those producers who find the conservation easement program too invasive, an alternative is the Conservation Reserve Program. This program is more flexible than the conservation easement program. It allows producers to sign a contract with the federal government to establish long-term conservation cover on eligible land.⁶⁵ This means that the farmer takes the land out of production and plants grass or trees.⁶⁶ The government would essentially rent the land from the producer to compensate her for taking the land out of production and planting conservation covers. These contracts range from a minimum of ten years to a maximum of fifteen

59. *Farm Bill: Several Provisions Delayed Until 2009*, SOUTHWEST FARM PRESS (July 8, 2008, 8:38 AM), <http://southwestfarmpress.com/farmbill/bill-provisions-0708/>.

60. *Id.*

61. *Id.*

62. *2008 Farm Bill Side-By-Side, Title II: Conservation*, U.S. DEPARTMENT AGRIC., ECON. RES. SERVICE, <http://www.ers.usda.gov/FarmBill/2008/Titles/TitleIIConservation.htm> (last updated Nov. 14, 2008).

63. *Farm and Commodity Policy: Glossary*, U.S. DEPARTMENT AGRIC., ECON. RES. SERVICE, <http://www.ers.usda.gov/briefing/farmpolicy/glossary.htm#conscompliance> (last updated Sept. 21, 2009).

64. *Id.*

65. *Id.*

66. *See id.* (discussing how the Conservation Reserve Program provides farm owners with half the cost of establishing permanent land cover).

years.⁶⁷ The 2008 Farm Bill capped the maximum acreage eligible for enrollment at 32 million, down from the previous farm bill that allowed 39.2 million acres.⁶⁸

The Wetlands Reserve Program allows the federal government to purchase conservation easements for the sole purpose of restoring wetlands.⁶⁹ The price paid must be fair market value. The 2008 Farm Bill increased the total land eligible for enrollment to 3.041 million acres.⁷⁰ This program operates on offers and acceptance. The Secretary reviews each application and “buys” conservation easements for wetland restoration based on the following factors: environmental benefits, cost-effectiveness, productivity of the land, environmental threats of continuing use for agricultural production, the extent to which purposes of the program would be achieved, and whether the landowner offers to contribute financially to the cost of the easement.⁷¹ The 2008 Farm Bill added a provision where states, Indian tribes, and nonprofit organizations can partner with the Secretary to select the best offers and which sites would be consistent with the spirit of the program.⁷²

The Environmental Quality Incentives Program (EQIP) provides “technical assistance, cost-share payments, and incentive payments to assist crop and livestock producers with environmental and conservation improvements on land used for agricultural production.”⁷³ The Natural Resources Conservation Service runs this program, which is funded through the Commodity Credit Corporation.⁷⁴ This program provides contracts for producers lasting anywhere from one to ten years.⁷⁵ The cap that any one individual can receive over a six-year period is \$300,000.⁷⁶ However, if the Secretary deems the activity will yield great environmental benefits, the total amount received can be up to \$450,000.⁷⁷ The 2008 Farm Bill added a specific provision for organic farming. Producers who engage in organic production and transition steps are eligible for payments, which are capped at \$20,000 per year.⁷⁸ This version of the bill also adds specific payments

67. *Id.*

68. *Id.*

69. *Id.*

70. *2008 Farm Bill Side-By-Side, Title II: Conservation, supra* note 62.

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

for farming practices that address and improve air quality.⁷⁹ This program apportions \$37.5 million of EQIP funds for projects addressing air-quality concerns.⁸⁰ As part of the EQIP, the Agricultural Water Enhancement Program apportions \$280 million for producers who improve water quality on agricultural lands and participate in water conservation methods.⁸¹

The Conservation Stewardship Program “provides payments to producers for adopting or maintaining a wide range of conservation management and land-based structural practices that address 1 or more resources of concern, such as soil, water, and wildlife habitat.”⁸² This is a new program introduced in the 2008 Farm Bill and replaces the Conservation Security Program.⁸³

Under this program, the USDA works with the Natural Resources Conservation Service to provide financial and technical support to producers to “conserve and enhance soil, water, air, and related natural resources on their land.”⁸⁴ Producers have to apply to be in the program on a voluntary basis and must enroll their entire acreage.⁸⁵ There is a wide variety of simple and easy techniques that farmers may already be engaged in that qualify for payments under this program. If producers are not engaged in these conservation activities, it would not be difficult to modify their actions to qualify for these payments. Examples of such activities include: injecting or incorporating manure two inches or more below the surface to reduce odors and to restore nutrients to the soil in an organic manner; when spraying, use drift nozzles and lower the boom so as to reduce the possibility of pesticide drift on neighboring land; replacing wood and oil heaters in orchards and vineyards to improve air quality; on pastures, incorporate native grasses or legumes into fifteen percent of the acreage to restore nutrients; extend a riparian buffer to protect streams and rivers and provide for more wildlife habitat; implement a grazing pattern for allowing pastures to rest; harvesting crops using a higher setting on a

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *Conservation Stewardship Program, FY 2010 Ranking Period Two*, U.S. DEPARTMENT AGRIC., NAT. RESOURCE CONSERVATION SERVICE, http://www.nrcs.usda.gov/programs/new_csp/csp.html#describe (last updated Nov. 4, 2010) [hereinafter *Conservation Stewardship Program*].

85. *Id.*

combine to leave at least eighteen inches of stalk in the field to decompose and provide organic matter.⁸⁶

This program encourages the producer to continue his or her regular course of production and business, but gives options of small modifications in farming techniques that can yield significant environmental impacts. The simple examples above can lead to considerable environmental benefits. Although some methods call for reducing crop production, the subsidy will accommodate for this loss of farmable acres through the payments. These payments take into account environmental benefits achieved, profits foregone by taking the land out of production, and implementation costs.⁸⁷ There are two types of payments included in this program.⁸⁸ First, an annual payment for installing and adopting the list of conservation activities identified by the NCRS.⁸⁹ Second, supplemental payments for crop rotations.⁹⁰ The producer enters into a contract with the federal government stating that they will continue to practice in an environmentally friendly manner consistent with the examples above. The contract length is five years and is renewable.⁹¹

For producers wishing to adopt and apply conservation farming techniques but lacking the expertise, the 2008 Farm Bill includes a technical assistance provision.⁹² This provision makes expert services available to producers who want to implement conservation practices but are unsure how to do so.⁹³ This technical assistance can come directly from the USDA or from a third-party consultant.⁹⁴ The 2008 Farm Bill expanded the technical assistance provision to include technical assistance for organic conservation practices.⁹⁵

The Farmland Protection Program provides money to states to purchase easements on land.⁹⁶ These easements would prevent nonfarm activities and

86. NATURAL RES. CONSERVATION SERV., U.S. DEP'T OF AGRIC., CONSERVATION STEWARDSHIP PROGRAM CONSERVATION ACTIVITY LIST (2010), *available at* http://www.nrcs.usda.gov/programs/new_csp/special_pdfs/CSP_Conservation_Activity_List.pdf.

87. AM. FARMLAND TRUST, SUMMARY OF FARM BILL CONSERVATION PROVISIONS 2 (2008), *available at* http://www.farmland.org/programs/farm-bill/analysis/documents/AFT-2008FarmBill-ConservationPolicies_6-6-08.pdf.

88. *Conservation Stewardship Program*, *supra* note 84.

89. *Id.*

90. *Id.*

91. AM. FARMLAND TRUST, *supra* note 87.

92. *2008 Farm Bill Side-By-Side, Title II: Conservation*, *supra* note 62.

93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

development on the land, and ensure the land will remain productive farmland.⁹⁷ The 2008 Farm Bill increased funding for this program from \$499 million to \$743 million through the year 2012.⁹⁸ Forestland is also eligible for this program because it achieves the program's goals of preventing development of farmland.

Similarly, the Grassland Reserve Program allots money to purchase easements with the purpose of restoring and conserving grassland, while still allowing the producer to use the land for grazing and hay production.⁹⁹ This is achieved by the government purchasing an easement or a long-term rental agreement.¹⁰⁰ The rental agreements can be for the duration of ten, fifteen, or twenty years, while the easements are permanent.¹⁰¹ The capped acreage allowed for enrollment is 1.22 million acres.¹⁰² When considering which applications to approve for enrollment in the program, the government will give higher priority to expiring land that was previously enrolled in the program, or highly sensitive lands that are threatened by uses other than grazing.¹⁰³

The 2008 Farm Bill specifies environmentally sensitive areas and provides conservation programs for these areas. One of the region-specific programs is the Chesapeake Bay Watershed Conservation Program.¹⁰⁴ This is a new provision to the 2008 Farm Bill.¹⁰⁵ The Chesapeake Bay is a highly sensitive ecological site. It is the country's largest estuary.¹⁰⁶ Its watershed extends across five states for a total of fifteen million acres.¹⁰⁷ These five states include Delaware, Maryland, New York, Pennsylvania, and Virginia.¹⁰⁸ This program authorizes payments to farmers who voluntarily agree to convert productive cropland to natural vegetation in order to restore the bay.¹⁰⁹ This creates a riparian buffer that improves water quality and

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. TADLOCK COWAN & RENÉE JOHNSON, CONG. RESEARCH SERV., RL 34557, CONSERVATION PROVISIONS OF THE 2008 FARM BILL 1, 11 (2008), available at <http://www.nationalaglawcenter.org/assets/crs/RL34557.pdf>.

106. *Chesapeake Bay Watershed Conservation: Multi-state Agriculture Program Helps Cleanup Chesapeake Bay*, COOPERATIVECONSERVATIONAMERICA.ORG, <http://www.cooperativeconservationamerica.org/viewproject.asp?pid=255> (last visited Dec. 8, 2010).

107. *Id.*

108. *Id.*

109. *Id.*

provides habitat for animals in the area.¹¹⁰ Another geographically specific area is the Great Lakes. This program is smaller in funding; it only authorizes five million dollars for technical assistance and education programs to improve water quality and prevent soil erosion in the area.¹¹¹

Market-Based Incentives for Conservation is a new addition to the 2008 Farm Bill. Through this program, the Secretary can determine which conservation incentives are the most effective and beneficial at achieving conservation goals.¹¹² Another new provision appearing in the 2008 Farm Bill is the Voluntary Public Access and Habitat Incentive Program. This program provides funding to Indian tribes and States to encourage private landowners to give the public access to their land for “wildlife-dependent recreation, including hunting or fishing.”¹¹³ A total of fifty million dollars is allotted for this program and landowners must apply to be enrolled.¹¹⁴

Additionally, the 2008 Farm Bill added the new provision to encourage, promote, and conserve habitat for bees. This provision is called the Encouragement of Pollinator Habitat Development and Protection.¹¹⁵

III. CRITICISM OF CURRENT LEGISLATION

While many conservation incentives were continued and new programs were added to the 2008 Farm Bill, it still received criticism for its shortcomings, mainly with the disproportionate funding for conservation subsidies, continuing commodity subsidies, and continuing LDP and direct payment programs. The total funding for conservation programs in the 2008 Farm Bill is \$24.3 billion for a five-year period.¹¹⁶ In contrast, total spending for the commodity programs, such as direct payments and counter-cyclical payments, is \$41.6 billion for the same time period.¹¹⁷

110. *Id.*

111. *2008 Farm Bill Side-By-Side, Title II: Conservation, supra* note 62.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. COWAN & JOHNSON, *supra* note 105, at i.

117. JOHNSON, *supra* note 16.

*A. Traditional Commodity Programs Impede
the Growth and Success of Conservation Programs*

When enrolled in the commodity programs, farmers receive direct payments from the government for growing a variety of commodities. The five most common types of commodities, corn, cotton, wheat, rice, and soybeans, account for approximately ninety percent of government payments.¹¹⁸ Direct payments are cash payments given to producers regardless of production volume or commodity price.¹¹⁹ In contrast, counter-cyclical payments are not automatic payments and are only triggered by low market prices.¹²⁰ Congress sets these target points, and, when the market price is below the statutory price point, producers receive payments.¹²¹ The final types of payments under the commodities program are the marketing loans and loan deficiency payments (LDP). These are nonrecourse loans¹²² that allow farmers to commit their harvested commodities as collateral.¹²³ If a farmer does not want to put the commodity up as collateral, the farmer can participate in the LDP.¹²⁴ This provides cash payments to the farmer to sell commodities based on market prices without fronting the commodity as collateral, while still receiving the additional price benefits of the loan program, so it essentially is not a loan.¹²⁵

Direct payments and LDP payments have received open criticism. Both programs help farmers when market prices are not depressed. There is no reasonable justification for direct payments. Even when grain is selling at an all time high, like in 2006 when corn was at an all time high of four dollars a bushel, producers still receive direct cash payments from the government.¹²⁶ These direct payments are made regardless of market price,

118. JIM MONKE, CONG. RESEARCH SERV., RL 34594, FARM COMMODITY PROGRAMS IN THE 2008 FARM BILL 3 (2008), available at <http://nationalaglawcenter.org/assets/crs/RL34594.pdf>.

119. *Id.* at 5.

120. *Id.* at 9.

121. *Id.*

122. A nonrecourse loan is a “loan agreement under which the collateral securing a loan [the commodity] is the ultimate source of repayment, and the lender [the federal government] cannot hold the borrower [the producer] personally liable in the event of a default. The lender [the federal government] can seize (and sell) the collateral but cannot seize non-pledged assets or property.” BUSINESSDICTIONARY.COM, <http://www.businessdictionary.com/definition/non-recourse-loan.html> (last visited Dec. 8, 2010).

123. MONKE, *supra* note 118, at 12.

124. *Id.*

125. *Id.*

126. Dan Morgan, *Corn Farms Prosper; but Subsidies Still Flow*, WASH. POST, Sept. 28, 2007, <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/27/AR2007092702054.html>.

yield, or weather conditions.¹²⁷ The direct payments were introduced in 1996 as an attempt to bolster farm incomes, while other subsidies were eliminated.¹²⁸ The 2002 and 2008 Farm Bills, however, retained these programs.¹²⁹

Senator Richard J. Durbin stated that direct payments are a “bonus . . . not a safety net.”¹³⁰ If direct payments are a bonus, as Senator Durbin suggests, the Farm Bill rewards producers for simply growing one of the designated commodities covered by this program. Producers do not have to do anything extra to receive these payments. The National Farmers Union disagrees with Senator Durbin, asserting that this is a safety net, but an inefficient one at that.¹³¹ The Union commented on the program as a “costly and inefficient method for providing a safety net.”¹³² Fuel was added to the fire when a representative from the Environmental Working Group learned that, “[y]ou don’t have to sit on a tractor seat, visit the tractor seat, you don’t even have to be alive to get a fixed payment We have fixed payments to dead people all over the place.”¹³³ Critics of direct payments argue that lawmakers missed the opportunity in 2002 and 2008 to eliminate the \$5 billion a year direct payments.¹³⁴

LDP payments kick in when market prices fall below the government-set minimum, even if it is only for a day. Producers receive this payment in addition to the grain they sell at market prices. The producer could wait to sell the grain on the day that the market offers the best price and still collect the LDP, since the market dipped below the government minimum. This program has caused producers to hope prices would go down, so they would receive LDP payments. One grain dealer stated in congressional hearings, “In the fall of the year, we find the farmer wanting the price to go down It’s almost unnatural.”¹³⁵

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.*

133. Marian Burros, *The Debate over Subsidizing Snacks*, N.Y. TIMES, July 4, 2007, http://www.nytimes.com/2007/07/04/dining/04farm.html?_r=1&scp=1&sq=The%20Debate%20over%20Subsidizing%20Snacks&st=cse.

134. David M. Herszenhorn, *Reaching Well Beyond the Farm*, N.Y. TIMES, May 20, 2008, <http://www.nytimes.com/2008/05/20/washington/20farm.html?scp=1&sq=Reaching%20Well%20Beyond%20the%20Farm&st=cse>.

135. Dan Morgan, Sarah Cohen & Gilbert M. Gaul, *Growers Reap Benefits Even in Good Years: Crops that Sell High Qualify for Payments*, WASH. POST, July 3, 2006, <http://www.washingtonpost.com/wp-dyn/content/article/2006/07/02/AR2006070200691.html>.

Not only are these programs wasteful spending, but direct payments and LDPs also encourage producers to plant only the five crops covered in the direct payment program and LDP program. Producers are less likely to enroll their land in conservation programs when it is more economical in the short-term to plant corn, sell it, and receive subsidies from commodity programs. The government must make it economically feasible to leave a hundred-acre field as native grassland, instead of offering greater monetary incentives to plow the field for corn.¹³⁶

B. Too Much Funding Is Allocated to Commodity Payment Plans

Producers should not be blamed for taking advantage of the Farm Bill and making the most economically feasible decision. Congress should be blamed for allowing these provisions to remain in place to keep large agribusiness constituents happy. By making these commodity programs more attractive than the conservation programs, Congress is indirectly promoting loss of habitat, soil erosion, water pollution, and air pollution. As long as funding for commodity programs is larger and it is more economically beneficial for producers to use land for farming, commodity programs will continue to undercut conservation programs. However, some conservation techniques, like crop rotation or cover crop plantings, can be achieved while enrolled in both programs. But, the weight should shift to conservation programs becoming economically feasible and beneficial, which will give producers greater incentive to adopt these methods.

There are plenty of conservation programs in the 2008 Farm Bill; however, funding is lacking for the programs to make them attractive to producers. Additionally, the programs need to be more efficient and streamlined. There are roughly thirty different conservation programs in the 2008 Farm Bill, all with different types of sign-up or enrollment processes.¹³⁷ It would be easier for producers to work with their local Farm Service Agency (FSA) to determine which programs they are eligible for. Instead of filling out ten different forms for ten different programs, the process should be streamlined. There is a streamline provision in the 2008 Farm Bill that instructs the Secretary to collect information and review

136. See *The Final 2008 Farm Bill – A Retrospective and Briefing*, CENTER FOR NATIVE ECOSYSTEMS (June 2, 2008), <http://nativeecosystems.org/critterthink/archive/2008/06/03/the-2008-farm-bill-a-retrospective-and-briefing> (addressing the shortfalls of the 2008 Farm Bill and how the commodity programs encourage production of top five crops, which indirectly discourages enrollment in conservation programs).

137. *2008 Farm Bill Side-By-Side, Title II: Conservation*, *supra* note 62.

applications in a manner that reduces redundancy. However, farmers remain reluctant to enroll in these programs because of all the red tape and steps it takes to get a minimal amount of money for enrolling in a conservation program. Farmers are willing to enroll in commodity programs because it is worth the time and effort—the payout is bigger.

IV. IMPROVEMENT OF CURRENT LEGISLATION

Congress has the opportunity in 2012 to draft new legislation for the Farm Bill. Congress must emphasize conservation in this new bill, not by just simply including *conservation* in the title. In order for conservation subsidies to become more effective and commonplace in a producer's practices, greater incentives must be provided. One commentator stated, "Because these programs are voluntary, their effectiveness depends on the willingness of farm operators to participate."¹³⁸ The conservation programs are in place, but if no one enrolls because of red tape and confusion, the program will achieve nothing. The policy of all farm bills is to provide an affordable supply of safe food to Americans while protecting, preserving, and conserving farmland, natural resources, and the environment.¹³⁹ The problem has always been, and will continue to be, how to balance this tension of providing safe affordable food while protecting and conserving the environment.

Commodity payment plans have been a part of all farm bills, with variation, since the first farm bill in 1933.¹⁴⁰ Conservation subsidies were not introduced into farm bills until 1985 in the Food Security Act.¹⁴¹ In order to make conservation subsidies more effective and increase enrollment in conservation programs, the bill must provide more economic incentives, streamline the process, and modify some program requirements. The programs are set-up, but now producers must take advantage of them and enroll. The barriers that some farmers complain about are the

138. DAYTON LAMBERT ET AL., ECON. RESEARCH SERV., CONSERVATION-COMPATIBLE PRACTICES AND PROGRAMS: WHO PARTICIPATES? iii (2006), available at <http://www.ers.usda.gov/publications/err14/err14.pdf>.

139. OXFAM AM., FARM BILL 101: A QUICK AND EASY GUIDE TO UNDERSTANDING THE FARM BILL 2 (2007).

140. CONG. RESEARCH SERV., 96-900 ENR, FARM COMMODITY LEGISLATION: CHRONOLOGY 1933-2002 (Geoffrey S. Becker ed., 2002), available at <http://www.nationalaglawcenter.org/assets/crs/96-900.pdf>.

141. COWAN & JOHNSON, *supra* note 105, at 1.

complicated processes of enrolling and that program enforcement is too invasive.

*A. Increase Funding for Conservation Programs and
Eliminate or Reduce Commodity Payment Plans*

Something drastic must be done to encourage producers to enroll in these conservation programs. To promote conservation and environmentally friendly farming methods, programs have to be “not only profitable for farmers, but *more* profitable than conventional practices.”¹⁴² The funding for conservation programs and the commodity programs should be flipped, thereby allocating the bulk of the money for conservation programs. “Economists typically assume that the decision to adopt a specific farming practice is based on profit-maximizing behavior, given the resources—including the type of farmland and the amount of time and management skills”¹⁴³ Direct payments should be eliminated completely. It is not a market driven payment. Counter-cyclical payments are more economical and efficient because such payments set a minimum that producers will receive for planting a commodity. The counter-cyclical payments are more justifiable than direct payments. Counter-cyclical payments also reassure producers that if the market dives, they will at least be able to recoup the investment needed to produce the crop and will make a small profit.

By cutting out direct payments and LDP, the government can allocate these funds to conservation subsidies. The 2008 Farm Bill allocates \$5 billion a year for direct payments alone.¹⁴⁴ This money should be redirected to the conservation programs. If producers still want to maintain federal funding of their operations, they will have to implement conservation methods. This fundamentally forces producers, who want federal funds, to operate their farms and ranches in an environmentally friendly manner and enroll in the conservation programs. Additionally, “emphasis should rather be on removing subsidies for agricultural systems and practices that threaten [the environment and] biodiversity.”¹⁴⁵ By cutting out direct payments for the five most common types of commodities, farmers would be more open to growing different types of crops and increasing

142. JEFFREY A. MCNEELY & SARA J. SCHERR, *ECOAGRICULTURE: STRATEGIES TO FEED THE WORLD AND SAVE WILD BIODIVERSITY* 217 (2003).

143. LAMBERT ET AL., *supra* note 138, at 2.

144. Editorial, *A Disgraceful Farm Bill*, N.Y. TIMES, May 16, 2008, http://www.nytimes.com/2008/05/16/opinion/16fri3.html?_r=1.

145. MCNEELY & SCHERR, *supra* note 142, at 218.

biodiversity. Without these direct payments, farmers would be more willing to conserve land and contract or donate land for conservation easements as long as it is economically beneficial. We cannot expect landowners to willingly give over land for a minimal price when it is more beneficial to farm the land.

B. Enrollment in Conservation Programs Needs to Be Straightforward

Additionally, the process of enrolling in these programs needs to be simpler. Producers avoid enrolling because the process is complicated, time consuming, and not worth the compensation in the end. To remedy this situation, a producer should be able to fill out one exhaustive form. This form will include everything from total acres farmed, to types of methods used. This way, FSA workers, who act as the liaison between producers and the USDA, can sit down with the producer to determine which programs he or she is eligible for. If a producer is already practicing some of the environmentally friendly farming methods, he or she should get paid to continue to do so. Some programs, such as conservation easements, require contracts. While these contracts should be maintained because property interests are being transferred, all other programs should have a uniform application or form that collects the necessary information at one time. This process should make it easier for a producer to enroll in a program and make him or her more willing to do so.

C. Modified Enforcement Policy of Conservation Programs

Another complaint of producers is that the enforcement of the programs is too invasive. If a producer is enrolled in a program, the federal government and its agents have access to the producer's property to ensure he is complying with all necessary procedures. Commodity programs do not have this enforcement requirement. For commodity programs, a producer fills out a form stating the amount of acres farmed and the varieties of crops grown, and then the producer receive payments. There is nothing invasive about this program. The enforcement of the conservation programs should be modified. The government employee should contact the farmer at a convenient time and request a site-inspection. This gives the farmer notice, so the farmer can set aside time to give the government employee a tour and discuss the methods and techniques used.

Some opponents of this notice recommendation may think that by giving notice, a producer could enroll in the program and then not actually execute requirements of the program. However, given the nature of most

conservation programs, it is impossible with only a few days notice for the producer to only *appear* to be executing the conservation methods. Thus, giving notice of a site inspection will not open the door to fraud or violations of the conservation programs.

*D. The Farm Bill Provisions Should Be Complementary,
Not Undercut Each Other*

The Sodsaver program should be mandatory. The Sodsaver program was designed to stop farmers from plowing up native prairie lands to convert to farmland.¹⁴⁶ If a farmer did plow up the native prairie land for agriculture use, the land would be ineligible to receive certain types of federal payments.¹⁴⁷ Farmers did this because “even if the land didn’t produce a crop, farmers knew they would get a federal farm payment.”¹⁴⁸ Plowing up native prairie lands is a concern because it is an integral part of habitat in the Plain states. The Sodsaver provision is voluntary and will only be enacted if approved by the state’s governor.¹⁴⁹ This is another example of how the Farm Bill itself undercuts the effectiveness of the conservation programs by making it more economical to farm the land by direct payments than enroll the land in conservation programs.

The new Farm Bill, which will be drafted in 2012, should increase the acres allowed for enrollment in the Conservation Reserve Program. Thus far the Conservation Reserve Program has been the most successful program to retire farm land.¹⁵⁰ However, the 2008 Farm Bill took 3.4 million acres out of the program in September 2009 when the producers’ contracts expired.¹⁵¹ The states that have the most expired acreage include Texas, Colorado, Kansas, Montana, South Dakota, and North Dakota.¹⁵² The new Farm Bill put a cap on acreage enrollment in the program, which is why the contracts expired upon reenrollment.¹⁵³ As a result, this land will

146. Dan Gunderson, *Uncertainty over Conservation Programs in the Farm Bill*, MINN. PUB. RADIO NEWS, May 29, 2008, <http://minnesota.publicradio.org/display/web/2008/05/23/farmbillconservation/>.

147. *Overview of the 2008 Farm Bill*, CENTER FOR RURAL AFF., <http://www.cfra.org/newsletter/2008/05/overview-2008-farm-bill> (last visited Dec. 8, 2010).

148. Gunderson, *supra* note 146.

149. *Id.*

150. DENNIS KEENEY ET. AL., INST. FOR AGRIC. & TRADE POLICY, A FAIR FARM BILL FOR CONSERVATION 6 (2007), available at <http://www.agobservatory.org/library.cfm?refid=99437>.

151. Roxana Hegeman, *3 Million Acres Taken Out of Conservation Program*, ABCNEWS, <http://abcnews.go.com/print?id=8991444> (last visited Dec. 8, 2010).

152. *Id.*

153. *Id.*

likely be plowed up for agriculture use. The repercussions go beyond the loss of habitat for native species such as quail, pheasant, and prairie chickens¹⁵⁴—the conversion of this land to productive farm land presents a great risk for soil erosion, dust storms, and water pollution.¹⁵⁵ One farmer voiced his concern about the impact on markets that an additional 3.4 million acres of commodities will produce.¹⁵⁶

The program's goal was to improve soil quality, provide natural habitat, and improve water quality.¹⁵⁷ The program paid an average of fifty-one dollars an acre to take the land out of production.¹⁵⁸ One farmer enrolled in the program in 1987, sold all his farm equipment, and lived off the conservation payments.¹⁵⁹ His contract is now expired with no hopes for renewal.¹⁶⁰ In order to make a living, he will now have to start farming the land again or rent it to someone who will farm it.¹⁶¹

This is a prime example of the different provisions of the 2008 Farm Bill that inadvertently undermine the good intentions of the conservation programs. Future farm bills need to send a clear message that conservation is the top priority. When faced with balancing the budget and deciding which programs to cut, President Obama took aim at the 2008 Farm Bill.¹⁶² President Obama wanted to eliminate direct payments to producers whose annual gross income exceeds \$500,000.¹⁶³ The proposal shocked many and lacked congressional support and thus, failed.¹⁶⁴ However, when it comes time to draft the next Farm Bill, Congress should take heed of President Obama's willingness to change and reform the Farm Bill to encourage an efficient use of taxpayers' dollars that will also benefit the environment.

CONCLUSION

The original Farm Bill started out as useful legislation that benefitted farmers, provided subsidies to stabilize the market, and allowed farmers to

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. David M. Herszenhorn, *Obama's Farm Subsidy Cuts Meet Stiff Resistance*, N.Y. TIMES, Apr. 3, 2009, <http://www.nytimes.com/2009/04/04/us/politics/04farm.html>.

163. *Id.*

164. *Id.*

make a profit. Today's Farm Bill is unrecognizable from the original legislation. Conflicting subsidies and incentives make the conservation provisions futile because it is more economical for producers to farm the land instead of enrolling in the conservation programs. Congress can ease its conscience because on paper the conservation provisions look good. However, ineffective red tape, lack of funding, and invasive enforcement make producers reluctant to enroll and participate.

Farm Bills have deep roots in American history and have supplied Americans with an ample source of affordable food. The challenge now is to preserve and conserve the environment, while still maintaining a constant supply of affordable food. Hopefully when the opportunity arises in the coming years to draft new legislation for a farm bill, Congress will strengthen conservation programs. Congress should listen to concerns about water pollution, air pollution, soil erosion, loss of organic matter, loss of natural habitat, and climate change to make conservation provisions an economically viable option for producers, instead of undermining them by providing excessive direct payments and LDPs.

