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September 27, 2007

The Honorable Robert F. Bennett
Ranking Minority Member
Subcommittee on Agriculture,
Rural Development, Food and Drug Administration,
and Related Agencies
Committee on Appropriations
United States Senate

Subject: *Department of Agriculture—Conservation Security Program*

Dear Mr. Bennett:

In April 2006, at your request, GAO issued a report examining increased cost estimates and cost controls for the Department of Agriculture's Conservation Security Program (CSP). GAO, *Conservation Security Program: Despite Cost Controls, Improved USDA Management Is Needed to Ensure Proper Payments and Reduce Duplication with Other Programs*, GAO-06-312 (Washington, D.C.: Apr. 28, 2006). Among other things, we found that in fiscal year 2004, the department made payments pursuant to CSP contracts that exceeded annual payment limits imposed by statute, 16 U.S.C. § 3838c. See GAO-06-312, at 31–32. Subsequently, we agreed to examine whether the department was authorized to make these payments. Letter from Susan A. Poling, Managing Associate General Counsel, GAO, to the Honorable Robert F. Bennett, Chairman, Subcommittee on Agriculture, Rural Development, and Related Agencies, Committee on Appropriations, United States Senate, Oct. 17, 2006. As explained below, we conclude that the department was not authorized to make payments that exceed the statutory annual payment limits. Any payment that exceeds the statutory annual payment limit is an improper payment.

Our practice when rendering legal opinions is to obtain the views of the relevant federal agency to establish a factual record and to elicit the agency's legal position in the matter. GAO, *Procedures and Practices for Legal Decisions and Opinions*, GAO-06-1064SP (Washington, D.C.: Sept. 2006), available at www.gao.gov/legal.htm. In this case, we contacted the department's General Counsel to solicit her legal views and obtain factual information. Letter from Thomas H. Armstrong, Assistant General Counsel for Appropriations Law, GAO, to Nancy S. Bryson, General Counsel, Department of Agriculture, Oct. 24, 2006. On July 9, 2007, the department responded to our request providing its legal views and additional factual information. Letter

from Stuart L. Shelton, Assistant General Counsel, Conservation and Environmental Division, Department of Agriculture, to Thomas H. Armstrong, Assistant General Counsel, GAO, July 9, 2007 (Shelton Letter).

BACKGROUND

Congress authorized CSP in Public Law 107-171¹ to provide assistance to agricultural producers who advance the conservation and improvement of the quality of soil, water, air, energy, plant and animal life. 16 U.S.C. § 3838a. CSP provides financial assistance to agricultural producers who meet defined standards of conservation and environmental management in their operations. *See* 16 U.S.C. §§ 3838–3838c. Administered by the Natural Resources Conservation Service (NRCS), the program encourages qualifying producers to continue their high level of stewardship that meets the standards to qualify for CSP assistance. GAO-06-312, at 2.

Under CSP, the department and an eligible agricultural producer enter into a conservation security contract after agreeing to a conservation security plan. 16 U.S.C. § 3838a(e). Under these contracts, the agricultural producers agree to implement the plan in exchange for the department making annual payments to the producers. 16 U.S.C. § 3838a(b),(d). Contracts are categorized under a three-tier system under which the length of contract and payment scheme may vary. 16 U.S.C. § 3838a(d)(5). Tier I contracts are 5-year contracts and include conservation practices that address at least one significant resource of concern, such as water conservation, for a portion of an agricultural operation at an appropriate nondegradation standard. 16 U.S.C. § 3838a(d)(5)(A). Tier II contracts are 5- to 10-year contracts and include conservation practices that address at least one significant resource of concern for an entire agricultural operation at an appropriate nondegradation standard. 16 U.S.C. § 3838a(d)(5)(B). Tier III contracts are 5- to 10-year contracts and include conservation practices that address a resource management system at an appropriate nondegradation standard for all resources. 16 U.S.C. § 3838a(d)(5)(C). Congress limited the annual payment that agricultural producers could receive under a CSP contract for each tier: Tier I, \$20,000; Tier II, \$35,000; and Tier III, \$45,000. 16 U.S.C. § 3838c(b)(2). For fiscal years 2002 through 2007, Congress directed that the department “shall use the funds, facilities, and authorities of the Credit Commodity Corporation to carry out” CSP. 16 U.S.C. § 3841.

In fiscal year 2004, NRCS made payments under CSP contracts described as “advance enhancement payments.” *See* GAO-06-312, at 31–32. NRCS officials explained that because of lower than anticipated participation in CSP in fiscal year 2004, NRCS did not need all of the funding that Congress appropriated to the department to make payments under the program. *Id.* at 32. Using the excess funding, NRCS provided the advance enhancement payment as a one-time payment in addition to the other annual payments due under the CSP contracts. *Id.* The advance enhancement payment was intended to cover enhancement payments that NRCS, under the conservation security contracts, committed to make to producers in future years of the contracts. As a

¹ Pub. L. No. 107-171, title II, subtitle A, § 2001, 116 Stat. 134, 223 (May 13, 2002).

result of the advance enhancement payments, NRCS made 95 Tier I annual payments that exceeded the statutory limitation of \$20,000, 209 Tier II annual payments that exceeded the statutory limitation of \$35,000, and 105 Tier III annual payments that exceeded the statutory limitation of \$45,000. *Id.* at 31.

The department concedes that NRCS, in fiscal year 2004, made annual payments to 409 CSP participants that were above the statutory maximums allowed for their tiers. Shelton Letter, at 3–4, referring to GAO-06-312, at 31–32. The department asserts, however, that its regulations allowed NRCS to advance a portion of the annual contract payment in the first year of the CSP contract. Shelton Letter, at 1–2. The annual payment made to each program participant consists of three elements, 16 U.S.C. § 3838c(b)(1), only one of which is at issue here—the enhancement payment,² 16 U.S.C. § 3838c(b)(1)(C)(iii). NRCS makes an enhancement payment to a producer engaged in or who has agreed to engage in practices that, among other things, provide increased resource benefits beyond the minimum level that is required for program eligibility. 16 U.S.C. § 3838c(b)(1)(C)(iii). The department’s regulations provide that payment for “[e]nhancements above the minimum criteria for the resource concern . . . may be included in the first CSP payment.” 7 C.F.R. § 1469.23(d)(7).

According to the department, the enhancement payment consists of two components—the “benchmark” portion, based upon efforts already undertaken and identified during a benchmark inventory process to determine program eligibility, and an “other exceptional conservation efforts” portion, based upon future efforts. Shelton Letter, at 1–2. The department states that, consistent with 7 C.F.R. § 1469.23(d)(7), NRCS paid the benchmark portion of the enhancement payment due under the entire term of the contract as an advance enhancement payment to some CSP participants. *Id.* at 2. The department explains that if a participant received \$20,000 as an advance enhancement payment in the first year of a 5-year CSP contract, NRCS then would offset this \$20,000 payment through the remaining 4 years of the CSP contract term by deducting a *pro rata* amount, in this case \$4,000, from the remaining annual payments due to the participant under the contract. Shelton Letter, at 3. So, in the remaining 4 years, NRCS would pay the producer \$16,000 per year instead of \$20,000 per year.

DISCUSSION

At issue here is whether NRCS, during the course of a year, may make payments to agricultural producers under a CSP contract that exceed the statutory limits on annual payments in the CSP authorizing act. In the CSP authorizing act, Congress provided that—

² The other two parts are a base payment, 16 U.S.C. § 3838c(b)(1)(C)(i), and an amount calculated by reference to the county costs for operations, 16 U.S.C. § 3838c(b)(1)(C)(ii).

“the Secretary shall make an annual payment, directly or indirectly, to an individual or entity covered by a conservation security contract *in an amount not to exceed*—

- “(i) in the case of a Tier I conservation security contract, \$20,000;
- “(ii) in the case of a Tier II conservation security contract, \$35,000; or
- “(iii) in the case of a Tier III conservation security contract, \$45,000.”

16 U.S.C. § 3838c(b)(2)(A) (emphasis added).

Here, the language of section 3838c(b)(2) is clear: annual payments cannot exceed the amounts listed for each tier. When the language of a law is clear and unambiguous on its face, it is the plain meaning of that language that controls. *See Connecticut National Bank v. Germain*, 503 U.S. 249, 253–54 (1992). In this case, neither we nor the department have identified a statutory exception. Indeed, the department has conceded that “NRCS does not have any information to dispute [the] finding” that 409 payments exceeded the limits set out in section 3838c(b)(2). Shelton Letter, at 4. We conclude that the department had no authority to exceed the annual payment limitations set out in section 3838c(b)(2).

The department argues that its regulations allow NRCS to advance the enhancement payment portion. The department’s regulation, 7 C.F.R. § 1469.23(d)(7), provides that payment for “[e]nhancements above the minimum criteria for the resource concern . . . may be included in the first CSP payment.” *Id.* We do not object to the department’s interpretation of 7 C.F.R. § 1469.23 to allow NRCS to advance the enhancement payment portion of the annual payment in the first year of the contract, as long as NRCS’s contract payments in any one year do not exceed the annual payment limitation imposed by section 3838c(b)(2). Section 3838c(b)(2) is clear and provides for no exception. The department may not apply its regulation in such a way as to permit payments that exceed a clear statutory limitation on annual payments. *See Oregon v. Ashcroft*, 368 F.3d 1118, 1130 (9th Cir. 2004) (no effect is given to an agency’s interpretation of its regulations that contradicts federal law).

The department also argues that because NRCS had enough money in fiscal year 2004 to cover advance payments, the department acted within its authority. Shelton Letter, at 1–2. *See also* GAO-06-312, at 31–32. In the department’s fiscal year 2004 appropriations act, Congress provided that “[n]ot more than \$41,443,000 for fiscal year 2004 of funds appropriated or otherwise made available by this or any other Act shall be used to carry out the conservation security program . . .”³ Pub. L. No. 108-199, div. A, title VII, § 752, 118 Stat. 3, 38 (Jan. 23, 2004). NRCS explained that it

³ For fiscal years 2002 through 2007, Congress directed that the department “shall use the funds, facilities, and authorities of the Credit Commodity Corporation to carry out” CSP. 16 U.S.C. § 3841.

did not actually need \$41,443,000 to meet its contractual commitments to agricultural producers; NRCS, therefore, used its surplus to advance payments to producers. The department would have us conclude that because it had more than enough money to satisfy its fiscal year 2004 contract commitments, it could ignore the statutory limitations imposed on contract payments. To do so, we would have to read the fiscal year 2004 appropriations act as repealing, at least for fiscal year 2004, section 3838c(b)(2) and its limitations on contract payments. We are unwilling to do so. It is a well-established rule that such repeal by implication is strongly disfavored.

Tennessee Valley Authority v. Hill, 437 U.S. 153, 189 (1978). Instead, rules of statutory construction provide that, where acts address the same subject in a manner that may present a conflict, effect should be given to all acts if at all possible. *See* B-303268, Jan. 3, 2005 (citing *Posadas v. National City Bank of New York*, 296 U.S. 497, 503 (1936)).

The appropriations act contains no language that could be construed to repeal the annual payment limits per contract within section 3838c(b)(2). Reading the appropriations act and section 3838c(b)(2) together, we find no difficulty in giving effect to both. The amounts available to the department in fiscal year 2004 were available for use only in a manner that was consistent with the CSP authorizing statute, 16 U.S.C. §§ 3838–3838c. The fact that the level of participation in the CSP program did not require the \$41,443,000 that Congress made available for obligation and expenditure does not allow the department to circumvent Congress's clear direction that the department make annual payments to agricultural producers that do not exceed prescribed amounts depending upon a participant's qualifying tier.

The department has conceded that NRCS made payments in excess of the annual limits in section 3838c(b)(2) in 409 CSP contracts. *See* Shelton Letter, at 4. All payments made in excess of the statutory limits are improper payments. B-309181, Aug. 17, 2007; B-239592, Aug. 23, 1991. The 95 Tier I improper payments have been resolved by the passage of time. Tier I contracts are 5-year contracts. In fiscal year 2004, NRCS advanced payments to cover fiscal years 2005 through 2008 (or the remaining years of a then current Tier I contract). In reducing the annual payments made in those 4 years to cover the amounts advanced in fiscal year 2004, NRCS, effectively, has resolved those improper payments. However, many of the Tier II and Tier III contracts are for periods of up to 10 years, continuing through fiscal year 2013. The department should identify these Tier II and Tier III contracts and promptly resolve any improper payments—for example, by adjusting the next payments due under the contracts. It would be irresponsible of the department to leave the discharge of improper payments to the passage of time. To do so would render the statutory limitations on contract payments meaningless.

We note that the department has taken administrative measures to ensure that statutory annual payment limits are respected in the future. The department adjusted its CSP sign-up notices for subsequent fiscal years to state clearly that any annual contract payment, including any advance enhancement portion, would not exceed statutory limitations. *See Notice, Natural Resources Conservation Service Conservation Security Program*, 71 Fed. Reg. 6250, 6252 (Feb. 7, 2006); *Notice,*

Conservation Security Program, 70 Fed. Reg. 15,277, 15,279 (Mar. 25, 2005). The department informed us that it also has improved its administrative software to take into account the annual payment limits. Shelton Letter, at 5. We commend the department for taking these actions. It is important that the department ensure adherence to Congress's clearly stated annual payment limits.

CONCLUSION

The department was not authorized to make payments that exceed the annual payment limits established by 16 U.S.C. § 3838c(b)(2). Accordingly, the 409 contract payments that exceeded the statutory annual limits were improper payments. To the extent that such improper payments will not be resolved with the fiscal year 2008 payment to CSP recipients, the department should take action to resolve any remaining improper payment balance yet to be recovered.

Sincerely yours,

Gary L. Kepplinger
General Counsel

DIGEST

The Department of Agriculture was not authorized to make annual payments to Conservation Security Program participants that exceeded the annual payment limits imposed by 16 U.S.C. § 3838c(b)(2). Any payment that exceeded the annual payment limit is improper and should be promptly resolved.