Federal Register

Monday,
November 29, 2004

Part II

Department of Agriculture

Natural Resources Conservation Service

7 CFR Part 652

Technical Service Provider Assistance; Final Rule

DEPARTMENT OF AGRICULTURE

Natural Resources Conservation Service

7 CFR Part 652

Technical Service Provider Assistance

AGENCY: Natural Resources Conservation Service, USDA.

ACTION: Final rule.

SUMMARY: The Natural Resources Conservation Service (NRCS) is issuing a final rule for technical service provider assistance as authorized under section 1242 of the Food Security Act of 1985 (Food Security Act), as amended by the Farm Security and Rural Investment Act of 2002, P.L. 107–171 (2002 Farm Bill). This final rule responds to comments received on the Interim Final Rule and two amendments, makes adjustments to the implementation of Technical Service Provider (TSP) assistance in response to these comments, and sets forth the final process for providing conservation technical assistance through technical service providers. The Secretary of Agriculture has delegated responsibility for administering technical services provided by technical service providers to NRCS.

DATES: Effective November 29, 2004.

FOR FURTHER INFORMATION CONTACT: Angel Figueroa, Technical Service Provider Coordinator, NRCS, P.O. Box 2890, Washington, DC 20013–2890, telephone: (202) 720–2520; fax: (202) 720–0428; submit e-mail to: *angel.figueroa@usda.gov*, Attention: Technical Service Provider Assistance.

SUPPLEMENTARY INFORMATION: NRCS is issuing a final rule for the implementation of TSP assistance, as authorized by Section 1242 of the Food Security Act of 1985, as amended. In this preamble, NRCS provides background information about the TSP statutory authority, the promulgation of the Interim Final Rule and the two amendments thereto implementing such authority, summary analysis of the comments received, significant modifications NRCS is making to the rule in response to the comments, and a section-by-section summary of the comments received and the agency response.

Historical Background

In 1994, the Department of Agriculture reorganized and transferred increased responsibilities for administration of conservation programs to the NRCS to provide technical and financial assistance to producers to improve the natural resource conditions on their land. The Federal Agricultural Improvement and Reform Act of 1996 (1996 Farm Bill), Public Law 104–127, created several new conservation programs for which the Secretary of Agriculture delegated administrative responsibility to NRCS.

Through the implementation of its conservation programs, NRCS utilizes its technical expertise to provide producers with information to help them make land management decisions. When a producer applies to participate in a conservation program, NRCS helps the producer evaluate the resource conditions on their land to determine the most appropriate way to meet the producer's conservation objectives. Through its conservation planning process, NRCS helps the producer develop a conservation plan and, depending upon the availability of funds, the Department provides financial assistance to the producer to implement identified conservation practices or systems.

The 2002 Farm Bill

The 2002 Farm Bill expanded the availability of financial and technical assistance funds for the implementation of conservation programs. At the time of enactment, the Congressional Budget Office estimated that the 2002 Farm Bill represented a $17 billion increase in the level of funding for conservation programs.

The current staffing levels of NRCS are insufficient to adequately meet the increased need for technical assistance under the conservation programs authorized or re-authorized by the 2002 Farm Bill. Section 2701 of the 2002 Farm Bill amended Section 1242 of the Food Security Act to require the Secretary of Agriculture to provide technical assistance for conservation programs authorized under Title XII of the Food Security Act to a producer eligible for that assistance ''directly * * * or at the option of the producer, through a payment * * * to the producer for an approved third party, if available.'' The Secretary of Agriculture delegated authority to implement Section 1242 to NRCS.

Section 1242 of the Food Security Act greatly expands the availability of technical assistance to producers by encouraging other non-USDA potential providers of technical assistance to assist in the delivery of technical services. To ensure that high quality technical services are available to all producers, Section 1242 requires the Secretary of Agriculture to establish, by regulation, a system for ''approving individuals and entities to provide technical assistance to carry out programs under the [Farm Bill] * * * and establishing the amounts and methods for payments for that assistance.''

Overview of Technical Service Provider Assistance

In the winter 2003, NRCS launched TechReg, a Website, through which individuals, businesses, and public agencies may apply to become certified TSPs. It also provides conservation participants with a registry for identifying certified TSPs. As of October 2004, there were approximately 2,100 entities (individuals or businesses) listed as certified in the TechReg registry. There remained about 1,300 certifications pending.

During fiscal years (FY) 2003 and 2004, NRCS obligated approximately $23 and $48 million for technical service provider assistance, and NRCS has a goal of obligating at least $35 million for technical service provider assistance during FY 2005.

Interim Final Rule and Amendments

NRCS published an Interim Final Rule on November 21, 2002, (67 FR 70119) that established a certification process under which NRCS evaluates and approves individuals, entities, and public agencies as eligible to provide conservation technical services for certain conservation programs. The Interim Final Rule also established the criteria by which NRCS evaluates all potential providers of technical assistance.

The Interim Final Rule distinguished between certification of an individual working under his or her own auspices and that of an organization, such as a corporation or a public agency, which has individuals working on its behalf. Certification of an individual means the individual has the requisite education and technical expertise to perform the technical services. Certification of an entity or public agency means that the organization could receive payment for the services provided by individuals working under its auspices provided certified individuals review the work while the organization assumes the liability for the quality of work performed.

The Interim Final Rule requires that the same certification process applies regardless of the individual or entity's desire to provide technical service through USDA or directly to participants. NRCS requested comments on proposed methods for determining payment rates for reimbursing participants for technical services obtained from certified TSPs stipulating

that the payment method would be set forth in a subsequent rule-making.

The Interim Final Rule also sets forth conditions and procedures by which NRCS determines that a certified technical service provider has failed to provide producers technical services of adequate quality, and thus, should not remain certified as a provider of technical assistance for conservation programs under Title XII of the Food Security Act.

The Interim Final Rule had a 90-day comment period. On March 31, 2003, NRCS re-opened the comment period for the Interim Final Rule and extended the comment due date to April 30, 2003. NRCS received 1350 comments on the Interim Final Rule from over 350 entities, both private and public, to the Interim Final Rule.

On March 24, 2003, NRCS published an amendment to the Interim Final Rule in the **Federal Register** (68 FR 14131), establishing the process for determining payment levels for technical service provider assistance. In addition, the amendment sets forth the policy regarding subcontracting by technical service providers in the course of their delivery of technical services. The amendment also clarifies the process for certification and amended the definition of technical service provider. The March 24, 2003, amendment had a 90-day comment period. NRCS received 15 comments from seven entities.

On July 9, 2003, NRCS published a second amendment to the Interim Final Rule in the **Federal Register** (68 FR 40751), establishing a limited exception to the certification and payment requirements when the Department is partnering with State, local, or tribal governments to carry out its duties to provide technical services. The July 9, 2003, amendment had a 30-day comment period. Eleven entities submitted 25 comments on this second amendment to NRCS.

Organizational Differences Between the Interim Final Rule and Final Rule

Change description	Interim final rule		Final rule	
	Section No.	Heading	Section No.	Heading
► Sections on definitions and applicability exchanged places.	7 CFR 652.1	Definitions	7 CFR 652.1	Applicability.
	7 CFR 652.2	Applicability	7 CFR 652.2	Definitions.
► Exception section content incorporated in section on Department acquisition of services, eliminating the need for this section.	7 CFR 652.8	Limited Exception to Certification Requirements for State, Local, and Tribal Government Partners.	7 CFR 652.6	Department Delivery of Technical Services.

Note: The final rule contains no further organizational changes.

Overview of Public Comments

In this final rule, NRCS reorganized several of the sections to improve the regulation's overall organization. For example, NRCS received comments that it would be better to have the applicability and administration sections of the rule described prior to the definitions section in order to provide an overview of the rule's applicability. Accordingly, § 652.1 of the Interim Final Rule has been moved to § 652.2 of the final rule. Additionally, NRCS removed several provisions in the administration section that addressed internal administrative matters that did not need to be incorporated in regulation. These changes were not substantive changes. NRCS made such adjustments in the final rule; however, NRCS has organized the discussions regarding public comments in the same sequence as the sections appeared in the Interim Final Rule.

NRCS received 1350 comments from over 350 entities on the Interim Final Rule. Among these comments, NRCS received two series of batch letters from individuals, conservation districts, and certified crop advisors. The March 24, 2003, amendment had a 90-day comment period, and NRCS received 15 comments from seven entities to this amendment. The July 9, 2003, amendment had a 30-day comment period. NRCS received 25 comments from 11 entities to this second amendment. NRCS considered all these comments received to the Interim Final Rule and the two amendments, and responds to these collectively in its section-by-section discussion below. Overall, most comments commended NRCS for publishing the rule and its ongoing efforts to develop and implement an effective TSP process.

Most of the comments NRCS received on the November 21, 2002, TSP Interim Final Rule related to Subpart A and Subpart B. Of the comments received on Subpart A, the sections regarding administration, technical service standards, and participant acquisition of technical services received the majority of the comments.

In the administration section, § 652.3, 20% expressed concern over the changing relationship between NRCS and conservation districts. Ten percent expressed support for the evaluation of NRCS' historic relationship and existing agreements with providers of technical services to avoid conflicts of interest. The same 10% also recommended that NRCS not enter into any Memoranda of Understanding or agreements with any group or program that does not have or enforce its written code of ethics.

In the section regarding technical service standards, § 652.4, the primary concern in this section was liability, with over 40% of the comments focused on the issue. Though comments expressed understanding for the need to hold providers liable for services rendered, most members of the private sector expressed strong concern over being held fully liable for an overall project, even when the TSP is not involved in all phases of the project's technical service delivery. The other concern expressed was for liability in situations where NRCS standards and specifications were met, but final outcome proved deficient. In addition, numerous Extension Service employees expressed concerns over the extent of liability of TSP trainers. 30% of comments supported the Agency's allowance of new technologies and innovative practices upon prior NRCS approval, and also sought the use of TSPs as a means of expanding these and alternative methods to promote sustainable agriculture. Finally, over 10% of comments suggested that the Agency provide clarification on the process, roles, and responsibilities of TSPs relating to liability and reporting accomplishment data to NRCS.

In the section regarding participant acquisition of technical services, § 652.5, NRCS received over 160 comments. Most comments expressed disappointment that NRCS did not promulgate the rule amendment about payment rates within the 30 days time-frame originally set forth in the preamble of the Interim Final Rule. Of

the three payment rate options published in original Interim Final Rule, most comments supported not-to-exceed rates, though there was concern about the method through which NRCS would establish these rates. Several comments expressed opinion that prices needed to be based on realistic estimates based on data from both the public and private sectors. Establishing flat rates received least support as it was perceived as not allowing for geographic differences and marketplace fluctuations. Commenters also expressed concern that the Privacy Act and Freedom of Information Act did not apply to information provided by participants to TSPs directly hired by the participants. The public requested additional clarification on the roles and responsibilities of NRCS, its contractors, participants, and TSPs hired directly by participants on matters related to the confidentiality of information.

NRCS also received many comments regarding the section about the Department's delivery of technical services, § 652.6. Under this section, NRCS received the most comments on two areas: (1) Potential conflicts of interest; and (2) the 50% matching requirement for contribution agreements. Most comments were submitted primarily in a batch letter format. In terms of potential conflicts of interest, over 55% comments came from certified crop advisors who expressed strong opposition to statements suggesting conflicts of interest with private technical service providers who sell agriculture input products. These commenters felt strongly that these statements failed to recognize the trust and strong relationships developed over the years between farmers and their consultants. This group also expressed frustration with the slow development of agreements for technical services between NRCS and the private sector.

However, over 25% comments of the comments received on this issue did not support the certification of entities engaged in the selling of agricultural products. NRCS also received numerous comments related to the requirement that the TSP provide a 50 percent match under a contribution agreement, with 30% stating that the matching requirement should be lowered or eliminated.

Under Subpart B of the Interim Final Rule, Certification, NRCS received over 220 comments primarily in the areas certification criteria, training, and certification costs and fees. Most comments expressed the need to have strong, rigorous, and uniform certification criteria that set the bar high enough to ensure that only qualified people received certification. The commenters also expressed that NRCS should recognize demonstrated competence, allow for recognition of private sector certification programs, and encourage involvement from professional societies, universities, and others qualified sectors. Many commenters expressed that certification criteria should also seek to promote a more holistic approach to the delivery of conservation technical services. Overall, the commenters believe that the certification process goes hand in hand with success of the TSP process and delivery of quality services, and overall quality assurance. Several wildlife groups expressed frustration with their wildlife qualifications not meeting the criteria for wildlife professionals identified in TechReg.

Most of the comments related to training expressed a need for the evaluation of a high quality training program that addresses continuing education, facilitates reciprocity from one State to another, avoids duplication with private sector certification programs, focuses on Department/NRCS protocol and procedures, recognizes the technical expertise of State agencies, and specifies training requirements that are equally stringent for all providers of technical service. Of the comments related to costs and fees, over 20 universities and Extension Service entities provided comments expressing interest in providing training and in having capacity to provide training, but also needing funding to cover training costs, including supplemental funds from NRCS. This same group expressed a belief that universities cannot provide education at no-cost and should be allowed to create fee structures that cover program development and delivery costs while meeting educational needs. Several comments from private sector entities expressed opposition to being charged for certification costs, as they have already paid fees to meet training program requirements and State requirements.

Summary of Changes

NRCS analyzed the comments received related to the Interim Final Rule and the amendments. NRCS established an interdisciplinary team of agency staff to evaluate comments as well as the Department's experience gained from implementation of the Interim Final Rule in its first year. The team reviewed overall agency operation of the TSP provisions and ascertained efficiencies that could be gained through adjustments to the process. The public comments and the internal review identified several common areas needing clarification, and as a result, NRCS has incorporated the following changes in the final rule: (1) Verification of TSP credentials, (2) liability of technical service providers, (3) Department acquisition of technical services, (4) cost-share incentives, and (5) customer utilization of technical service providers prior to entering program agreements. NRCS describes below its basis for the changes in these five areas within the section-by-section discussion of the public comments received.

Section-by-Section Comments and Response

Section 652.1 Definitions

Comment: NRCS received 15 comments on § 652.1, Definitions. In particular, NRCS received 4 comments referring to the inclusion of conservation planning in the definition of ''technical services'' and recommended that the quality assurance section, § 652.7, provide for separate and specific measures for quality assurance as it relates to conservation planning and conservation practice implementation. Seven commenters suggested that ''deficient, harm, and injury'' are terms that are difficult to define and recommended that NRCS add language to clarify these and similar terms in the rule. One commenter recommended that the acronym ''TSP'' not be used for Technical Service Provides since it causes confusion with the Thrift Savings Plan. One commenter suggested that the term ''entity'' should include specific reference to farmer cooperatives. One commenter recommended that Conservation Districts be explicitly referred to as a public entity TSP.

Response: NRCS agrees that specific standards should be developed for conservation planning and conservation practice implementation, and will incorporate new language in its quality assurance policy to address the specific needs of both planning and implementation. However, because the quality assurance process is an internal management process, NRCS has determined that it is not appropriate to set forth the specifics of its quality assurance policy in this rulemaking. The terms ''deficient, harm, and injury'' are legal standards surrounding the duty of care owed by a professional to a customer or client, the parameters of which are established in case law regarding such duties of care. Therefore, NRCS does not believe that further clarification is warranted in the rule. The acronym ''TSP'' may cause confusion to Federal employees who participate in the Thrift Saving Plan

program, but NRCS believes the general public can distinguish between a Federal retirement benefits system and a delivery mechanism for technical services. Therefore, NRCS will continue to use the acronym ''TSP.'' NRCS agrees that farmer cooperatives have delivered valuable services to farmers in the past, and NRCS wants to assure that equal access is provided to all available sources of technical services. Therefore, NRCS has added the term ''cooperative'' to the definition of ''entity'' in the final rule. However, NRCS believes that its definition of ''public agency'' adequately encompasses Conservation Districts since it includes subdivisions of State and local government. While NRCS appreciates its long-standing partnership with America's Conservation Districts, the term ''public agency'' adequately includes Conservation Districts and all other subdivisions of government, without the need to identify specific partners. Therefore, no change has been made to this definition.

Section 652.2 Applicability

Comment: NRCS received 1 comment regarding the applicability section of the Interim Final Rule. The commenter requested NRCS to identify specific categories of technical services since the designation of categories is important for the TSP and educational institutions to understand the educational programs needed to support the TSP effort.

Response: NRCS agrees that specificity may help clarify educational requirements for TSPs and assist educational institutions in developing courses to help TSP meet those requirements. However, specific categories are more appropriately described in TechReg. Consequently, only references to general categories appear in the final rule.

Section 652.3 Administration

Comment: NRCS received a total of 88 comments on § 652.3, Administration. In particular, NRCS received 1 general comment on the section as a whole, 6 comments on paragraph (a), 4 comments on paragraph (b), 28 comments on paragraph (c), and 49 comments on paragraph (e).

The one general comment viewed the privatization of the provision of technical services in theory as acceptable, but felt that there was a large amount of training, oversight, and administration requirements related to the implementation of programs that only NRCS could provide adequately.

Response: NRCS agrees that NRCS must provide oversight of the technical services provided under the programs for which it has been delegated responsibility. Additionally, there exist several activities requiring technical expertise, such as the assigning of ranking points to a particular program application for enrollment, which are tied to program administration, and thus are inherently NRCS responsibilities.

Comment: Paragraph (a) of § 652.3 of the Interim Final Rule simply sets forth the statutory provision that the Department of Agriculture will provide technical services to participants, or at the option of the participant, through a technical service provider. One commenter recommended that there should be incentives, such as awarding additional points to landowners that either participate in or select TSPs that participate in watershed groups or other collaborative conservation partnerships.

Response: NRCS believes that these matters would best be handled under program ranking criteria, and are not appropriate considerations for the TSP rule. Therefore, no change to the TSP interim final rule has been made in response to this comment.

Comment: One commenter requested that NRCS make it clear to participants that they may choose either NRCS or a TSP to provide needed technical assistance in the delivery of programs.

Response: NRCS will continue to provide outreach to its participants and potential sources of technical services to ensure that participants are aware of their options under the TSP provisions.

Comment: One Commenter supported the provisions but recommended NRCS build a strong TSP infrastructure and support new, strategic investments to develop a cadre of qualified professionals in both the public and private sectors. This Commenter also recommended that NRCS develop adequate tools and use a multi-disciplinary approach to provide technical assistance.

Response: NRCS recognizes the need to develop a cadre of professionals equipped with adequate tools within both the NRCS workforce and Technical Service Providers. NRCS also supports the use of a multi-disciplinary approach and encourages collaboration between technical service providers to ensure comprehensive planning assistance is provided to landowners. As clarified by the March 24, 2003, amendment to the Interim Final Rule, technical service providers may subcontract for any additional support they need to deliver the necessary services to participants. However, NRCS has very limited authority to expend funds for training of professionals other than for its own personnel. As described later, NRCS will make its staff available to the training efforts developed by other entities.

Comment: One Commenter recommended that technical assistance requests should be offered to the private sector before NRCS or other public agencies so that private organizations could screen and select the projects most suitable for them. The Commenter also recommended that participants be required to seek three bids and select the lowest bid, and require that bids that are either too high or too low be rejected. A different Commenter agreed that NRCS staffing levels should not be increased, and that certified crop advisers, as TSPs, should meet the conservation demand.

Response: NRCS policy supports the authorizing statute that participants select technical service providers, whether they are public or private entities. NRCS does not impose a three-bid requirement upon its participants because the Agency believes it creates an unreasonable administrative burden on them. As discussed in its payment section, NRCS is updating the process for establishing Not-To-Exceed (NTE) cost information. This update should provide better information regarding the NRCS costs related to the delivery of technical services. The Agency believes that these updated rates should be more reflective of costs incurred by technical service providers. New NTE rates should allow participants to access quality technical assistance from either public or private sources while exercising their right to choose who delivers the service to them. NRCS does not believe it is appropriate to impose on participants one type of technical service provider over another.

Comment: Paragraph (b) of § 652.3 provides that the Chief, NRCS, shall direct and supervise the administration of the rule. One commenter suggested that NRCS extend the comment period.

Response: NRCS provided an initial 90-day comment period, which was then extended for an additional period of time. NRCS received 1350 comments from over 350 entities and believes that it has received a broad spectrum of comments on all aspects of the rule. Therefore, NRCS does not intend to re-open the comment period.

Comment: Another commenter requested that NRCS keep the TSP process simple and free of paperwork, and to keep the approval process localized and streamlined. This same commenter recommended that delays in payment should not be tolerated and that complaints of unfairness handled quickly and in an un-biased manner. Another commenter stated that the rule was silent on the format of the

paperwork associated with the development of conservation plans and contracts, noting that NRCS field offices utilize geographic information systems and specially-developed software in the completion of their work.

Response: NRCS agrees that it is important to minimize paperwork and ensure an efficient process for reimbursing participants for technical services obtained from TSPs. The Agency also agrees that it is critical to the success of the program to ensure that all complaints are handled fairly and expeditiously as possible. NRCS has instituted TechReg as an electronic means for TSP to obtain certification, and is instituting other e-government provisions in order reduce the paperwork burden on its participants. These e-government efforts provide a mechanism through which NRCS will streamline applications and payments. NRCS is working collaboratively with partners to develop a means to allow technical service providers to access conservation planning information currently available to NRCS field personnel. TSPs will have an opportunity to gain analogous access to the same reference information, planning tools including forms, and reporting systems as Department employees currently have.

Comment: One commenter stated that it may be necessary for NRCS and the Department to provide national leadership to ensure successful adoption of the TSP policy by the public and by NRCS employees in all the regions and States. The commenter reflected that the differences in States should not create significant inconsistencies in policy implementation.

Response: NRCS believes that the use of TSPs will be more readily accepted in some States than others. While there has been only one year of implementation of TSP policy, some regional differences have emerged with the Midwest region of the country utilizing TSPs to a much greater extent than other parts of the country. However, NRCS is committed to promoting the use of technical service providers throughout the country, and has established a National framework, sensitive to State and local requirements. NRCS is also committed to ensuring that NRCS Regional and State personnel seek every opportunity to utilize qualified technical service providers in the delivery of its conservation programs.

Comment: Paragraph (c) of § 652.3 consists of several paragraphs. In order to streamline its response, NRCS will address the comments by topics within each paragraph comprising § 652.3(c). Several comments expressed concern regarding the unprecedented nature of the TSP provisions and recommended several approaches to ensure that NRCS had the requisite advice and framework to ensure successful implementation of the TSP provisions. One approach included the establishment of a Federal Advisory Committee to provide NRCS advice. Another approach suggested that NRCS conduct State listening sessions and surveys of conservation needs to guide delivery of technical assistance.

Response: NRCS agrees with comments that success lies in cooperation between all parties involved in TSP, but does not believe that a Federal Advisory Committee is needed, especially since adequate opportunities for advice and input exists through the public comment period under rulemaking and participation in State Technical Committees. State Technical Committees provide guidance to State Conservationist on a broad range of conservation issues, and entities interested in participating on a State Technical Committee should contact the State Conservationist.

Comment: One commenter encouraged NRCS to anticipate needed technical assistance and develop contracts with organizations based on competitive processes that focus primarily on quality.

Response: NRCS State Conservationists, with the advice of State Technical Committees, determine natural resource priorities within the State and develop strategies for delivery of conservation programs to meet these resource needs. Through this assessment, State Conservationists anticipate where workload demand necessitates the increased use of technical service providers to meet this demand and may choose to enter into contracts and cooperative agreements with qualified technical service providers. NRCS also balances its own obligation to administer its conservation programs effectively while ensuring that sufficient funds are available to support participants' option to select individual technical service providers. NRCS will enter into written agreements with participants wishing to hire TSPs in accordance with the priorities identified by the State Conservationists.

Comment: Paragraph (c)(3) of the Interim Final Rule stated that NRCS would establish policies, procedures, and guidelines regarding the certification and decertification of technical service providers. NRCS received 4 comments on this paragraph, 2 of which expressed a need for the procedures to be in ''plain English.'' One comment indicated that State Technical Committees should provide leadership in fashioning TSP initiatives, and one comment indicated that NRCS should focus on training.

Response: NRCS agrees that the language used to explain its procedures should be clear and concise, and will work to simplify the guidance made available through TechReg. As described earlier, NRCS believes the State Technical Committees can provide valuable advice on the implementation of TSP initiatives and encourages interested parties to attend State Technical Committee meetings. NRCS concurs with the comment on training and addresses this concern fully in the discussion on training under § 652.21.

Comment: Paragraph (c)(4) of the Interim Final Rule stated that NRCS will certify, decertify, renew certification, and recertify technical service providers. NRCS received 4 comments on this paragraph, all of which encouraged NRCS to work with existing and appropriate certification programs, and recommended that the certification system be stringent enough to ensure high quality technical service providers. However, these commenters expressed concern that NRCS not place itself in direct competition with private sector programs, but instead rely almost exclusively upon other entities' certification programs.

Response: NRCS agrees that there are several high quality certification programs in the private sector and has entered into Memoranda of Understanding with several of these certifying organizations. However, the statute clearly assigns responsibility to NRCS for establishing the criteria for qualifications that technical service providers must meet. NRCS is committed to working with all partners to ensure that certification programs meet established criteria. NRCS is not going to utilize one organization's certification as applicable to all categories because an organization's certification process is specific to the mission of that particular organization. NRCS must focus on the certification criteria that best meet the resource needs and issues addressed under its publicly-funded conservation programs.

NRCS values the assistance provided by recommending organizations through Memoranda of Understanding to evaluate the qualifications of applicants and make recommendations for certification. However, NRCS also believes that the TSP certification system must have an avenue for qualified individuals and entities to become certified technical service

providers, whether or not such individuals or entities are associated with a particular certifying organization or for disciplines where a certifying organization does not exist. NRCS believes that the TechReg's certification process, combined with a credible quality assurance and verification process, provides a streamlined process for such technical service providers without competing with private professional organizations.

Comment: Paragraph (c)(5) of the Interim Final Rule stated that NRCS will encourage the development and availability of training opportunities. NRCS received 4 comments on this paragraph, 3 of which stressed that additional training should be based on need and built into a continuing education system of a certification program. One commenter supported the use of NRCS personnel and materials for training technical service providers.

Response: NRCS recognizes the need for development of training and addresses this concern fully in the discussion on training under § 652.21.

Comment: Paragraph (c)(6) indicated that NRCS would track payment and accomplishment data related to technical services delivery. NRCS received 1 comment to this paragraph, expressing concern that the technical services provided may not be done in the most cost-effective way. This commenter requested that NRCS indicate the methods it would utilize when NRCS seeks to acquire technical services from non-Federal sources.

Response: NRCS recognizes that there is inevitably some inefficiency in offering new opportunities to deliver technical assistance through technical service providers, but believes that the framework in place will help minimize such inefficiency by encouraging highly qualified technical service providers to work with NRCS conservation participants. NRCS will utilize the most appropriate tool, whether that be contracts, cooperative agreements, or contribution agreements, to achieve the most efficient delivery of service to the public.

Comment: Paragraph (c)(7) states that NRCS will implement a quality assurance process to evaluate technical service provided by Technical Service Providers. NRCS received one comment regarding this issue. The commenter stated that NRCS should develop a system of compensation and job descriptions on a component basis that provides for incentives for quality not just quantity. The respondent also emphasized that conservation technical assistance work is based significantly on consulting with landowners which may not correlate directly to obligating conservation program funds.

Response: NRCS concurs with these comments, working with private landowners requires regular, authentic communication to foster a trusting relationship. NRCS has developed more detailed, practice-specific statements of work for technical service providers' use. These working documents carefully describe required components and documentation of work completed to be submitted for payment. The use of these templates, available through the Field Office Technical Guides, should also guide some discussion between landowners and technical service providers and should lead to improved communication and planning.

Section 652.3(e)

Comment: Section 652.3(e) of the Interim Final Rule stated that the Department would evaluate the terms and conditions of existing agreements with technical service providers to ensure they were consistent with the regulation. NRCS received 25 comments that expressed concern about the historic relationship NRCS has with conservation districts and 7 comments that supported NRCS re-evaluating historic and existing agreements to ensure there were no conflicts of interest.

Response: NRCS believes that it addressed these concerns in its second amendment to the Interim Final Rule, published July 9, 2003, when it provided for a limited waiver to the certification requirements for public entities who enter into contribution agreements with NRCS to provide technical services. NRCS described in detail the long-standing, productive partnership NRCS has with other public agencies, especially conservation districts. NRCS also described the cooperative working agreements that it has with conservation districts and its desire to continue this relationship and approve district employees to provided technical services through these agreements. These agreements set forth criteria and ensure that they are met.

As described in the amendment, if NRCS contributes financial resources to a partnership with a conservation district, such a relationship is consummated through a contribution agreement and the conservation district must contribute at least 50 percent of the resources needed for implementing the contribution agreement. Under the provisions of the Interim Final Rule amendment, public agencies that wanted to compete for contracts or cooperatives agreements for the delivery of technical services had to become certified in accordance with the certification process set forth in the Interim Final Rule. However, this final rule changes the certification requirement for all entities, whether a public agency or private company, when such an entity seeks to enter into an agreement or contract with NRCS to provide technical services.

As described in the preamble discussion under § 652.6 of this final rule, when obtaining technical services directly, NRCS will utilize qualification and performance criteria in a procurement contract or cooperative agreement, rather than the certification process under Subpart B, to select qualified technical service providers. NRCS will comply with applicable rules of competition under Federal acquisition and assistance authorities in its selection of technical service providers under procurement contract or cooperative agreement. The NRCS contracting officer is responsible for ensuring that the procurement process is fair and competitive. The impetus for this change is explained in this preamble's discussion of § 652.6(b).

Comment: One commenter said that existing agreements should be allowed to run their course without interference.

Response: NRCS honored its obligations under existing contracts and agreements. However, NRCS reviewed and modified many framework agreements that did not involve specific obligation of funds to ensure that the terms and conditions of the agreements were consistent with the Interim Final Rule and the two amendments. NRCS also did not enter into modifications or renewals of existing documents that obligated funds unless the terms and conditions were consistent with the Interim Final Rule and the two amendments.

Comment: One commenter suggested that NRCS create a highly pragmatic, two-tiered approach with public entities or non-profit organizations providing comprehensive technical assistance, and private, for-profit vendors providing specifically-defined technical assistance.

Response: As described more fully below in the discussion about changes to § 652.6, NRCS will utilize a two-prong approach similar to that recommended by the commenter. However, NRCS does not believe that the profit motive of the TSP is the determining factor in selecting a TSP for comprehensive technical assistance. NRCS believes that the TSP needs the Agency has in the implementation of the conservation programs differs from the TSP needs of a participant meeting program requirements. In particular,

NRCS distinguishes the qualification evaluation process used for TSPs hired directly by participants and TSPs hired directly by NRCS. NRCS believes that the selection process through the existing legal framework for Federal acquisition and cooperative agreement activities ensures that the agency obtains qualified technical services from vendors and partners for the types of technical services the Agency needs, while the certification process set forth under this final rule will ensure that participants obtain qualified technical services they need.

Comment: Two commenters expressed concern over the accelerated time schedule for implementation of the TSP provisions while another commenter recommended that a Federal Advisory Committee should be established to assist with the new initiative. One commenter stated that TechReg was an effective mechanism for implementing TSP provisions.

Response: NRCS believes that the time schedule set forth in the Interim Final Rule was warranted by the need to meet the additional technical services demand. As mentioned earlier in this preamble, NRCS does not intend to establish a Federal Advisory Committee at this time, and recommends that interested parties provide input to NRCS through the State Technical Committees. Through adjustments made in the two amendments to the Interim Final Rule and in this final rule, NRCS believes it has demonstrated flexibility to meet effectively the new issues that have arisen from this unprecedented initiative for expanding the availability of technical services to America's farmers and ranchers. NRCS will continue to seek sensible and innovative improvements to the implementation of these provisions.

Comment: One commenter stated that NRCS should not compete with private sector services, while another commenter expressed support for Department employees providing technical services. Three commenters stated that technical service providers should supplement rather than replace the base delivery of technical services.

Response: NRCS policy encourages the expansion of technical services provided by all sources. The not-to-exceed payment rates, established under this part, are based upon the direct and indirect costs to NRCS for providing technical services, and thus help minimize cost differences between NRCS and non-NRCS sources of technical services. Additionally, private, commercial sources may be in a better position to provide a participant with more timely services.

Comment: Two commenters expressed approval for NRCS and partner technical service delivery in New York and 2 commenters expressed approval for NRCS and partner technical service delivery in North Carolina. All 4 comments commended NRCS'' utilization of private and public sector partners. One commenter, however, felt that NRCS should empower its field office employees more in deciding the technical service needs of participants.

Response: NRCS appreciates the continued support it receives for its delivery of technical services to participants, especially from its field office professionals. NRCS is committed to stimulating the private sector technical service provider industry through its policies and partnerships , and NRCS believes that participants will benefit greatly from having a broader choice of technical service providers. NRCS contends that it has empowered its field offices through TSP by providing them with another tool to meet their conservation goals.

Section 652.4 Technical Service Standards

Comment: In the Interim Final Rule, § 652.4 establishes the technical service standards that technical service providers must meet to receive payment for their services. NRCS received 142 comments on the provisions contained within this section. In general, several commenters expressed concern that TSPs are not subject to the Freedom of Information Act and Privacy Act protections against disclosure of participants' proprietary information.

Response: The Freedom of Information Act, the Privacy Act, and the confidentiality provision of the Food Security Act of 1985, 16 U.S.C. 3844, are Federal statutes that promote an open Government with recognition of protections for private citizens, and thus these statutes only apply to records maintained by the Federal Government. For these reasons, NRCS again cautions participants to obtain necessary assurances regarding the confidentiality of information that is provided to the TSPs they hire.

Section 3844 of Title 16 of the United States Code (the ''confidentiality provision'') addresses the disclosure of certain information provided to the Department or a contractor of the Department by a participant for the purposes of providing the participant technical or financial assistance under a conservation program of the Department. In particular, the Department may release certain information obtained from a participant to a technical service provider working in cooperation with the Department if the disclosure of such information is needed in providing technical or financial assistance to the participant. By statute, the technical service provider hired by the Department is prohibited from disclosing the information to anyone outside the Department, and NRCS incorporates such prohibition in the terms of its contracts and agreements.

However, the confidentiality provision does not authorize the Department to disclose such information to a technical service provider hired by a participant unless the participant consents to such disclosure. Therefore, § 652.5 notifies a participant that NRCS will not disclose information in an NRCS case file to a technical service provider hired by the participant unless the participant provides such written authorization.

Comment: Section 652.4(a) of the Interim Final Rule required that the technical services provided by technical service providers meet all applicable NRCS standards and specifications. NRCS received 3 comments on this provision, including 2 commenters expressing support for high standards and 1 commenter expressing concern that the State-specific nature of NRCS standards and specifications will cause administrative burdens to TSPs who wish to provide technical services in several different States.

Response: NRCS developed its standards and specifications based upon its lengthy experience with local resource conditions and believe they are the most appropriate standards for the conservation programs it administers.

Comment: Section 652.4(b) of the Interim Final Rule specified that the Department must approve all new technologies and innovative practices prior to a technical service provider initiating technical services for those technologies and practices. NRCS received 47 comments on this provision. Three commenters expressed general support for this provision while 3 commenters expressed concern that the requirements would be too burdensome and restrictive. One commenter agreed that all projects should meet NRCS standards, but believed that TSPs should be able to utilize more innovative methods than might exist in NRCS manuals, handbooks, or other references. NRCS received 9 comments that recommended that NRCS establish a review and approval process for innovative technologies and practices. NRCS also received 29 comments that the rule should encourage technical service providers to develop innovative

practices that promote sustainable agriculture. One commenter requested further clarification of what constituted an innovative technology or practice.

Response: While the perspectives of these commenters are appreciated, NRCS must first ensure the integrity of conservation program implementation and that the practices installed and funded by public investment are technically sound and cost effective. Throughout its history, NRCS, and its predecessor the Soil Conservation Service, have internally developed and tested standards and specifications that provided safe, reliable, and effective conservation practices. These practice standards are performance-based in that they encourage the use of innovative treatments by establishing performance criteria rather than prescriptively describing the specific treatment. As new technologies have been proven through research and demonstration efforts, NRCS has adopted many new technologies and made them available for implementation through its interim standards process. The interim standards process allows for State, regional, and national testing of the application and its performance for subsequent adoption into the Field Office Technical Guides. For these reasons, NRCS believes that it balances reliability and innovation for use in its publicly-funded conservation programs. Therefore, NRCS requires under its conservation programs that practices meet NRCS standards and specifications prior to making payment for their installation. NRCS made a change to § 652.4(b) in the final rule to clearly state this requirement.

Additionally, NRCS has received authorization in the 2002 Farm Bill to implement the Conservation Innovation Grants program (CIG). CIG, authorized under the Environmental Quality Incentives Program (EQIP), is a voluntary program intended to stimulate the development and adoption of innovative conservation approaches and technologies while leveraging Federal investment in environmental enhancement and protection, in conjunction with agricultural production. Under CIG, EQIP funds are used to award competitive grants to non-Federal governmental or non-governmental organizations, Tribes, or individuals. NRCS published a Request for Proposals in the **Federal Register** on March 29, 2004 (69 FR 169400), announcing the availability of up to $15 million of CCC funds for the implementation of CIG in FY 2004. NRCS expects that the CIG-funded projects will lead to the transfer of conservation technologies, management systems, and innovative approaches into NRCS technical manuals or guides, or to the private sector. NRCS believes CIG should fund the development of innovative practices related to sustainable agriculture.

Comment: Section 652.4(c) requires that technical service providers warrant in writing that the particular technical service provided meets several requirements, including compliance with all applicable Federal, State, Tribal, and local laws and incorporates, where appropriate, low-cost alternatives that meet the objectives of both the program and its participants. NRCS received one comment expressing concern that technical service providers must warrant that practices meet all requirements even though there may exist conflicts between the various legal requirements.

Response: Technical service providers are responsible for knowing the legal and regulatory framework under which they are providing services. While there may exist overlapping and varied regulatory standards under applicable law, a professional experienced in providing technical services will be aware of the appropriate resolution to these potential conflicts of law.

Comment: NRCS also received 5 comments about low-cost alternatives, with 1 commenter expressing general support for the provision, 3 commenters expressing concern that technical service providers will not promote low-cost alternatives, and 1 commenter requesting clarification on how low-cost alternatives that are not currently in the FOTG might be incorporated.

Response: There often exist several approaches to solve a resource issue under the NRCS conservation programs. The NRCS conservation planning procedures manual provides guidance on appropriate planning methods, including the development of alternatives to be presented to participants to address their resource concerns. These alternative approaches are supported by the standards and specifications available to resolve the issue. However, NRCS agrees that the concept of what constitutes the ''low-cost alternative'' is problematic in implementation, especially since the choice of alternatives belongs to the participant based upon their conservation needs and which alternative best addresses the needs of the resource. Therefore, in this final rule, NRCS modified the language to require that technical service providers incorporate alternatives that are both cost-effective and appropriate to address the resource issues.

Comment: Section 652.4(d) of the Interim Final Rule required that technical service providers must assume all legal responsibility for the technical services provided, and must indemnify and hold the Department and the participant harmless for injuries arising from negligent or wrongful acts arising from the technical services provided. NRCS received 58 comments on this provision. The breakdown of the comments is as follows: 15 commenters expressed support for holding technical service providers liable but requested that clarification be provided on several aspects of liability; 9 comments opposed the hold harmless provision as a barrier to TSP participation; 14 comments expressed concern for potential liability of the individuals and institutions who provide training to technical service providers; 10 comments believed that NRCS should require technical service providers to have liability insurance; 1 commenter recommended that NRCS should provide liability insurance to technical service providers; 1 commenter inquired regarding who would ensure that standards and specifications were being met; 4 commenters felt that the liability provisions did not adequately protect participants; 1 commenter expressed concern about a public agency assuming broad liability; and 4 comments believed that NRCS should share in the liability if the technical services met NRCS standards and specifications.

Response: NRCS recognizes that the terminology used in the Interim Final Rule may have inadvertently caused problems in the ability for technical service providers to obtain liability insurance. The terms ''indemnify'' and ''warrant'' are used throughout the Interim Final Rule. Professional consultants find these terms problematic because a warranty or guarantee of their work could negate their professional liability coverage.

While technical service providers need to be held accountable for the work they do, the current regulatory language needs to more clearly state the extent of the liability that technical service providers assume when they provide technical services under this part. Of particular concern to many commenters was that technical service providers might be held liable for an overall project when they were not involved in all phases of its technical services delivery.

Therefore, NRCS has revised the liability language in § 652.4(d) to state more clearly that technical service providers assume legal responsibility for the technical services they provide. In response to the commenters' concerns,

the new language does not require blanket indemnification. NRCS has not required in this regulation that technical service providers submit to NRCS proof of liability insurance. Rather, NRCS will incorporate appropriate bonding and insurance requirements in its contracts or agreements with technical service providers and recommends that participants consider such matters when they hire their own technical service providers.

NRCS did not address in this regulation all the other potential liable parties if a project fails as a result of negligence or wrongful acts because such matters are beyond the scope of this regulation. Tort law provides the relevant framework for addressing such issues.

Comment: Section 652.4(e) of the Interim Final Rule stated that the Department will not be in breach of any program contract or agreement for not making payment for technical services that do not meet NRCS program requirements. NRCS received 3 comments to this provision. All 3 of the commenters expressed support for the provision, but 2 of the commenters provided alternative language.

Response: NRCS believes that the current language best captures the intent of the provision, and has made no changes in response to these comments.

Comment: Section 652.4(f) of the Interim Final Rule confirms that participants are responsible for complying with the terms and conditions of the program contract or agreement. NRCS received 4 comments on this provision. Three of the commenters expressed support for the provision, but the fourth commenter expressed concern that the language could be interpreted to attach liability to the participant for something that the technical service provider should assume sole responsibility.

Response: NRCS understands the concern expressed by this commenter. However, the technical service provider is not a party to the program contract or written agreement between NRCS and the participant, and therefore, the participant is responsible for compliance with the agreement. When the participant hires TSPs to assist in meeting the participant's obligations under the program agreement, the participant should incorporate their expectations of the contracted service provider, including fulfilling program requirements, into their contract with the provider of the technical service.

Comment: Section 652.4(g) of the Interim Final Rule requires TSPs to report in the NRCS accomplishment tracking system the appropriate information associated with the technical services provided. NRCS received 16 comments on this provision. Five commenters requested additional information about how to access the accomplishment tracking system. Three commenters expressed the need for such a tracking system. Four commenters did not support requiring TSPs to use the accomplishment tracking system because it would be excessive, burdensome, and serve as a significant disincentive to TSP participation. Two commenters expressed concern that projects with multiple TSPs may result in redundancy in reporting. One commenter expressed concern that NRCS maintain the confidentiality of participant's proprietary information. One commenter requested that NRCS clearly identify the differences between outcomes and output, and that NRCS be able to use the tracking system to determine clearly accomplishments and areas needing improvement.

Response: It is essential to track performance information related to the implementation of NRCS' conservation programs, including the extent and type of technical services provided to conservation participants, to ensure the public investment in conservation is being well-spent and conservation objectives achieved. NRCS agrees that it is important to distinguish outcomes (*i.e.* improved water quality) and outputs (*i.e.* number of acres treated), but recognizes that there is overlap in these two concepts. NRCS has modified its performance tracking system to distinguish more clearly between the two concepts, stream-line data input, and provide a user-friendly system available to NRCS personnel and technical service providers. NRCS recognizes the challenges between balancing client privacy and accessibility to information contained within NRCS client files needed to develop appropriate planning and design products. As discussed more fully above in the discussion about the confidentiality provision of the 2002 Farm Bill, NRCS maintains the confidential nature of participant information and will only disclose information to a third party with the written agreement of the participant or in accordance with Federal disclosure laws. The confidentiality provision does allow NRCS to distribute aggregated performance information.

Section 652.5 Participant Acquisition of Technical Services

Section 652.5 of the Interim Final Rule stated that participants may obtain technical assistance directly from the Department or from a TSP. NRCS received 180 comments on this section of the rule. Two comments were general comments, one commenter stating that good faith exceptions that apply to participants do not apply to technical service providers, and the second commenter suggesting that the TSP provisions will work only if NRCS allows private sector technical service providers to determine the work load that they can handle first. Most of the comments, 120 of the 180 received, were responses to the NRCS request for comments on how NRCS should determine the payment rates for technical service providers. NRCS has organized its response to these comments by topic, as set forth below.

Payment Rates

Comment: Sixteen distinct perspectives summarized the 120 comments NRCS received related to payment rates:

- Thirty-five of the commenters expressed approval for a not-to-exceed (NTE) payment approach utilizing NRCS cost as the basis for the maximum rate to be paid. However, most of the comments suggested that NRCS incorporate the ''true'' cost to NRCS to provide technical services, including overhead and operating expenses such as utilities and rental space.
- Five commenters requested that the not-to-exceed rates should incorporate an element of profit since private sector business need to make a profit to survive and that public sector entities benefit from having the public pay overhead costs.
- Seven commenters expressed concern that the costs will be difficult to establish and that the payment rates should be set at the cost charged for services in the private sector.
- Twelve commenters recommended utilizing both private and public sources of cost data to establish payment rates.
- Nine commenters expressed opposition to a flat rate while an additional five commenters expressed opposition to the establishment of a National price that did not take into account State-level differences in cost.
- Four commenters recommended that NRCS introduce a voucher system.
- Three commenters recommended that NRCS establish a fee structures based on a per acre rate or per plan rate.
- Three commenters advised against using a lowest-cost basis for acquiring professional services.
- Three commenters recommended that NRCS provide incentive payments for disadvantaged groups.
- Three commenters recommended that NTE rates as cap for the acceptable

bid obtained pursuant to NRCS acquisition process.

- Three commenters recommended that payments be based on specific practices or tasks.
- Three commenters expressed concern that NRCS would pay for services that were once provided to participants at no charge by private sector service providers and additionally discourage volunteer service.
- Three commenters recommended that NRCS utilize a two tiered payment process, where the payment rate would be based (1) upon a percentage of the total project cost and (2) upon a percentage of a not-to-exceed rate.
- Three commenters recommended utilizing an hourly rate with locally-set caps on the amount that can be paid.
- One commenter recommended that the payment rate should incorporate a fee to compensate general contractors for overseeing the work activities of non-certified technical service providers.
- One commenter wanted to be assured that NRCS could be chosen as the technical service provider because of the NRCS proven record of providing quality technical services.

Response: NRCS appreciates the thoughtful recommendations it received in response to its request for comments on this issue which is key to the success of the TSP provisions. The overriding goal for NRCS is to encourage the highest quality technical services for its participants with the most cost-effective expenditure of public dollars. Consequently, NRCS will base payment rates on the NRCS cost to provide a particular service. This cost will be reflected in the NTE rate for the technical service related to a particular conservation practice. NRCS used NTE rates in its FY 2003 implementation of TSP, and has made adjustments in order to better incorporate the complete cost for NRCS to provide a particular service.

For FY 2004, NRCS developed NTE rates from NRCS'Technical Assistance Cost for Conservation Practice (TACCP) database. It contains estimates for time required for each skill necessary to complete the four tasks of planning, design, installation, and checkout, associated with each conservation practice. The time by skill estimates are then applied to an NRCS staff cost per hour plus overhead for each needed discipline, to derive the estimates of the total technical assistance cost for a typically sized practice task. Then an NTE rate for a specific task is derived by dividing that total task costs by the reported typical job size (in acres, feet or in Animal Units). The current TACCP includes personnel salary and benefits by discipline plus an overhead rate equal to about 26% of the associated personnel cost incurred from field offices up to the state level.

The rates are based on typically sized conservation practice jobs within 214 time team regions (TTRs) across the country. Each typically sized conservation practice job reflects the natural resource, regulatory, social and economic conditions that exist within each of TTRs. NTE rates are established for each of the four major conservation practice tasks, namely planning, design, installation and checkout. NTE rates have been established for most of the 163 conservation practices being applied by NRCS.

If special conservation practice situations arise that have unique or unusual circumstances, NRCS would be expected to incur higher costs. Therefore, State Conservationists are authorized to change NTE rates accordingly, with justification and documentation. The Deputy Chief for Science and Technology recently issued a National Bulletin providing conditions and a process for State Conservationists to justify exceptions to the NTE rates.

NRCS requested sources of technical services and pricing data for past technical services provided through a FedBizOpps advertisement. NRCS continues to make efforts to identify sources and receive information on current market prices from individuals and entities providing conservation technical assistance. The request for cost data posted on FedBizOpps allows users to submit these pricing data online. NRCS intends to use this pricing data to evaluate payment rates for technical service providers.

In its March 24, 2003 amendment to the Interim Final Rule and in response to the public comments received, NRCS considered several other options in determining how to establish the payment rate for technical service. This rulemaking is setting forth that policy decision. One option considered was for NRCS to base technical service payments upon a flat rate. Under this option, NRCS would pay a flat rate for each project. For instance, regardless of what a technical service provider might charge for a project, NRCS would pay a participant $4,000, whether the work impacted 10, 100 or 1,000 acres. However, NRCS has determined that such an approach would not adequately address the actual cost for technical services on any particular project. NRCS believes that participants would have difficulty obtaining technical services for small or more complex projects because the actual cost for the design could exceed the flat rate. Additionally, the flat rate would not encourage competition in the market place because it does not encourage cost-efficiency between potential technical service providers. NRCS believes the market would tend to shift towards the flat rate rather than encouraging more efficient or innovative delivery. Therefore, NRCS did not adopt this option.

NRCS also considered soliciting bids and selecting the low cost technical service providers for participants for specific services within specific geographic areas. The Department did not adopt this method as part of the rule because it would force the participant to select only the technical service provider identified by Department rather than allowing the participants to choose their preferred qualified technical service provider. In addition, the Department believes that this alternative method would create a substantial workload for the Agency because of the need to develop and administer contracts, especially given the variety and scope of technical services needed.

NRCS also considered soliciting bids for all technical service needs on a case by case basis and contract directly on behalf of participants with each technical service provider on each technical service needed. The Department did not adopt this method as part of the rule since this method would also limit the available choices of technical service providers to a participant and would create a similar significant administrative workload for the Agency.

In considering whether to continue using the NTE rates as a basis for TSP reimbursement, NRCS has determined that the NTE rates as described above provides the greatest opportunity for the marketplace to provide input on the costs of technical services, and it provides maximum flexibility for participants to choose their technical service provider.

NRCS believes that the current regulatory framework provides adequate flexibility to NRCS to adjust payment rates in response to additional information obtained from internal and external sources of cost data. Therefore, no changes were made to this regulatory language in this provision of the rule.

Section 652.5(a)

Comment: Section 652.5(a) of the Interim Final Rule restated the statutory provision that a participant may obtain technical assistance from the Department, or at the participant's option, from a certified technical services provider. NRCS received 2

comments to § 652.5(a). One commenter stated that the provision should not be written as an entitlement without some qualifying statement about whether certified TSPs were available in the particular geographic region. The other commenter suggested replacing the term from ''participant'' to ''producer.''

Response: The ability for a participant to obtain technical services from a certified technical service provider depends upon whether there exist certified technical service providers in the geographic area and for the particular technical services. Therefore, NRCS has added the term ''if available'' to the language of § 652.5(a).

NRCS has sought to expand the availability of technical service providers nationwide, though their distribution across the country is not uniform. NRCS believes that the term ''participant'' more accurately defines the individuals and entities for which the TSP provisions are available. Therefore, no changes have been made to this term.

Section 652.5(c)

Comment: Section 652.5(c) provides that to acquire technical services from a technical service provider, participants must comply with the program agreement and select a certified technical service provider from the approved list of technical service providers. NRCS received 12 comments to this section. Eight of the commenters expressed support for the participant selecting the technical service provider from the NRCS list of certified technical service providers. Two commenters expressed concern about a program participant being assigned a technical service provider through a State contract or cooperating agreement. Two commenters requested that NRCS clarify whether a public agency can be placed on approved list of certified technical service providers.

Response: Participants are given the option to choose whether they wish NRCS to provide the technical services or to hire a technical service provider themselves. If NRCS is the chosen technical service provider, NRCS will either provide the services with its own personnel or with technical service providers assisting NRCS under a procurement contract or a contribution agreement. If a public agency plans to provide technical assistance directly to landowners, they may be placed on the approved list of certified technical service providers if they meet the certification standards. Public agencies may also be eligible to enter into program contracts or written agreements directly with the Department to deliver technical assistance if they meet the requisite qualifications.

Section 652.5(d)

Comment: Section 652.5(d) provides that a participant must submit to the Department an invoice, supporting documentation, and a request for payment in order to obtain payment for technical services obtained from a certified technical service provider. Section 652.5(d) provides that a participant may receive payment or, upon receipt of an assignment of payment from the participant, NRCS may make payment directly to the technical service provider. NRCS received fifteen comments related to this provision. Nine of the commenters expressed concern about receiving payment through a participant because the submission of payment information would be done on the participant's schedule and subject to the participant's level of satisfaction with the quality of the technical services. Six commenters expressed support for the ability of technical service providers to receive payment directly through an assignment of payment process.

Response: NRCS based its payment process in the rule upon the requirements in the TSP statutory provisions that the option for the participant to select a technical service provider be through a payment to the participant. Any payment by the participant to the TSP is between those two parties under their contract and does not impact our payment to the participant under the program agreement. NRCS believes that the payment and assignment of payment options meet these statutory limitations and therefore no changes were made to this provision.

Section 652.5(g)

Comment: Section 652.5(g) of the Interim Final Rule provided that a participant may be reimbursed for technical service provider costs incurred prior to entering into a program contract or agreement provided several requirements were met. NRCS received 8 comments in response this section. These comments supported the concept of providing assistance for technical services needed prior to entering into a program agreement or contract, but expressed concern that some participants may view it as an entitlement. Therefore, several of the commenters suggested the modification to the regulatory language to require a written contract or working agreement with NRCS before a participant can expect payment for these technical service costs.

Response: NRCS made changes to this section in response to these comments. NRCS modified the regulation to add the explicit requirement that NRCS requires the participant to enter into a written agreement with NRCS before NRCS will pay a participant for technical services obtained prior to entering into a program agreement or contract. This written agreement is not the same as the program agreement or contract, and does not indicate that a person has been accepted into a Farm Bill program. Any agreement is subject to the availability of funds and will be awarded in accordance with the priorities established by the State Conservationists. By making these changes in the final rule, NRCS will be able to manage the technical service funds more efficiently to meet the needs of its participants.

Section 652.5(h)

Comment: Section 652.5(h) provides that participants must authorize in writing to the Department the disclosure of their records on file with the Department that they wish to make available to specific technical service providers hired by the participant. NRCS received 16 comments specific to this provision. Fourteen of the comments expressed support for the confidentiality of participant records but were concerned that Federal disclosure laws and protections did not apply to technical service providers hired by participants. Two of the commenters expressed concern that the use of technical service providers should not be a shield from scrutiny when the service provided are paid with public funds to implement public programs.

Response: NRCS incorporated § 652.5(h) in the Interim Final Rule to notify participants that the Federal government would not disclose their records unless required by Federal disclosure laws or authorized by the participant. NRCS discussed this issue in greater detail earlier in the preamble discussion under § 652.4. NRCS did not make any changes to this section in the final rule.

Section 652.5(i)

Comment: Section 652.5(i) provides that payments for technical services will be made only one time for the same technical service provided unless, as determined by the Department, the emergence of new technologies or major changes in the participant's operations necessitated the need for additional technical services. NRCS received 2 comments, one commenter stating that a conservation plan should not have to

cover a landowner's entire property and the other commenter stating the provision needs to allow for follow-up assistance in implementing their plans and agreements.

Response: NRCS believes that conservation program requirements determine the extent of conservation planning that is needed to meet the goals of the particular program, and consequently, such a matter does not need to be addressed further in this rule. Therefore, no changes have been made to this provision.

Section 652.5(j)

Comment: Section 652.5(j), was added in the amendment to the Interim Final Rule published March 24, 2003, and provides that a participant may earn credits towards their cost-share practice installation if a participant selects a technical service provider with prices below the not-to-exceed rates for the provision of technical services. The credits earned will be equal to a percentage of the savings generated by the participant by choosing a lower cost technical service provider, but such amount could not exceed any statutory limitations on cost sharing or payments for a particular program. NRCS received 23 comments on this provision, 22 of which expressed concern about the ethical problems the cost-share credit could create.

In particular, these commenters expressed that the incentives created by this provision would encourage participants to make the cost of the professional service their first consideration. Pressure would be placed on prospective TSPs to make cost concessions in order to obtain the contract with the participant. Succumbing to this pressure may even violate the professional's code of ethics to which he or she must adhere.

Response: In response to these comments and internal financial administrative concerns, NRCS has removed this provision from the final rule. Without the cost-share credit, NRCS believes that the NTE framework for establishing TSP reimbursement is consistent with principles that quality should be a primary focus regarding the acquisition of professional services. The use of NTE rates is analogous to developing a reasonable estimate of what professional services should cost as part of the Federal procurement process.

NRCS believes that it has attempted to introduce market forces into the process by utilizing NTE rates as a base that the participant is assured when negotiating for professional services. Since NRCS will not cover any cost above the NTE rate, the participant has a vested interest in obtaining the best quality service for the price. Therefore, market incentives are already built into the system without including a credit clause. In addition, NRCS believes that these market incentives maintain a more balanced approach between quality of service and cost when encouraging a private market for technical service providers.

Section 652.6 Departmental Delivery of Technical Services

Comment: Section 652.6 of the Interim Final Rule described how NRCS may procure technical services from technical service providers to assist NRCS in the development and implementation of the Farm Bill conservation programs and the instruments that NRCS would utilize to obtain those technical services. NRCS received a total of 296 comments about the provisions in § 652.6, including 19 general comments on the topics encompassed within the section.

Five of the general comments expressed concern about the ability of TSPs to have the breadth of knowledge about conservation planning and also expressed concern about the continued ability of NRCS to maintain its technical capabilities if NRCS staff were diverted to handle the administrative responsibilities associated with the TSP provisions.

Response: NRCS appreciates the commenters' recognition that NRCS is the leader in the delivery of conservation planning services. However, in order for conservation practices to be implemented effectively to land owners with varied needs, conservation planning needs to be integrated more completely in the delivery of technical services by private and other public entities, including delivery to customers who do not participate in Farm Bill programs. The TSP provisions provide an incentive to these non-NRCS technical service providers to gain expertise in conservation planning, and thus increasing the availability of conservation planning services. NRCS will work to maintain and improve its own capabilities to provide technical assistance directly, while encouraging expansion of the availability of technical services through other sources.

Comment: Six of the commenters urged that NRCS maintain flexibility in administering the TSP provisions since the provisions will raise new and unique issue that require flexibility and deliberation to develop effective solutions.

Response: NRCS believes that it has created a broad and flexible framework for the TSP provisions in which effective solutions can be crafted.

Comment: Six of the commenters expressed general concern about the relationships between NRCS and other public agencies, especially conservation districts, that the new TSP provisions might undermine the base delivery of technical services. These commenters believed that NRCS will need to take action to maintain its base capabilities to deliver technical services in addition to fashioning means to expand the availability of technical services to participants.

Response: The second amendment to the Interim Final Rule helped to ensure that NRCS could maintain its historic relationship with conservation districts and build additional relationships with other public agencies by removing the certification requirement for public agencies who provide technical services under a contribution agreement. Additionally, NRCS has addressed this concern about expanding the availability of technical services in the final rule at 652.6(b) by replacing the certification requirements with a qualification and performance-based selection process when NRCS procures technical services under Federal acquisition processes or enters into a contribution agreement with public or private entities.

Comment: One commenter expressed general disapproval for the provisions.

Response: NRCS recognizes that there may be dissatisfaction among some potential TSPs about the approach NRCS has taken in the Interim Final Rule. However, NRCS believes that some of this dissatisfaction may be alleviated by the adjustments NRCS is making in the final rule in response to the comments it received.

Comment: One commenter believed that only NRCS personnel, and not individuals hired under Federal contract, should work with Tribal governments in order to maintain the government to government relationship.

Response: NRCS will work with Tribal governments similar to how NRCS works with other governmental entities. NRCS personnel will be the signatories to agreements and the contacts for agreements entered into with Tribal governments. Tribal participants, like other participants, have the option to utilize NRCS or a technical service provider. If a participant selects NRCS, in order to meet work load obligations, NRCS may obtain assistance from a technical service provider hired directly by NRCS.

Comment: Section 652.6(a) provides that NRCS may procure services through either a contract or a contribution agreement. Paragraph (a) specifies that NRCS will only enter into a contribution agreement if the technical service provider ''contributes at least 50 percent of the technical services needed to accomplish the goals of the project. * * *'' NRCS received 80 comments on paragraph (a), 78 of which referred to the 50 percent contribution rate. These 78 comments felt that the contribution rate should either be lowered or eliminated completely, stating that this requirement would discourage partners from providing assistance at a time when NRCS wanted to expand the availability of technical assistance. One commenter agreed with language in the preamble to the Interim Final Rule that indicated NRCS would seek to meet the additional demand for technical services through contracts and agreements, rather than expanding its own work force. One commenter expressed that the rule should be structured to give the State Conservationist and the conservation district boards the ability to work together in deciding the role of conservation districts in delivering conservation programs in association with NRCS.

Response: The authority for contribution agreements is the Agriculture Appropriations Act for FY 2001, 7 U.S.C. 6962a, and is permanent authority for the agency. Section 6962a of Title 7 of the United States Code specifies that NRCS may enter into cooperative agreements to obtain goods and services without competition provided that (1) both parties to the agreement share in meeting the goals of an NRCS program; and (2) both parties contribute resources to meeting those goals. The statute did not specify a contribution rate, but allowed that issue to be decided by the agency.

NRCS determined that the mutuality goals would best be served if the other party, or parties, shared at least 50% of the cost. While NRCS is not able to renew several of its previous contribution agreements because a partner is unable to meet the 50% contribution requirement, NRCS has greatly increased its utilization of competitive processes under Federal contracts and cooperative agreements. Therefore, several partners with whom NRCS previously worked with under a contribution agreement may now compete for projects through these competitive processes. If an interruption in program delivery appears to result from the 50% contribution requirement, NRCS will reconsider this particular issue. However, NRCS's current experiences is that the conservation programs are being effectively delivered under the current contribution rate requirements.

NRCS will continue to work with conservation districts and its other partners to provide a comprehensive technical service delivery to its conservation participants. Conservation participants benefit from having multiple potential sources of technical services.

Comment: Section 652.6(b) of the Interim Final Rule indicated that the Department may also enter into competitive cooperative agreements to expand the availability of technical services. Paragraph (b) specified that only the Chief, NRCS, or Administrator, Farm Service Agency, could determine that competition was not needed for an award of a particular cooperative agreement, as allowed by 7 CFR Part 3015. NRCS received 15 comments on § 652.6(b). Ten of these comments expressed general support for the use of cooperative agreements, especially to provide external expertise in geographic or substantive areas where NRCS may not have sufficient personnel. One commenter recommended that NRCS State Conservationists be authorized to determine whether competition was needed or not in the award of a particular agreement. One commenter stressed that NRCS honor existing cooperative agreements. One commenter recommended that NRCS consider proposals from qualified conservation organizations to partner on regional or large-scale conservation initiatives. One commenter questioned the role of the Farm Service Agency. One commenter questioned whether there existed enough qualified technical service providers and whether Federal annual appropriation processes and funding delays would prevent the adequate availability of technical assistance funds.

Response: NRCS honored existing cooperative agreements but has only renewed or entered into new cooperative agreements that are consistent with the provisions of the Interim Final Rule. The scope of the contracts and cooperative agreements NRCS has formed reflects program participants' varying needs for technical services. Some contracts or agreements are project-specific, while others provide the framework for numerous projects within a geographic area or of a particular technical service need. NRCS works with the full range of available qualified technical service providers, though in the first year of implementation, NRCS worked more predominantly with public agencies and non-profit organizations.

NRCS expects that it will enter into more contracts with private commercial entities in the current fiscal year and will strive to balance its acquisition of assistance from all sources of technical services. However, technical assistance funds are annual funds, and unless they become obligated by the end of the fiscal year, they become unavailable. The Farm Bill technical assistance funds that were made available this year encompassed all Title XII programs, including the Conservation Reserve Program administered by FSA.

NRCS has restructured § 652.6 to incorporate the two-pronged approach for NRCS acquisition of technical services, and thus paragraph (b) of the final rule now provides that a TSP may obtain a payment for technical services under a contract, cooperative agreement, or contribution agreement with NRCS that contains qualification and performance criteria even if the TSP is not certified in accordance with subpart B of the final rule.

Comment: Section 652.6(c) of the Interim Final Rule provided that a certified technical service provider is not eligible to receive payment under a program contract or agreement for technical services provided directly to a participant if that technical service provider has entered into an agreement with NRCS to provide technical services to that participant.

Response: The provisions of § 652.6(c) have been moved to § 652.6(d), and the new § 652.6(c) in the final rule provides that NRCS will utilize the applicable competition and selection criteria under the Federal Acquisition Regulations, Federal Grants and Cooperative Agreements Act, and related applicable requirements.

Comment: NRCS received 181 concerning issues related to matters in paragraph (c) of the Interim Final Rule. For example, questions were raised in listening sessions and elsewhere about a potential ''conflict of interest'' if a technical service provider hired by NRCS also attempts to sell agricultural products in the course of providing those technical services. This particular issue was not discussed in the Interim Final Rule. Ninety-six commenters responded negatively, stating that they strongly opposed statements made by some people at the listening sessions that suggested to NRCS that private sector TSPs who sell agriculture input products have a conflict of interest. These 96 commenters emphasized the trust and strong relationship that such private sector TSPs have developed with their farmer customer over the

years. Sixty-one commenters responded that they favored a conflict of interest provision, stating that TSPs should be independent of any financial interest in the sale of any materials, equipment, or inputs needed for implementing a conservation plan.

Response: This particular issue is not a regulatory issue appropriately addressed in this regulation, but is one that should be handled between the party who seeks technical services and the party who provides the technical services. This is not an ethics matter to which the Federal rules apply. Participants are prudent to adopt a ''buyer-beware'' approach in their business transactions, including who they decide to hire to provide them with technical services.

Comment: NRCS received 15 comments requesting that NRCS consider the significant role that certified crop advisers (CCA) can play in helping NRCS in implementing the Farm Bill conservation programs. In particular, these comments described the rigorous agronomic curricula and testing programs needed in modern agriculture and the extensive training that exist through the CCA certification program.

Response: NRCS has entered into Memoranda of Understanding (MOU) with several organizations related to evaluating the qualifications of individuals and entities interested in providing technical services to conservation participants. These recommending organizations include: the Society for Range Management (signed 02/02/03); the American Society of Agronomy—Certified Crop Advisers, Certified Professional Crop Scientists, Certified Professional Agronomists (Updated 02/06/03); American Society of Agronomy—Certified Professional Soil Scientists (Updated 02/06/03); The Wildlife Society—Certified Wildlife Biologist (signed 03/27/03); University of Tennessee (signed 04/09/03); Irrigation Association (signed 05/08/03); Environmental Management Solutions, LLC (signed 06/17/03); American Registry of Professional Animal Scientists (signed 07/30/04); Association of Consulting Foresters of America, Inc. (signed 09/15/04); and, Iowa State University (signed 10/14/04). NRCS values the contribution provided by certified crop advisers and the many other professionals and professional organizations that have assumed responsibility for ensuring that high quality technical assistance is provided to landowners. Through these MOUs and other discussions with professional organizations, NRCS is clarifying the proficiencies, standards, and work statements that help both the recommending organization and technical service provider applicants to understand and provide the expected quality of service.

Comment: NRCS received 1 comment competition between profit and non-profit organizations is unfair. NRCS also received 1 comment disagreeing with preamble language that public agencies have a conflict of interest. One commenter indicated that NRCS should ensure that individuals and organizations that provide technical services do not recommend or approve their own work. Finally, NRCS received one comment that the rule did not clearly distinguish between TSPs hired by participants and those obtained by NRCS through contracts, contribution agreements, and cooperative agreements.

Response: NRCS is making changes to § 652.6 in response to these comments and comments received internally from the implementation of the TSP provisions for the past year and a half. NRCS indicated in the preamble of the Interim Final Rule that it would utilize technical assistance from only technical service providers that had been certified under the provisions of the Interim Final Rule. The original TSP Interim Final Rule prohibited NRCS from making a payment under a program contract or agreement, a procurement contract, a contribution agreement, or cooperative agreement for technical service provided by a technical service provider unless the technical service provider was certified by NRCS and was identified on the approved list. NRCS modified this provision in the July 9, 2003, TSP rule amendment to allow NRCS to make a payment to a public agency who entered into a contribution agreement with NRCS, as described above. In the final rule, NRCS has placed all parties who do business directly with the Agency, both public and private entities, on an even playing field by removing the certification requirements and simplifying the process for selection of qualified providers.

NRCS has determined that its TSP certification requirements are potentially inconsistent with the legal framework for obtaining Architectural and Engineering (A & E) services, and that it needed to address this issue in this final TSP rule. NRCS based its determination upon the Brooks Act (Public Law 92–582) and the process by which Federal agencies must select A & E services. The Brooks Act sets forth the procurement process by which architects and engineers are selected for design contracts with Federal design and construction agencies. The Brooks Act establishes a qualifications-based selection process, in which contracts are negotiated on the basis of demonstrated competence and qualification for the type of professional services required at a fair and reasonable price. The Brooks Act selection process is more detailed and tailored to the acquisition of these types of services than the TSP certification requirements.

NRCS is modifying § 652.6 in the final rule distinguishing further between participant acquisition of technical services and NRCS delivery of technical services through contracts, contribution agreements, or cooperative agreements. Technical service providers who desire to work directly with participants will need to be certified under these regulations to receive payment from the participant through a reimbursement from NRCS. Technical service providers who wish to enter into a Federal contract, contribution agreement, or cooperative agreement with NRCS to deliver technical services must meet Federal acquisition or USDA Federal assistance rules and requirements for competency, quality, and selection, as appropriate. NRCS will incorporate into its contracts and agreements the necessary quality and performance requirements. Technical service providers who are selected as qualified and competent under such requirements will not need to be certified separately under TechReg when entering into contracts and agreements with NRCS.

This two-pronged system will meet statutory requirements, address concerns raised by commenters to the Interim Final Rule, and provide a logical distinction between technical service providers who are hired by participants and those who are hired by NRCS.

In addition, Section 1242(b)(3) of the Food Security Act, as amended, requires that NRCS evaluate individuals and entities with whom it had, prior to May 13, 2002, an agreement to provide technical assistance according to the system for approving individuals and entities developed by NRCS under regulation. In particular, Section 1243(d) of the Food Security Act provides that participants may obtain technical assistance from ''approved sources, as determined by the Secretary, other than the Natural Resources Conservation Service.'' Pursuant to this authority, enacted in the 1996 Farm Bill, prior to the enactment of the 2002 Farm Bill, NRCS had entered into Memoranda of Understanding (MOU) with several organizations to assist NRCS with the evaluation and approval of individuals and entities to provide technical services, such as conservation planning,

to conservation participants. The MOU set forth the qualifications these sources of technical assistance would need to meet in order to be ''approved'' by NRCS. While NRCS did not make payment to participants for participants to utilize these sources of technical assistance, these technical assistance providers have received a type of approval from NRCS to provide technical services to participants. Pursuant to Section 1242(b)(3), NRCS updated many of these Memoranda of Understanding to ensure that these previously approved providers of technical services were evaluated under the requirements of the Interim Final Rule, and thus allow participants that utilized these sources of technical services to receive payment for such assistance. Where appropriate, the MOUs, as modified, now serve as the basis for NRCS to receive recommendations for certification from organizations with an appropriate accreditation program in place under § 652.25 of this part.

Section 652.7 Quality Assurance

Section 652.7 of the Interim Final Rule provided that NRCS would review, in consultation with the Farm Services Agency (FSA), as appropriate, the quality of the technical service provided by technical service providers. In particular, the Interim Final Rule required that technical service providers develop and maintain documentation in order to facilitate the NRCS quality assurance process.

Comment: NRCS received 83 comments to this section. Forty commenters believed that NRCS must review and approve all plans prepared by technical service providers to ensure consistency and adequacy of the technical services, and thus make NRCS accountable for the plans. Seventeen commenters, however, believed that a system of random spot-checks was adequate to ensure quality of technical service.

Response: Similar to NRCS quality assurance reviews conducted for conservation programs, NRCS will conduct quality assurance reviews to verify the quality of technical services provided. As an internal management process, NRCS does not specify in the final rule the particular methodology it will utilize for conducting quality assurance reviews. Instead, NRCS sets forth in policy its quality assurance methodology and procedures, and will modify these procedures if needed. Currently, NRCS randomly selects and evaluates projects implemented by both its employees and technical service providers to ensure quality of technical service delivery. When deficiencies are identified, NRCS takes the necessary action. NRCS believes that the random selection process provides sufficient review of the work performed by its employees and TSPs in a cost-efficient manner. While a 100% review would provide more complete information about the quality of work being performed, such an extensive quality assurance process would greatly increase technical assistance costs and lacks practicality from an administrative standpoint.

Comment: NRCS received six comments expressing support for NRCS as the agency providing quality assurance, four comments requesting that NRCS extend its quality assurance process to training programs for technical service providers, three comments expressing support for quality assurance, two comments requesting that NRCS distinguish its quality assurance process for plans from its quality assurance process for practice implementation, two comments requesting clarification of the need for coordination with FSA, and one comment requesting that NRCS district conservationists hold regular meetings with technical service providers to improve communications.

Response: The Secretary of Agriculture delegated to NRCS the responsibility to implement the TSP provisions of the 2002 Farm Bill for all conservation programs, including programs administered by FSA. Since FSA participants may utilize the services of technical service providers, NRCS must coordinate with FSA to ensure that the needs of FSA and its participants are met.

NRCS intends to ensure, through the certification criteria and quality assurance procedures, that participants will receive high quality technical services, whether the participant chooses NRCS or a technical service provider. Therefore, NRCS will provide comprehensive policy and guidance on technical service delivery and will make such policy and guidance available through TechReg. As mentioned above, NRCS currently selects and evaluates projects implemented by both its employees and TSPs on a random basis. The number, type, and location of projects selected for review are determined through criteria identified in the NRCS Conservation Programs Manual.

Comment: NRCS also received 3 comments regarding the need to have a strong quality assurance program and to verify the credentials of individuals and entities certified as technical service providers.

Response: The verification of Technical Service Provider certifications and quality assurance of services provided are essential elements in assuring that there are available qualified, able and skilled Technical Service Providers. TSPs identify in TechReg that they have the requisite education and experience to accomplish the technical service for which they wish to be certified, and NRCS must be able to confirm that such criteria have been met. In the final rule, NRCS identifies the verification as an essential part of its quality assurance and certification responsibilities by adding a paragraph to § 652.2(c), a new sentence to § 652.2(f) regarding submission of education and licensing documentation, and a new provision in § 652.7(a) about utilizing documentation submitted by the TSP as part of its quality assurance process. NRCS adopts a verification process for all certified technical service providers. This will ensure that participants receive the highest quality technical service. A potential TSP will still need to submit only one application and list additional States in which the applicant wishes to be considered for national certification.

Section 652.8

Section 652.8 was added to the Interim Final Rule in the July 9, 2003 amendment, and established a limited exception to certification requirements for State, Local and Tribal Government partners. In particular, § 652.8 of the Interim Final Rule established that, in carrying out its duties to deliver technical services, the Department may enter into agreements with State, local and tribal governments (including conservation districts) approving such governmental entities to provide technical services when the Department determines that such a partnership is an effective means to provide technical services.

Comment: NRCS received 24 comments on this section. The topics fell into 8 categories. Eight commenters supported the limited exception and the use of agreements, however, they felt that only one agreement should be required by a partner rather than both a working agreement to establish qualification requirements and a contribution agreement to obligate funds for projects. Fourteen commenters opposed the use of the exception because they believed it is preferential and should be available to all interested in participating in this manner. These commenters felt strongly that the private sector has the same ability to contribute as the public sector. Two commenters recommended reducing the match

requirement from 50% or allowing in-kind contributions to constitute the match. One commenter asked for clarification of the restrictions, such as time frame limitations related to the memorandum of understanding. They also stated that it would be difficult for State agencies to keep current the names listed as representing them because of high turnover rates.

Response: NRCS responded to the concerns raised in this section in its discussion in § 652.6, Department delivery of technical services. In particular, NRCS has established a two-prong system for technical services delivery. NRCS has modified § 652.6 to distinguish between participant acquisition of technical services and NRCS procurement of technical services. Technical service providers who desire to work directly with participants will need to be certified under these regulations to receive payment from the participant through a reimbursement from NRCS. Technical service providers who enter into a Federal contract, contribution agreement, or cooperative agreement with NRCS to deliver technical services must meet Federal acquisition or USDA Federal assistance rules and requirements for competency, quality, and selection, as appropriate. NRCS will incorporate into its contracts and agreements the necessary quality and performance requirements. However, technical service providers who are selected as qualified and competent under such requirements will not need to be certified separately under TechReg when they enter into procurement contracts or agreements directly with NRCS. Therefore, NRCS has removed § 652.8 from the final rule.

Section 652.21 Certification Criteria and Requirements

Section 652.21 of the Interim Final Rule set forth the minimum certification criteria and requirements for an individual to qualify for certification under the TSP provisions. In particular, § 652.21 establishes that an individual must: (1) Have the technical training, education, or experience to perform the level of technical assistance for which certification is sought; (2) meet the applicable licensing or similar qualification standards; (3) demonstrate through documentation of training or experience, familiarity with NRCS technical and program requirements; and (4) not be decertified in any State under these provision. Section 652.21 also requires as part of certification, that the individual must enter into a certification agreement with NRCS specifying the terms and conditions of the certification. NRCS certification is in effect for three years, unless decertified. NRCS also indicated that it might establish and collect fees for certification of technical service providers. Finally, this section also addressed conditional certification.

NRCS received 247 comments on this section concerning three main topics: criteria and requirements, training, and certification. Therefore, NRCS discusses these comments below by topic, rather than by paragraph as was done in the previous preamble discussion.

Criteria and Requirements

Comment: NRCS received 9 comments opposing national certification and 4 comments supporting national certification with State reciprocity. The commenters opposed to national certification expressed concern that technical service providers would not be in compliance with State regulations. One commenter believed certification should be done on a single-State basis. This commenter also believed that technical service providers should be subject to all NRCS documentation requirements and that NRCS should provide ongoing training. Two commenters supported regional certification. These commenters also recommended cross-state certification reciprocity for technical service providers working in multiple states.

Two commenters did not support self-certification, but recommended that if such an approach were taken, NRCS should post self-certifications on a public website, with meaningful certification limited to those areas where credentials are checked by State Conservationists or their designees. These commenters believed that payments should only be made to those technical service providers whose credentials have been verified. Six commenters recommended that NRCS require State Conservationists to contact appropriate State agencies to ensure compliance with State requirements. Two commenters suggested that NRCS establish a review and sampling process to verify and evaluate TSP qualifications. One commenter recommended the development and use of a TSP locator to encourage TSPs to post resumes, one commenter thought there is a need for uniform criteria and requirements with a baseline national certification on self-certified qualifications and compliance, and one commenter recommended NRCS provide guidance to State Conservationists that encouraged the development of quality assurance measures to ensure program standards and legal requirements are being met. The commenter felt that NRCS should not check every single practice but rather provide onsite NRCS spot checks on newly certified technical service providers and ongoing random spot checks to ensure quality. One commenter said NRCS should make sure the qualification standards are high enough so that NRCS field staff does not have to recheck contractor work.

Response: NRCS believes comments about National certification and verification of credentials are interrelated. As clarified in this final rule, the education, licensing and experiential qualifications that a TSP indicates through TechReg are subject to verification by NRCS. Notably, in both the original Interim Final Rule and in the March 24, 2003 Amendment, applicants for certification are required to ''demonstrate, through documentation of training or experience'' their familiarity with NRCS policy, including standards, specifications and guidelines. Service provider applicants must demonstrate this familiarity and may not merely indicate that they have this familiarity through TechReg.

Currently, National certification is based on a review by the designee of the certifying State Conservationist of applicants' information submitted through TechReg, including self-certification that the applicant is in compliance with all State and local laws and is familiar with NRCS guidelines, including those applicable to particular counties.

NRCS State Conservationists have expressed concerns about one State Conservationist certifying an individual in their State and other States in which the applicant wishes to be considered for certification. Normally, certifying State Conservationists have only the requisite knowledge of the requirements of Federal and State requirements within their State, and not the requirements within the other States where the technical service provider may wish to be certified. Therefore, NRCS is making internal policy adjustments to address this concern while maintaining a National process through which individuals seek certification in a single application, and thus maintain uniformity of the certification process. Certifying State Conservationists will verify in-State compliance with certification criteria, and refer the application to the other States where the applicant wishes to provide technical service. These States will verify the applicant's compliance with their particular certification criteria and only then will the certifying State Conservationist approve the

certification for the applicant for all the identified States. In addition, NRCS is improving its processes to verify qualifications.

Comment: NRCS received 15 comments that expressed appreciation for NRCS recognition of its historic relationships with conservation districts by providing for an exemption from certification requirements for public agencies. Three of these commenters also encouraged the maintenance and continuation of cooperative agreements and contribution agreements. Two commenters recognize the short time frame to implement the provisions and stated that it warranted immediate certification for traditional partners.

Response: NRCS discussed above in § 652.6 that when it obtains assistance from a technical service provider, whether a public agency or a private entity, through a procurement contract, contribution agreement, or cooperative agreement, the technical service provider is authorized to provide technical services and receive payment even if such individual is not certified in accordance with § 652.21.

Training

Comment: NRCS received 75 comments related to the topic of training and certification. Many of these comments, including 37 from universities, recommended adding language to the rule that NRCS will subsidize the cost of providing training. In particular, these commenters recommended that training entities should be allowed to design and provide training on a cost recovery basis with NRCS covering the cost of training. NRCS also received a range of recommendations regarding the development and delivery of training, including partnering with universities and the Extension Service; delivering training through distance learning and demonstration projects; establishing core training with state additions; continuing education requirements; building capacity based upon current competency; and reciprocity of the training materials between States.

Response: NRCS recognizes that TSP has the potential to support expansion of a qualified technical service provider industry, however NRCS has neither the resources nor specific authority to provide training to individuals and entities outside of the agency, nor does it want to compete with partners and private interests whose primary purpose is to provide training and services to professionals in this field.

NRCS also recognizes that its staff currently comprises the largest repository of information and expertise in the field of natural resource planning and implementation on private land. NRCS is committed to enabling the development of external training sources and for these reasons, agency staff will be made available to assist in the support of the training developed by others in order to facilitate the administration of the Title XII programs.

NRCS recently convened a Technical Service Provider Training Summit, where TSPs, private training consultants and Universities, defined training strategies to address the future needs for training in this area. NRCS recognizes that its staff's expertise is required to train the trainers initially. For a limited time, NRCS will commit staff resources and funding to support the development of training, after which it is anticipated that private sector providers and universities will aptly provide the required training.

Although NRCS knows that service providers will eventually depend on external sources for training, NRCS will continue maintaining the standards that TSPs must meet. For instance, NRCS has developed and intends to maintain statements of work for each of the practices for which technical service providers may be paid. NRCS has developed and shared with entities with accrediting programs and other potential trainers the proficiency standards technical service providers must meet in order to successfully become NRCS-certified. NRCS is working with these organizations to ensure that their training programs meet these standards. NRCS will maintain these proficiency standards requisite to establishing a qualified core of professionals carrying out natural resource work funded with public money.

NRCS acknowledges its responsibility service providers, both those seeking certification others already certified, to help them understand the requirements and processes associated with TSP. To fulfill this responsibility, NRCS intends to develop step-wise Web or compact disc based training in TSP procedures. Training in order to facilitate administration of technical services for Title XII conservation programs is an internal administrative matter more appropriately addressed in internal agency guidance and policy. So although NRCS has not made any additions to the final rule in response to comments on training, it intends to facilitate the growth of professional development opportunities for natural resource professionals.

Certification

Comment: NRCS received 33 general comments about certification as described in this section, § 652.21. Nine commenters felt certification should be streamlined to minimize service delivery costs. They expressed that part of this streamlining should include delegating approval authority to each NRCS State office, because National certification standards would not accommodate individual State differences.

Response: As described above, NRCS will have essentially a National certification process and registry through State-verified certification. Adjustments to the administration of the certification process will be handled through internal agency policies regarding the routing of applications to the appropriate NRCS State offices.

Comment: Five commenters recommended that State Conservationist actively encourage a wide range of technical service providers to participate in the TSP program and that NRCS should not limit certification to any one group. These commenters were concerned about potential conflict of interest that could result if only one source of technical service providers was utilized. The commenters also expressed that certification should require a combination of credentials, education, training and experience, and that individuals providing technical service through an entity or public agency should have qualifications and expertise specific to the resource concerns, practices and systems relevant to the services provided. NRCS also received 2 related comments expressing concern that the relationship between certified crop advisors (CCA) and NRCS needs to be clarified and that a technical service provider must not necessarily be a CCA.

Response: NRCS believes that the success of the TSP provisions depends upon attracting a diverse technical service provider pool with varied skills and perspectives. Therefore, no single source of technical services is emphasized, and the opportunity for certification is open to all qualified individuals and entities. However, any individual or entity providing technical services to either participants or the Department must demonstrate their qualifications as competent technical service providers. NRCS encourages a multi-disciplinary approach to resource conservation, as it is often difficult for a single profession or discipline to provide the full range of demanded technical services.

Comment: NRCS received nine comments related to the qualification standards for certification. Three commenters recommended recognizing and grandfathering into certification retired NRCS employees, thereby creating a system that provides levels of certification based on years working for NRCS. Two other commenters recommended utilizing existing certifications, and one commenter believed that all technical service providers, including new and experienced technical service providers, should be held to the same standard of certification. One commenter suggested that certification be for specific practices, tied to specific educational requirements, credentials, training and professional experience. The commenter also suggested there be a limit on the number of uncertified employees under a certified persons' direction. One commenter believed the certification requirements were unclear, while two other commenters expressed appreciation for what they felt was a simple application process that only evaluated necessary information.

Response: NRCS believes that all technical service providers need to be held to the same standards of quality and proficiency, regardless of their prior relationship to NRCS. NRCS plans to verify technical service provider credentials in a manner that ensures participants receive competent technical service delivery.

NRCS also is making efforts to clarify its expectations regarding specific practices through published statements of work that outline required deliverables. NRCS recognizes the challenges that technical service providers must meet in order to comply with State licensing provisions and NRCS requirements. Technical service providers should identify and establish staffing levels to meet these requirements, that may vary depending upon the type of work to be completed. Therefore, NRCS does not believe it is prudent for the agency to establish in the rule a numeric limit on how many non-certified employees a certified individual may supervise. The certified individual and entity assumes full legal responsibility for the work completed by non-certified individuals working under the auspices of their certification, and therefore, should exercise the necessary level of oversight.

Comment: NRCS received 4 miscellaneous comments regarding certification. One commenter recommended that NRCS develop a TSP packet that includes an explanation of the certification process, forms and application. This commenter also recommended that NRCS include field practices and cost share lists, as well as appropriate reporting codes for databases. One commenter recommended establishing a carbon sequestration specialist class to be added to the cadre of TSP specialists. These specialists would develop landscape management plans on eligible lands that increase biomass production over a baseline for the purpose of drawing carbon dioxide from the atmosphere and storing it for periods of time in plants and soils. One commenter stated that State Conservationists should work with State agencies in the development of fish and wildlife technical services delivery. Finally, NRCS received one comment recommending that NRCS allow technical service providers to use local NRCS office space, phones, faxes and electronic mail.

Response: NRCS has established a website, TechReg, that provides the electronic equivalent of a TSP packet. On TechReg, technical service providers and participants may access current information and technical references about TSP. Among the available technical references, a person can access eFOTG, the NRCS electronic reference for technical standards. NRCS expects that as demand for additional and emerging technical services grows, new categories and standards for technical service, such as carbon sequestration specialists, will be developed. While NRCS is dedicated to making available technical resources, overhead costs for delivery of technical services are the responsibility of the technical service provider and not the Federal government.

Fees

Comment: Section 652.21(e) provides that NRCS may establish a system for collecting fees related to certification. NRCS received 21 comments about this provision, 18 of which expressed support for NRCS charging a certification fee. However, several of these commenters recommended that particular individuals or entities, such as State agencies or retired professionals, should be exempt from having to pay the fee. Some commenters said certification fees would be viewed as a mandatory tax, while others suggested that the certification fee was a duplicate certification charge since many service providers already pay fees to State licensing boards. Three commenters said it would be appropriate to charge a fee to cover administrative costs only.

Response: NRCS has not established a system for collecting fees at this time. However, the authority exists under 31 U.S.C. 9701, for such a system, and the rule reflects that this authority exists and may be used in the future. No changes were made to the rule in response to these comments.

Policy & Procedure

Comment: NRCS received nineteen comments related to policy and procedures for technical service providers that mirror many of the comments NRCS received under other sections. In particular, these commenters felt that TSP certification should be national in scope with flexibility to meet State and local conditions. They suggested that standards need to be tailored to State and local needs. These comments indicated that NRCS should establish minimum qualification standards for all groups, including requirements for education, training, and experience for all resource concerns, practices and agricultural systems for which certification is sought. One commenter suggested that a process be developed to ensure entities and public agencies do not provide blanket certification of individuals where expertise has not been developed. NRCS also received a comment that NRCS should define methods for certifying farmland protection skills.

Response: NRCS has developed proficiency standards accessible through TechReg and is working with various organizations and universities to develop appropriate training to ensure technical service providers' competence. NRCS will not change its certification requirements, but as previously described, it has established a means to validate self-certified credentials.

State Coordination

Comment: Five commenters said NRCS needs to ensure State and local reciprocity in its certification process. One commenter indicated that technical service providers should not be unduly inhibited or restricted when providing technical services across State lines. Two commenters said the certification process needs to allow for technical service providers to work across State lines.

Response: As described earlier, certification needs to be coordinated between States due to the unique and diverse conservation technical requirements of each State and its laws. However, NRCS does not have authority to exempt technical service providers from State law requirements. Since technical service providers must comply with State law, including licensure

requirements, State-specific requirements must be met and a State-by-State review of self-certification requirements is necessary. NRCS facilitates the ability of technical service providers to offer technical services to multiple States through its streamlined National certification application process, provided such technical service providers meet all State requirements specific to the locations where they wish to work. If a service provider applying for certification in multiple states lacks the qualifications to gain certification in each state, NRCS will encourage the applicant to withdraw his or her certification request for those particular states for which the applicant lacks the necessary qualifications. If the service provider does not wish to withdraw these requests, NRCS will delay granting certification until the applicant obtains the necessary qualifications in each state requested.

Comment: One commenter believed that the certification process for NRCS employees should be the same as for technical service providers.

Response: NRCS has a long-established planning certification and job approval authority structure that applies to its employees and the proficiencies they must meet to provide services in their location of employment. If a current NRCS employee wishes to act as a TSP in an off-duty job that is unrelated to the performance of his or her NRCS responsibilities, such NRCS employee would need to be certified under this regulation.

Comment: NRCS received one comment recommending that NRCS certification match the 2-year cycle for certified crop advisor certification renewal.

Response: As stated previously, NRCS will not base its certification process upon any one organization's certification program, regardless of whether such organization is also a recommending organization as described in § 652.25. While NRCS greatly appreciates the contribution that CCAs are making to the delivery system, there are multiple sources of technical service providers that also contribute to the delivery system and each has its own schedule for certification renewal. NRCS has adopted a flexible approach in this final rule, stating that certification shall not be for a period of time in excess of three years.

Quality Assurance

Comment: NRCS received three comments to § 652.21 related to quality assurance. One commenter stated that technical service providers must be certified even if the provider is working under NRCS supervision. One commenter encouraged NRCS to do onsite evaluations for animal waste systems design and installation, recommending that NRCS check on-the-ground outcomes related to changes in water quality or phosphorus index changes. One commenter stated that the review process should be either multi-county or at the State level. This commenter believed that local NRCS staff should act as a watchdog, a layer of local scrutiny, and should report poor performance to a local review board. One commenter said the section on certification agreements does not provide for non-disclosure of records or compliance with the Freedom of Information Act and Privacy Act.

Response: The only non-NRCS personnel that work under NRCS supervision are employees of a conservation district with which NRCS has a cooperative working agreement, as described in the July 9, 2003, amendment to the Interim Final Rule. These non-NRCS personnel are not authorized under the cooperative working agreement to be hired by participants as technical service providers while serving under NRCS supervision. If the conservation district, or its employee, is hired directly by a participant, then neither the district nor its employees are operating under NRCS supervision, and they must be certified and operating within the legal framework of that particular county and State.

When NRCS employees, or others working under its supervision or pursuant to a contract, provide technical services, NRCS performs the necessary quality assurance to ensure that practices have been properly designed and installed. NRCS also implements established processes to identify the conformance to practice standards and compliance with conservation program requirements. NRCS randomly selects and evaluates projects implemented by both its employees and technical service providers to ensure quality of technical service delivery. When deficiencies are identified, NRCS will take the necessary action, as appropriate.

As specified in the preamble discussion under §§ 652.4 and 652.5, technical service providers hired by participants are not subject to Federal disclosure and privacy requirements regarding the release of Government records. However, NRCS is subject to these requirements. Therefore, NRCS must have written authorization from the participant before it will provide the participant's technical service provider access to these records.

Section 652.22 Certification Process for Individuals

Comment: Section 652.22 of the Interim Final Rule sets forth the requirements for an individual to become a certified technical service provider. NRCS received 10 comments to this section. Three of these comments expressed the need to add rule language clarifying proficiency standards for trainers who provide training to Technical Service providers. This commenter also encouraged NRCS to certify training programs and materials that meet the agency criteria for certification of technical service providers.

Response: NRCS addresses these comments in the discussion on training under § 652.21.

Comment: One commenter stated that NRCS should require State Conservationists to provide clear guidance and information to applicants about laws and requirements. Technical service providers should not be certified without demonstrating knowledge of state laws and requirements for the specific work for which they are seeking certification.

Response: NRCS appreciates this commenters' opinion, however, each technical service provider is responsible for knowing and understanding the laws of the State in which they choose to do business. It is not within the agency's authority or area of expertise to interpret or provide information about the laws of any specific State. To the extent practicable, NRCS will make its staff available to any technical service provider to clarify its standards and specification or provide other information pertaining to contractual obligations imposed by the NRCS.

Comment: One commenter expressed support for national certification. Two commenters said TSP dollars should fund only the work of qualified individuals. Individuals should be certified by category and based on clear category guidelines avoiding blanket certification.

Response: As previously stated, NRCS is clarifying in its policy, as available on TechReg, the qualifications and proficiencies a technical service provider must meet in order for their work to be eligible for reimbursement with public funds. NRCS does certify individuals and entities according to categories of technical services, and does not provide blanket certification.

Comment: One commenter agrees that a sufficient review time period is essential to a successful certification process and suggests at the end of a 60-day time period NRCS would accept or

deny certification from applicants, allowing for some fixed amount of time for the applicant to complete the process.

Response: NRCS is continually making improvements to its online registration process, TechReg. NRCS agrees that timeliness in the certification process is essential and will do its part to ensure efficient certification of technical service providers.

Comment: One commenter believes that the lack of a 4-year college degree should not hinder an applicant from certification in an area where they can demonstrate knowledge and expertise, and that applicants should have the option to pass a test or prove through documentation their ability to complete the required work. One commenter believed certified technical service providers should meet all requirements related to knowledge, training and experience.

Response: NRCS understands that some of the education requirements may inadvertently hinder otherwise qualified individuals from becoming technical service providers. However, the first priority of the certification process is that participants are able to obtain qualified technical services, and appropriate levels of education is an important aspect to ensure competency in meeting such qualifications.

Section 652.23 Certification Process for Private-Sector Entities

Comment: Section 652.23 of the Interim Final Rule sets forth the requirements for a private-sector entity to become a certified technical service provider. NRCS received 13 comments to this section. Eleven of these comments stated that NRCS should complete a market analysis to determine availability of technical service providers, assess their training needs, and establish if there is sufficient workload to sustain the development of a business based on participant demand for their services. One commenter supported the certification of private-sector entities. One commenter believes NRCS should automatically certify registered, licensed foresters who are certified by the National Association of State Foresters or the State Forestry Association.

Response: NRCS regularly provides the public its State-by-State allocations and the end-of-fiscal year conservation program accomplishments, including the number of contracts entered, acres enrolled, and the amount of funds obligated. A private-sector technical service provider has the ability to utilize this information and other potential market information to perform its own business projections about whether adequate market-share is available to sustain a viable business investment. Existing and emerging technical service businesses need to define and market themselves to potential clients that need the services they provide.

Additionally, NRCS conducts its own workload analysis and identifies opportunities to compete specific workload products. In order to access such information, technical service providers may wish to familiarize themselves with FedBizOpps and related sources utilized by the Federal Government to advertise its solicitation for bids.

As discussed previously in this preamble, NRCS cannot provide blanket certification to members of a particular professional organization. NRCS has specific criteria that it needs to be met in order to certify an individual as a technical service provider. Blanket certification would be an impermissible delegation of NRCS's responsibility under the statute to certify individuals and entities as TSPs.

Section 652.24 Certification Process for Public Agencies

Comment: Section 652.24 of the Interim Final Rule set forth the requirements for a public agency to become a certified technical service provider. NRCS received 57 comments to this section. Fifteen of these comments expressed support for exempting from certification requirements conservation districts or State agencies working under contribution agreements with NRCS. Seven comments stated that State agencies have stringent proficiency requirements for their employees and should be exempt from NRCS certification requirements. Eleven commenters disagreed with the requirement that public agencies assume liability and would reconsider their relationship with NRCS if such requirement is not changed. Two commenters expressed support for the requirement that a public agency must have a certified individual working under its auspices.

Response: While NRCS recognizes that various agencies have rigorous requirements, the TSP statute requires NRCS to establish a system for evaluating who is qualified to provide technical services. Therefore, NRCS will require individuals and entities, including public agencies, to be certified in accordance with the certification process under subpart B, before a participant may obtain payment from NRCS for services rendered. When the agency is acquiring technical services, NRCS will set forth the qualification and performance criteria in a procurement contract, contribution agreement, or cooperative agreement, rather than through the certification process under Subpart B, to select qualified technical service providers. In either situation, a public agency must demonstrate that it has staff that meets NRCS technical requirements before NRCS will issue payment for technical services rendered by that public agency. NRCS also believes that it is appropriate for a public agency to assume responsibility for the work of its employees.

Comment: Six commenters disagreed with the restriction on outside employment while four commenters agreed with the restriction.

Response: Based on these comments, NRCS re-examined its position regarding outside employment of public agency employees, and felt that such matters were best addressed by ethical rules established by the public agencies. Therefore, NRCS did not prohibit in the final rule outside employment of certified individuals working under the auspices of a public agency as set forth in § 652.24 of the Interim Final Rule.

Comment: Four commenters stated that all technical service providers should be held to the same standards. Four commenters stated that public agencies should not be utilized as technical service providers unless private technical service providers were not available.

Response: NRCS believes that the final rule establishes consistent standards for all technical service providers. Additionally, NRCS believes that the extra demand for technical services created by the increased funding for conservation programs will necessitate support from all sources of technical services. More importantly, Section 1242 of the Food Security Act clearly provides that Federal, State, and local governments are all eligible to become technical service providers. Therefore, NRCS has not made any changes to this section in response to these comments.

Section 652.25 Alternative application Process for Individual Certification

Section 652.25 of the Interim Final Rule provided that pursuant to an agreement with NRCS, an organization with an adequate accreditation program could provide an NRCS official with a list of individuals identified by that organization (referred to as a ''recommending organization'') as meeting NRCS criteria for specific practices or categories of technical service and recommend that NRCS

certify these individuals as technical service providers. NRCS received 24 comments to this section.

Comment: Eight commenters expressed support for the alternative application process as described in the Interim Final Rule, and three other commenters expressed support for NRCS recognition of private sector certification organizations but felt that NRCS should not act as a certifier. Two commenters wanted NRCS to offer recommending organization various levels of recommendation of individuals. One commenter supported NRCS certification, one commenter supported State organizations as certification entities, and one commenter supported State-level agreements with recommending organizations. One commenter stated that individuals should not have to be certified crop advisors to be certified as a technical service provider, and one commenter stated that expectations of technical service providers should be the same whether or not they are independent or members of an organization. NRCS also received three comments stating that NRCS or certifying organization requirements were too stringent and would discourage potential sources of technical services.

Response: As described earlier, NRCS has entered into Memoranda of Understanding with several organizations to be recommending organizations. NRCS will continue to work with these organizations and others to ensure that recommended individuals have the appropriate proficiencies to meet NRCS requirements for technical services delivery. NRCS has the responsibility under the statute to approve individuals and entities to provide technical services for USDA conservation programs, and, therefore, cannot delegate this responsibility to an outside organization. The process outlined in the Interim Final Rule and adopted in the final rule without changes provides NRCS the flexibility to avail itself of the expertise of professional organizations while ensuring the technical standards required by USDA conservation programs are met in a consistent manner. Furthermore, all applicants are treated equally and must meet the same standards for certification regardless of whether an applicant is a member of a recommending organization. If a recommending organization whose agreement with NRCS either expires without renewal or is terminated, the technical service providers recommended for certification through this recommending organization would not lose their certification. However, when these technical service providers seek to renew their certification, these technical service providers will need to meet current qualification standards and apply through the prescribed application process. NRCS will develop MOUs with recommending organizations at the appropriate level within its organizational structure. Therefore, no changes have been made to this section in response to these comments.

Section 652.26 Certification Renewal

Comment: Section 652.26 of the Interim Final Rule provided a process for individuals and entities to renew their certification as technical service providers. NRCS received 9 comments on this section. Five commenters expressed support for a finite time limit for certification and believed that the time limit should match the continuing education cycle time limits of private sector certification. Three commenters disagreed with the 3-year limit to certification and felt that a 5-year limit would lower costs. One commenter believed that NRCS needs to provide criteria for certification renewal.

Response: NRCS has modified this section slightly to allow certifications to remain valid for a time period specified by NRCS in the Certification Agreement, not to exceed 3 years, and automatically expire unless they are renewed for an additional time period prior to expiration. By providing a time period of up to 3 years, NRCS has the flexibility to coordinate certification time frame with other requirements that a technical service provider may need to meet. Since State laws change frequently, and NRCS updates its standards and specifications regularly, NRCS believes that a 5-year time frame is too long a time period as a certification time frame, and the shorter time frame allows NRCS to ensure that technical service providers are current in their professional credentials. NRCS will provide through TechReg the specific requirements for certification renewal for each conservation practice as it does for certification.

Subpart C Decertification

Comment: Subpart C of the Interim Final Rule established the NRCS policy and procedures for decertification. NRCS received 21 comments to this subpart. Seven commenters expressed support for the subpart while seven commenters expressed concern that the decertification policy is inadequate, requesting that decertification be clearly linked to quality assurance criteria and that NRCS should clarify the conditions under which a technical service provider will be decertified. Two commenters emphasized that decertification should be a formal process, two commenters believed that technical service providers should be able to appeal decertification decisions to the Department's National Appeals Division, one commenter supported the possibility of permanent decertification for especially egregious action, and one commenter requested clarification about how contracted work would be completed if the technical service provider was decertified mid-performance.

Response: In response to these comments, NRCS slightly modified § 652.32 to clarify the reasons for which a technical service provider could be decertified, including matters encountered during NRCS quality assurance reviews. In particular, if a technical service provider, or someone acting on behalf of the technical service provider fails to meet NRCS standards and specifications in the provision of technical services; violates the terms of the Certification Agreement; engages in a scheme or device to defeat the purposes of this part, including, but not limited to, coercion, fraud, misrepresentation, or providing incorrect or misleading information; or commits any other action of a serious or compelling nature as determined by NRCS that demonstrates the technical service provider's inability to fulfill the terms of the Certification Agreement or in providing quality technical services under this part, that TSP would be decertified. NRCS added the phrase ''someone acting on behalf of the technical service provider'' to clarify that a private entity TSP or public agency TSP could be held accountable for the actions of individuals working under their auspices.

Technical service providers are not participants and therefore, the National Appeals Division does not have jurisdiction over decertification decisions affecting technical service providers. The decertification process provides one level of appeal to ensure due process. NRCS needs sufficient time to review the merits of an appeal, and thus has increased the time period in § 652.35 of the final rule for a State Conservationist decision from 30 days to 40 days. Additionally, in § 652.38(b) of the Interim Final Rule, an entity or public agency was required to ''promptly'' amend its Certification Agreement to remove decertified individuals from the Certification agreement. NRCS believes that the time period intended by the term ''promptly'' needed to clarified, and thus in the final

rule, NRCS has specified the time frame ''within 10 calendar days.'' All other time frames have remained as set forth in the Interim Final Rule. NRCS believes that the decertification process in the final rule provides an administrative process that adequately balances a TSP's right to due process with the need to decertify a TSP who provides substandard performance within a reasonable period of time.

NRCS believes that three years is an acceptable time frame for decertification. This time frame corresponds to the time period for suspension and debarment under the Federal Government's uniform suspension and debarment regulations. Once the term of the decertification has transpired, an individual or entity may apply for certification, and will need to meet the current requirements to be certified.

Regulatory Certifications

Executive Order 12866

Pursuant to Executive Order 12866 (58 FR 51735, October 4, 1993), it has been determined that this final rule is a significant regulatory action and has been reviewed by the Office of Management and Budget (OMB). Pursuant to § 6(a)(3) of Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this rulemaking, and included the analysis as part of a Regulatory Impact Analysis document prepared for this final rule. The analysis estimates that the technical service provider process will have a beneficial impact on the Nation's natural resources by accelerating adoption of conservation practices. New information included in this analysis but not considered in the analysis associated with the interim final rule is the cost for participant-selected TSP program oversight and administration, estimated at an additional $24 million to $26 million per year. A copy of this analysis is available upon request from Angel Figueroa, Technical Service Provider Coordinator, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890, or by e-mail to *angel.figueroa@usda.gov*; attn: Technical Service Provider Assistance—Economic Analysis, or at the following web address: *http://www.nrcs.usda.gov*.

Small Business Regulatory Enforcement Fairness Act (SBREFA)

This rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. This rule:

a. Does not have an annual effect on the economy of $100 million or more. This rule will result in a few, mostly administrative changes from the interim final rule currently in effect that are expected to improve program management and oversight. The economic analysis accompanying this rulemaking includes new estimates for the administrative costs of program oversight of participant-selected TSPs. These costs range from $24 million to $26 million per year.

b. Will not cause a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions.

c. Does not have significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of U.S.-based enterprises to compete with foreign-based enterprises.

Executive Order 12988

This final rule has been reviewed in accordance with Executive Order 12988. The provisions of this final rule are not retroactive. The USDA has not identified any State or local laws that are in conflict with this regulation or that would impede full implementation of this rule. Nevertheless, in the event that such conflict is identified, the provisions of this final rule preempt State and local laws to the extent such laws are inconsistent with this rule.

Regulatory Flexibility Act

Pursuant to 5 U.S.C. 605(c) of the Regulatory Flexibility Act, it has been determined that this rule will not have a significant impact on a substantial number of small entities as defined by the Act. This rule sets forth the process by which entities could, on a voluntary basis, become certified providers. Therefore, a regulatory flexibility analysis is not required for this final rule. This final rule sets forth the policies and procedures for the provision of technical service provider assistance, which involves the voluntary participation of technical service providers.

Pursuant to Section 2702 of the 2002 Farm Bill, the Secretary ''shall use the authority provided under section 808(2) of title 5, United States Code.'' As required by 5 U.S.C. 808(2), NRCS hereby finds that additional public notice and comment prior to the effective date of this final rule are unnecessary and contrary to the public interest. Even though proposed rulemaking was not required for this rulemaking, NRCS published in the **Federal Register** an Interim Final Rule on November 22, 2002, an Amendment on March 24, 2003, and a second Amendment on July 9, 2003, all three of which requested public comment. In this final rule, NRCS responds to the comments received during the comment period for these three previous rulemakings. Thus, NRCS does not believe that additional public notice through 5 U.S.C. 808(1) is necessary prior to the effective date of this final rule. NRCS has determined that it is in the public interest for this rule to be in effect upon its publication in the **Federal Register**.

National Environmental Policy Act

The regulations promulgated by this rule do not authorize any action that may negatively affect the human environment. Accordingly, an analysis of impacts under the National Environmental Policy Act has not been performed. The technical service provider process will help implement new and existing USDA conservation programs which are subject to the environmental analyses pursuant to the National Environmental Policy Act.

Paperwork Reduction Act

Section 2702 of the 2002 Farm Bill requires that the promulgation of regulations and the administration of Title II of said act be carried out without regard to chapter 35 of title 44 of the United States Code (commonly known as the Paperwork Reduction Act). Accordingly, these regulations and the forms, and other information collection activities needed to administer technical service provider assistance under these regulations, are not subject to review by the Office of Management and Budget under the Paperwork Reduction Act.

NRCS is committed to compliance with the Government Paperwork Elimination Act (GPEA) and the Freedom To E-File Act, which require Government agencies in general to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system, TechReg, for public use.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Public Law 104–4, NRCS assessed the effects of this rulemaking action on State, local, and Tribal governments, and the public. This action does not compel the expenditure of $100 million or more by any State, local, or Tribal governments, or anyone in the private sector; therefore, a statement under section 202

of the Unfunded Mandates Reform Act of 1995 is not required.

Federal Crop Insurance Reform and Department of Agriculture Reorganization Act of 1994

Pursuant to section 304 of the Department of Agriculture Reorganization Act of 1994, Public Law 104–354, USDA classified this final rule as not major.

Civil Rights Impact Analysis

A Civil Rights Impact Analysis has been completed regarding this rule. The review reveals no factors indicating any disproportionate adverse civil rights impacts for participants in NRCS programs and services who are minorities, women, or persons with disabilities. A copy of this analysis is available upon request from Angel Figueroa, Technical Service Provider Coordinator, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890, or by e-mail to *angel.figueroa@usda.gov*; attn: Technical Service Provider Assistance—Civil Rights Impact Analysis, or at the following web address: *http://www.nrcs.usda.gov*.

List of Subjects in 7 CFR Part 652

Natural Resources Conservation Service, Soil conservation, Technical assistance, Water resources.

■ For the reasons stated in the preamble, the Natural Resources Conservation Service hereby amends Title 7 of the Code of Federal Regulations as set forth below:

■ Accordingly, Title 7 of the code of Federal Regulations is amended by revising part 652 to read as follows:

PART 652—TECHNICAL SERVICE PROVIDER ASSISTANCE

Subpart A—General Provisions

Sec.
652.1 Applicability.
652.2 Definitions.
652.3 Administration.
652.4 Technical service standards.
652.5 Participant acquisition of technical services.
652.6 Department delivery of technical services.
652.7 Quality assurance.

Subpart B—Certification

652.21 Certification criteria and requirements.
652.22 Certification process for individuals.
652.23 Certification process for private-sector entities.
652.24 Certification process for public agencies.
652.25 Alternative application process for individual certification.
652.26 Certification renewal.

Subpart C—Decertification

652.31 Policy.
652.32 Causes for decertification.
652.33 Notice of proposed decertification.
652.34 Opportunity to contest decertification.
652.35 State Conservationist decision.
652.36 Appeal of decertification decision.
652.37 Period of decertification.
652.38 Scope of decertification.
652.39 Mitigating factors.
652.40 Effect of decertification.
652.41 Effect of filing deadlines.
652.42 Recertification.

Authority: 16 U.S.C. 3842.

Subpart A—General Provisions

§ 652.1 Applicability.

(a) The regulations in this part set forth the policies, procedures, and requirements related to delivery of technical assistance by individuals and entities other than the Department, hereinafter referred to as technical service providers. The Food Security Act of 1985, as amended, requires the Secretary to deliver technical assistance to eligible participants for implementation of its Title XII Programs either directly or, at the option of the producer, through payment to the producer for an approved third party provider. This regulation defines how a participant acquires technical service from a third party technical service provider, sets forth a certification and decertification process, and establishes a method to make payments for technical services.

(b) Technical service providers may provide technical assistance in the planning, design, installation, and check-out of conservation practices applied on private land or where allowed by conservation program rules on public land where there is a direct private land benefit.

(c) The Chief, NRCS, may implement this part in any of the fifty states, District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands, American Samoa and the Commonwealth of the Northern Marianna Islands.

§ 652.2 Definitions.

The following definitions apply to this part and all documents issued in accordance with this part, unless specified otherwise:

Approved list means the list of individuals, private sector entities, or public agencies certified by NRCS to provide technical services to a participant.

Certification means the action taken by NRCS to approve:

(1) An individual as meeting the minimum NRCS criteria for providing technical service for conservation planning or a specific conservation practice or system; or

(2) An entity or public agency as having an employee or employees that meet the minimum NRCS criteria for providing technical service for conservation planning or a specific conservation practice or system.

Chief means the Chief of NRCS or designee.

Conservation practice means a specified treatment, such as a structural or vegetative practice, or a land management practice, that is planned and applied according to NRCS standards and specifications.

Contribution agreement means the instrument used to acquire technical services under the authority of 7 U.S.C. 6962a.

Cooperative agreement means the same as that term is defined in the Federal Grants and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.*

Department means the Natural Resources Conservation Service, the Farm Service Agency, or any other agency or instrumentality of the United States Department of Agriculture that is assigned responsibility for all or a part of a conservation program subject to this part.

Entity means a corporation, joint stock company, association, cooperative, limited partnership, limited liability partnership, limited liability company, nonprofit organization, a member of a joint venture, or a member of a similar organization.

Participant means a person who is eligible to receive technical or financial assistance under a conservation program covered by this rule.

Procurement contract means the same as the term ''contract'' means under the Federal Grants and Cooperative Agreement Act, 31 U.S.C. 6301 *et seq.*

Program contract means the document that specifies the rights and obligations of any individual or entity that has been accepted for participation in a Title XII conservation program.

Public agency means a unit or subdivision of Federal, State, local, or Tribal government, other than the Department.

Recommending organization means a professional organization, association, licensing board or similar organization with which NRCS has entered into an agreement to recommend qualified individuals for NRCS certification as technical service providers for specific technical services.

Secretary means the Secretary of the United States Department of Agriculture.

State Conservationist means the NRCS employee authorized to direct and supervise NRCS activities in a State, the Caribbean Area, or the Pacific Basin Area.

Technical service means the technical assistance provided by technical service providers, including conservation planning, and/or the design, layout, installation, and check-out of approved conservation practices.

Technical service provider means an individual, entity, or public agency either:

(1) Certified by NRCS and placed on the approved list to provide technical services to participants; or,

(2) Selected by the Department to assist the Department in the implementation of conservation programs covered by this part through a procurement contract, contribution agreement, or cooperative agreement with the Department.

Written agreement means the document that specifies the rights and obligations of any individual or entity that has been authorized by NRCS to receive conservation planning assistance without having a program contract.

§ 652.3 Administration.

(a) As provided in this part, the Department will provide technical assistance to participants directly, or at the option of the participant, through a technical service provider in accordance with the requirements of this part.

(b) The Chief, NRCS, will direct and supervise the administration of the regulations in this part.

(c) NRCS will:

(1) Provide overall leadership and management for the development and administration of a technical service provider process;

(2) Consult with the Farm Service Agency and other appropriate agencies and entities concerning the availability and utilization of technical service providers and the implementation of technical service;

(3) Establish policies, procedures, guidance, and criteria for certification, recertification, decertification, certification renewal, and implementation of the use of technical service providers; and

(4) Establish a process for verifying information provided to NRCS under this part.

(d) The Department will not make payments under a program contract or written agreement with a participant for technical services provided by a technical service provider unless the technical service provider is certified by NRCS for the services provided and is identified on the approved list.

(e) The Department may enter into procurement contracts, contribution agreements, cooperative agreements, or other appropriate instruments to assist the Department in providing technical assistance when implementing conservation programs covered by this part. The Department will ensure that such instruments contain the qualification and performance criteria necessary to ensure quality implementation of the goals and objectives of these conservation programs; therefore, when the Department obtains assistance from a technical service provider in this manner, the technical service provider is authorized to provide technical services and receive payment even if such technical service provider is not certified in accordance with subpart B nor identified on the approved list.

(f) When a participant acquires technical services from a technical service provider, the Department is not a party to the agreement between the participant and the technical service provider. To ensure that quality implementation of the goals and objectives of the conservation programs are met, the technical service provider must be certified by NRCS in accordance with subpart B of this part and identified on the approved list. Upon request of NRCS, technical service providers are required to submit copies of all transcripts, licensing, and certification documentation.

§ 652.4 Technical service standards.

(a) All technical services provided by technical service providers must meet USDA standards and specifications as set forth in Departmental manuals, handbooks, guides, and other references for soils mapping and natural resources information, conservation planning, conservation practice application, and other areas of technical assistance.

(b) The Department will only pay a participant for technical services provided in accordance with established NRCS standards, specifications, and requirements. The Department must approve all new technologies and innovative practices, including interim standards and specifications, prior to a technical service provider initiating technical services for those technologies and practices.

(c) A technical service provider must assume responsibility in writing for the particular technical services provided. Technical services provided by the technical service provider must:

(1) Comply with all applicable Federal, State, Tribal, and local laws and requirements;

(2) Meet applicable Department standards, specifications, and program requirements;

(3) Be consistent with the particular conservation program goals and objectives for which the program contract was entered into by the Department and the participant; and

(4) Incorporate alternatives that are both cost effective and appropriate to address the resource issues. Conservation alternatives will meet the objectives for the program and participant to whom assistance is provided.

(d) Technical service providers are responsible for the technical services provided, including any costs, damages, claims, liabilities, and judgments arising from past, present, and future negligent or wrongful acts or omissions of the technical service provider in connection with the technical service provided.

(e) The Department will not be in breach of any program contract or written agreement if it fails to implement conservation plans or practices or make payment for conservation plans or practices resulting from technical services that do not meet USDA standards and specifications or are not consistent with program requirements.

(f) The participant is responsible for complying with the terms and conditions of the program contract or written agreement, which includes meeting USDA technical standards and specifications for any technical services provided by a technical service provider.

(g) The technical service provider shall report in the NRCS conservation accomplishment tracking system the appropriate data elements associated with the technical services provided to the Department or participant.

(h) To the extent allowed under State or Tribal law, technical service providers may utilize the services of subcontractors to provide specific technical services or expertise needed by the technical service provider, provided that the subcontractors are certified by NRCS in accordance with this part for the particular technical services to be provided and the technical services are provided in terms of their Certification Agreement. Payments will not be made for any technical services provided by uncertified subcontractors, except when such technical services are provided under the provisions of a procurement contract, cooperative agreement, or contribution agreement with the NRCS.

§ 652.5 Participant acquisition of technical services.

(a) Participants may obtain technical assistance directly from the Department or, when available, from a technical service provider.

(b) To acquire technical assistance directly from the Department, participants should contact their local USDA Service Center.

(c) To acquire technical services from a technical service provider, participants must:

(1) Enter into and comply with a program contract or a written agreement prior to acquiring technical services; and

(2) Select a certified technical service provider from the approved list of technical service providers.

(d) The Department may approve written agreements for technical assistance prior to program participation based on available funding and natural resource priorities as identified by the State Conservationist.

(e) The technical assistance indicated in paragraph (d) may include the development of conservation plans suitable for subsequent incorporation into a program contract.

(f) The Department will identify in the particular program contract or written agreement the payment provisions for technical service providers hired directly by the participant.

(g) To obtain payment for technical services, participants must submit to the Department valid invoices, supporting documentation, and requests for payment. The Department will issue payment within 30 days of receiving these items. The Department may pay a participant for some or all of the costs associated with the technical services provided by a technical service provider hired by the participant or, upon receipt of an assignment of payment from the participant, make payment directly to the technical service provider.

(h) Participants must authorize in writing to the Department the disclosure of their records on file with the Department that they wish to make available to specific technical service providers.

(i) Payments for technical services will be made only one time for the same technical service provided unless, as determined by the Department, the emergence of new technologies or major changes in the participant's farming or ranching operations necessitate the need for additional technical services.

(j) *Payment rates for technical services acquired by participants.* (1) NRCS will establish payment rates by calculating not-to-exceed rates for technical services. NRCS will calculate not-to-exceed rates using price data that it may acquire through various sources that it deems reliable.

(2) *Establishing not-to-exceed payment rates.* (i) NRCS will analyze the pricing information using a standardized methodology.

(ii) Not-to-exceed payment rates will be established nationally on a State by State basis for categories of technical services.

(iii) NRCS will coordinate payment rates between adjacent States to ensure consistency where similar resource conditions and agricultural operations exist. Payment rates may vary to some degree between States due to differences in State laws, the cost of doing business, competition, and other variables.

(iv) NRCS will review payment rates annually, or more frequently as needed, and adjust the rates based upon data from existing procurement contracts, Federal cost rates, and other appropriate sources.

(v) NRCS may adjust payment rates, as needed, on a case-by-case basis, in response to unusual conditions or unforeseen circumstances in delivering technical services such as highly complex technical situations, emergency conditions, serious threats to human health or the environment, or major resource limitations. In these cases, NRCS will set a case-specific not-to-exceed payment rate based on the Department's determination of the scope, magnitude, and timeliness of the technical services needed.

§ 652.6 Department delivery of technical services.

(a) The Department may enter into a procurement contract, contribution agreement, cooperative agreement, or other appropriate instrument to assist the Department in providing technical assistance when implementing the conservation programs covered by this part.

(b) The Department will ensure that such legal instruments contain qualification and performance criteria necessary to ensure quality implementation of these conservation programs. When the Department obtains assistance from a technical service provider through a procurement contract, contribution agreement, cooperative agreement, or other similar instrument, the technical service provider is authorized to provide technical services and receive payment even if such technical service provider is not certified in accordance with subpart B of this part nor identified on the approved list.

(c) The Department will implement procurement contracts, contribution agreements, cooperative agreements, and other appropriate instruments in accordance with applicable Federal acquisition or USDA Federal assistance rules and requirements for competency, quality, and selection, as appropriate.

(d) A technical service provider may not receive payment twice for the same technical service, such as once from a participant through a program contract or written agreement and then again through a separate contract or agreement made directly with the Department.

(e) The Department will, to the extent practicable, ensure that the amounts paid for technical service under this part are consistent across conservation program areas, unless specific conservation program requirements include additional tasks.

§ 652.7 Quality assurance.

(a) NRCS will review, in consultation with the Farm Service Agency, as appropriate, the quality of the technical services provided by technical service providers. As a requirement of certification, technical service providers must develop and maintain documentation in accordance with Departmental manuals, handbooks, and technical guidance for the technical services provided, and furnish this documentation to NRCS and the participant when the particular technical service is completed. NRCS may utilize information obtained through its quality assurance process, documentation submitted by the technical service provider, and other relevant information in determining how to improve the quality of technical service, as well as determining whether to decertify a technical service provider under subpart C of this part.

(b) Upon discovery of a deficiency in the provision of technical service through its quality assurance process or other means, NRCS will, to the greatest extent practicable, send a notice to the technical service provider detailing the deficiency and requesting remedial action by the technical service provider. Failure by the technical service provider to promptly remedy the deficiency, or the occurrence of repeated deficiencies in providing technical services, may trigger the decertification process set forth in subpart C of this part. A failure by NRCS to identify a deficiency does not affect any action under the decertification process. Technical service providers are solely responsible for providing technical services that meet all NRCS standards and specifications.

Subpart B—Certification

§ 652.21 Certification criteria and requirements.

(a) To qualify for certification an individual must:

(1) Have the required technical training, education, and experience to perform the level of technical assistance for which certification is sought;

(2) Meet any applicable professional or business licensing or similar qualification standards established by State or Tribal law;

(3) Demonstrate, through documentation of training or experience, familiarity with NRCS guidelines, criteria, standards, and specifications as set forth in the applicable NRCS manuals, handbooks, field office technical guides, and supplements thereto for the planning and applying of specific conservation practices and management systems for which certification is sought; and

(4) Not be decertified in any State under subpart C of this part at the time of application for certification.

(b) To qualify for certification an entity or public agency must be authorized to provide such services in the jurisdiction and have a certified individual providing, in accordance with this part, technical services on its behalf.

(c) A technical service provider, as part of the certification by NRCS, must enter into a Certification Agreement with NRCS specifying the terms and conditions of the certification, including adherence to the requirements of this part, and acknowledging that failure to meet these requirements may result in ineligibility to receive payments from the Department, either directly or through the participant, for the technical services provided or may result in decertification.

(d) NRCS will certify Technical Service Providers for a time period specified by NRCS in the Certification Agreement, not to exceed 3 years. Decertification and Renewal of Certification is administered in accordance with § 652.26.

(e) NRCS may, pursuant to 31 U.S.C. 9701, establish and collect fees for the certification of technical service providers.

§ 652.22 Certification process for individuals.

(a) In order to be considered for certification as a technical service provider, an individual must:

(1) Submit an Application for Certification to NRCS in accordance with this section;

(2) Request certification through a recommending organization pursuant to § 652.25; or

(3) Request certification through an application submitted by a private-sector entity or public agency pursuant to § 652.23 or § 652.24, as appropriate.

(b) The application must contain the documentation demonstrating that the individual meets all requirements of paragraph (a) of § 652.21.

(c) NRCS will, within 60 days of receipt of an application, make a determination on the application submitted by an individual under paragraph (a)(1) of this section and in accordance with paragraph (a) of § 652.21. If all requirements are met, NRCS will:

(1) Enter into a Certification Agreement and certify the applicant as qualified to provide technical services for a specific practice, category, or categories of technical service;

(2) Place the applicant on the list of approved technical service providers when certified; and

(3) Make available to the public the list of approved technical service providers by practice or category of technical services.

(d) NRCS may decertify an individual in accordance with the decertification process set forth in subpart C of this part.

§ 652.23 Certification process for private-sector entities.

(a) A private sector entity that applies for certification must identify, and provide supporting documentation, that it has the requisite professional and business licensure within the jurisdiction for which it seek certification, and that it employs at least one individual, authorized to act on its behalf that:

(1) Has received certification on an individual basis in accordance with § 652.22; or

(2) Seeks certification on an individual basis as part of the private-sector entity's certification and ensures that the requirements set forth in § 652.21(a) are contained within the private-sector entity's application to support such certification.

(b) NRCS will determine pursuant to § 652.22 whether the individual(s) identified in the private-sector entity's application meets the certification standards set forth in § 652.21 for the specific services the entity wishes to provide.

(c) NRCS will, within 60 days of receipt of an application, make a determination on the application submitted by an entity. If NRCS determines that all requirements for the private-sector entity and the identified individual(s) are met, NRCS will complete the actions described in paragraphs (c)(1) through (c)(3) of § 652.22.

(d) The Certification Agreement entered into with the private-sector entity shall:

(1) Identify the certified individuals who are authorized to perform technical services on behalf of and under the auspices of the entity's certification;

(2) Require that the entity has, at all times, an individual who is a certified technical service provider authorized to act on the entity's behalf;

(3) Require that the entity promptly provide an amended Certification Agreement to NRCS for approval when the list of certified individuals performing technical services under its auspices changes;

(4) Require that responsibility for any work performed by non-certified individuals be assumed by a certified individual who is authorized to act on the entity's behalf; and

(5) Require that the entity be legally responsible for the work performed by any individual working under the auspices of its certification.

(e) NRCS may, in accordance with the decertification process set forth in this part, decertify the private sector entity, the certified individual(s) acting under the auspices of its certification, or both the private sector entity and the certified individual(s) acting under the auspices of its certification.

§ 652.24 Certification process for public agencies.

(a) A public agency that applies for certification must identify, and provide supporting documentation, that it has the authority within the jurisdiction within which it seeks to provide technical services and an individual or individuals authorized to act on its behalf:

(1) Has been certified as an individual in accordance with § 652.22; or

(2) Seeks certification as an individual as part of the public agency's certification and sufficient information as set forth in § 652.21(a) is contained within the public agency's application to support such certification.

(b) NRCS shall determine whether the individual identified in the public agency's application meets the certification standards set forth in § 652.22.

(c) NRCS will, within 60 days of receipt of an application, make a determination on the application submitted by a public agency. If NRCS determines that all requirements for the public agency and the identified

individual(s) are met, NRCS will perform the actions described in paragraph (c)(1) through (c)(3) of § 652.22. The Certification Agreement entered into with the public agency shall:

(1) Identify the certified individuals that are authorized to perform technical services on behalf of and under the auspices of the public agency's certification;

(2) Require that the public agency have, at all times, an individual that is a certified technical service provider and is an authorized official of the public agency;

(3) Require that the public agency promptly provide to NRCS for NRCS approval an amended Certification Agreement when the list of certified individuals performing technical services under its auspices changes;

(4) Require that responsibility for any work performed by non-certified individuals be assumed by a certified individual that is authorized to act on the public agency's behalf; and

(5) Require that the public agency be legally responsible for the work performed by any individual working under the auspices of its certification.

(d) NRCS may, in accordance with the decertification process set forth in subpart C of this part, decertify the public agency, the certified individual(s) acting under its auspices, or both the public agency and the certified individual(s) acting under its auspices.

§ 652.25 Alternative application process for individual certification.

(a) NRCS may enter into an agreement, including a memorandum of understanding or other appropriate instrument, with a recommending organization that NRCS determines has an adequate accreditation program in place to train, test, and evaluate candidates for competency in a particular area or areas of technical service delivery and whose accreditation program NRCS determines meets the certification criteria as set forth for the technical services to be provided.

(b) Recommending organizations will, pursuant to an agreement entered into with NRCS:

(1) Train, test, and evaluate candidates for competency in the area of technical service delivery;

(2) Recommend to NRCS individuals who it determines meet the NRCS certification requirements of § 652.21(a) for providing specific practices or categories of technical services;

(3) Inform the recommended individuals that they must meet the requirements of this part, including entering into a Certification Agreement with NRCS, in order to provide technical services under this part;

(4) Reassess individuals that request renewal of their certification pursuant to § 652.26 through the recommendation of the organization; and

(5) Notify NRCS of any concerns or problems that may affect the organization's recommendation concerning the individual's certification, recertification, certification renewal, or technical service delivery.

(c) Pursuant to an agreement with NRCS, a recommending organization may provide to the appropriate NRCS official a current list of individuals identified by the recommending organization as meeting NRCS criteria as set forth in § 652.21(a) for specific practices or categories of technical service and recommend that the NRCS official certify these individuals as technical service providers in accordance with this part.

(d) NRCS will, within 60 days, make a determination on the recommendation for certification issued by the recommending organization. If NRCS determines that all requirements for certification are met by the recommended individual(s), NRCS will perform the actions described in paragraphs (c)(1) through (c)(3) of § 652.22.

(e) NRCS may terminate an agreement with a recommending organization if concerns or problems with its accreditation program, its recommendations for certification, or other requirements under the agreement arise.

§ 652.26 Certification renewal.

(a) NRCS certifications are in effect for a time period specified by NRCS in the Certification Agreement, not to exceed 3 years and automatically expire unless they are renewed for an additional time period in accordance with this section.

(b) A technical service provider may request renewal of an NRCS certification by:

(1) Submitting a complete certification renewal application to NRCS or through a private sector entity, a public agency, or a recommending organization to NRCS at least 60 days prior to expiration of the current certification;

(2) Providing verification on the renewal form that the requirements of this part are met; and

(3) Agreeing to abide by the terms and conditions of a Certification Agreement.

(c) All certification renewals are in effect for a time period specified by NRCS in the Certification Agreement, not to exceed three years and before expiration, may be renewed for subsequent time period in accordance with this section.

Subpart C—Decertification

§ 652.31 Policy.

In order to protect the public interest, it is the policy of NRCS to maintain certification of those technical service providers who act responsibly in the provision of technical service, including meeting NRCS standards and specifications when providing technical service to participants. This section, which provides for the decertification of technical service providers, is an appropriate means to implement this policy.

§ 652.32 Causes for decertification.

A State Conservationist, in whose State a technical service provider is certified to provide technical service, may decertify the technical service provider, in accordance with these provisions, if the technical service provider, or someone acting on behalf of the technical service provider:

(a) Fails to meet NRCS standards and specifications in the provision of technical services;

(b) Violates the terms of the Certification Agreement, including but not limited to, a demonstrated lack of understanding of, or an unwillingness or inability to implement, NRCS standards and specifications for a particular practice for which the technical service provider is certified, or the provision of technical services for which the technical service provider is not certified;

(c) Engages in a scheme or device to defeat the purposes of this part, including, but not limited to, coercion, fraud, misrepresentation, or providing incorrect or misleading information; or

(d) Commits any other action of a serious or compelling nature as determined by NRCS that demonstrates the technical service provider's inability to fulfill the terms of the Certification Agreement or provide technical services under this part.

§ 652.33 Notice of proposed decertification.

The State Conservationist will send by certified mail, return receipt requested, to the technical service provider proposed for decertification a written Notice of Proposed Decertification, which will contain the cause(s) for decertification, as well as any documentation supporting decertification. In cases where a private sector entity or public agency is being notified of a proposed decertification,

any certified individuals working under the auspices of such organization who are also being considered for decertification will receive a separate Notice of Decertification and will be afforded separate appeal rights following the process set forth below.

§ 652.34 Opportunity to contest decertification.

To contest decertification, the technical service provider must submit in writing to the State Conservationist, within 20 calendar days from the date of receipt of the Notice of Proposed Decertification, the reasons why the State Conservationist should not decertify, including any mitigating factors as well as any supporting documentation.

§ 652.35 State Conservationist decision.

Within 40 calendar days from the date of the notice of proposed decertification, the State Conservationist will issue a written determination. If the State Conservationist decides to decertify, the decision will set forth the reasons for decertification, the period of decertification, and the scope of decertification. If the State Conservationist decides not to decertify the technical service provider, the technical service provider will be given written notice of that determination. The decertification determination will be based on an administrative record, which will be comprised of: the Notice of Proposed Decertification and supporting documents, and, if submitted, the technical service provider's written response and supporting documentation. Both a copy of the decision and administrative record will be sent promptly by certified mail, return receipt requested, to the technical service provider.

§ 652.36 Appeal of decertification decisions.

(a) Within 20 calendar days from the date of receipt of the State Conservationist's decertification determination, the technical service provider may appeal, in writing, to the Chief of NRCS. The written appeal must state the reasons for appeal and any arguments in support of those reasons. If the technical service provider fails to appeal, the decision of the State Conservationist is final.

(b) Final decision. Within 30 calendar days of receipt of the technical service provider's written appeal, the Chief or his designee, will make a final determination, in writing, based upon the administrative record and any additional information submitted to the Chief by the technical service provider. The decision of the Chief, or his designee, is final and not subject to further administrative review. The Chief's determination will include the reasons for decertification, the period of decertification, and the scope of decertification.

§ 652.37 Period of decertification.

The period of decertification will not exceed three years in duration and will be decided by the decertifying official, either the State Conservationist or Chief, as applicable, based upon their weighing of all relevant facts and the seriousness of the reasons for decertification, mitigating factors, if any, and the following general guidelines:

(a) For failures in the provision of technical service for which there are no mitigating factors, *e.g.*, no remedial action by the technical service provider, a maximum period of three years decertification;

(b) For repeated failures in the provision of technical assistance for which there are mitigating factors, *e.g.*, the technical service provider has taken remedial action to the satisfaction of NRCS, a maximum period of one to two years decertification; and

(c) For a violation of Certification Agreement terms, *e.g.*, failure to possess technical competency for a listed practice, a period of one year or less, if the technical service provider can master such competency within a year period.

§ 652.38 Scope of decertification.

(a) When the technical service provider is a private sector entity or public agency, the decertifying official may decertify the entire organization, including all the individuals identified as authorized to provide technical services under the auspices of such organization. The decertifying official may also limit the scope of decertification, for example, to one or more specifically named individuals identified as authorized to provide technical services under the organization's auspices or to an organizational element of such private sector entity or public agency. The scope of decertification will be set forth in the decertification determination and will be based upon the facts of each decertification action, including whether actions of particular individuals can be imputed to the larger organization.

(b) In cases where specific individuals are decertified only, an entity or public agency must file within 10 calendar days an amended Certification Agreement removing the decertified individual(s) from the Certification Agreement. In addition, the entity or public agency must demonstrate that, to the satisfaction of the State Conservationist, the entity or public agency has taken affirmative steps to ensure that the circumstances resulting in decertification have been addressed.

§ 652.39 Mitigating factors.

In considering whether to decertify, the period of decertification, and scope of decertification, the deciding official will take into consideration any mitigating factors. Examples of mitigating factors include, but are not limited to the following:

(a) The technical service provider worked, in a timely manner, to correct any deficiencies in the provision of technical service;

(b) The technical service provider took the initiative to bring any deficiency in the provision of their technical services to the attention of NRCS and sought NRCS advice to remediate the situation; and

(c) The technical service provider took affirmative steps to prevent any failures in the provision of technical services from occurring in the future.

§ 652.40 Effect of decertification.

(a) The Department will not make payment under a program contract for the technical services of a decertified technical service provider that were provided during the period of decertification. Likewise, NRCS will not procure, or otherwise enter into an agreement for, the services of a decertified technical service provider during the period of decertification.

(b) National decertification list. NRCS shall maintain a current list of decertified technical service providers. NRCS shall remove decertified providers from the list of certified providers. Participants may not hire a decertified technical service provider. It is the participant's responsibility to check the decertified list before hiring a technical service provider. Decertification of a technical service provider in one State decertifies the technical service provider from providing technical services under current programs in all States, the Caribbean Area, and the Pacific Basin Area.

§ 652.41 Effect of filing deadlines.

A technical service provider's failure to meet the filing deadlines under this subpart will result in the forfeiture of appeal rights. All filings must be received by NRCS no later than the close of business (5 p.m.) the last day of the filing period.

§ 652.42 Recertification.

A decertified technical service provider may apply to be re-certified under the certification provisions of this part after the period of decertification has expired. A technical service provider may not utilize the certification renewal process in an attempt to be recertified after being decertified.

Signed in Washington, DC, on November 12, 2004.

Bruce I. Knight,

Chief, Natural Resources Conservation Service.

[FR Doc. 04–25990 Filed 11–26–04; 8:45 am]

BILLING CODE 3410–16–P