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(e) Requests for equitable relief shall include the following information:

(1) The reason why the participant was unable to comply with the requirements of the conservation program;

(2) Details regarding how much of the required action had been completed;

(3) Why the participant did not have sufficient reason to know that the action or information relied upon was improper or erroneous;

(4) Whether the participant did not act in reliance on their own misunderstanding or misinterpretation of the conservation program provisions, notices, or information; and

(5) Any other pertinent facts or supporting documentation.

# PART 636—WILDLIFE HABITAT INCENTIVES PROGRAM

Sec.
636.1 Applicability.
636.2 Administration.
636.3 Definitions.
636.4 Program requirements.
636.5 Establishing priority for enrollment in WHIP.
636.6 Cost-share payments.
636.7 The Wildlife Habitat Development Plan (WHDP).
636.8 Cost-share agreements.
636.9 Modifications.
636.10 Transfer of interest in a cost-share agreement.
636.11 Termination of cost-share agreements.
636.12 Violations and remedies.
636.13 Misrepresentation and scheme or device.
636.14 Offsets and assignments.
636.15 Appeals.

AUTHORITY: 16 U.S.C. 3839bb–1.

SOURCE: 62 FR 49365, Sept. 19, 1997, unless otherwise noted.

## § 636.1 Applicability.

(a) The purpose of the WHIP is to help participants develop habitat for upland wildlife, wetland wildlife, threatened and endangered species, fish, and other types of wildlife.

(b) The regulations in this part set forth the requirements for the Wildlife Habitat Incentives Program (WHIP).

(c) The Chief, NRCS may implement WHIP in any of the 50 states, the District of Columbia, the Commonwealth of Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands.

## § 636.2 Administration.

(a) The regulations in this part will be administered under the general supervision and direction of the Chief, NRCS.

(b) The State Conservationist will consult with the State Technical Committee in the implementation of the program and in establishing program direction for the NRCS in the applicable State. The State Conservationist has the authority to accept or reject the State Technical Committee recommendation; however, the State Conservationist will give strong consideration to the State Technical Committee's recommendation.

(c) NRCS may enter into cooperative agreements with Federal agencies, State and local agencies, conservation districts, local watershed groups, and private entities to assist with program implementation, including cost-share agreement execution, assistance, planning, and monitoring responsibilities.

(d) NRCS may make payments pursuant to agreements with other Federal, State, or local agencies, conservation districts, local watershed groups, or private entities for program implementation, coordination of enrollment of cost-share agreements, or for other goals consistent with the program provided for in this part.

(e) NRCS will provide the public with reasonable notice of opportunities to apply for participation in the program.

(f) Nothing in this part shall preclude the Chief of NRCS, or a designee, from determining any question arising under this part or from reversing or modifying any determination made under this part.

## § 636.3 Definitions.

*Chief* means the Chief of the Natural Resources Conservation Service or the person delegated authority to act for the Chief.

*Conservation district* means a political subdivision of a State, Native American Tribe, or territory, organized pursuant to the State or territorial soil conservation district law, or Tribal law. The subdivision may be a conservation district, soil conservation

district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar legally constituted body.

*Conservation plan* means a record of a participant's decisions, and supporting information, for treatment of a unit of land or water, and includes a schedule of operations, activities, and estimated expenditures needed to solve identified natural resource problems.

*Cost-share agreement* means the document that specifies the obligations and the rights of any person who has been accepted for participation in the program.

*Cost-share payment* means the payments under this part to develop wildlife habitat.

*Habitat development* means the physical actions or practices undertaken to establish, improve, protect, enhance, or restore the present conditions of the land for the specific purpose of improving conditions for wildlife.

*Participant* means an applicant who is a party to a WHIP cost-share agreement.

*Person* means an individual, partnership, association, corporation, cooperative, estate, trust, joint venture, joint operation, or other business enterprise or other legal entity and, whenever applicable, a State, a political subdivision of a State, or any agency thereof.

*Practice* means a specified treatment, such as a structural or land management measure, which is planned and applied according to NRCS standards and specifications.

*Recurring practices* means practices repeated on the same area over the life of a cost-share agreement to achieve specific habitat attributes.

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

*State Technical Committee* means a committee established by the Secretary of the United States Department of Agriculture in a State pursuant to 16 U.S.C. 3861.

*Wildlife* means birds, fishes, reptiles, amphibians, invertebrates, and mammals, along with all other animals.

*Wildlife habitat* means the aquatic and terrestrial environments required for wildlife to complete their life cycles, including air, food, cover, water, and spatial requirements.

**§ 636.4 Program requirements.**

(a) To participate in WHIP, a person must:

(1) Develop and agree to comply with a WHDP, as described in § 636.7;

(2) Enter into a cost-share agreement for the development of wildlife as described in § 636.8;

(3) Provide NRCS with written evidence of ownership or legal control for the life of the proposed cost-share agreement period; however, an exception may be made by the Chief:

(i) In the case of land allotted by the Bureau of Indian Affairs, tribal land, or

(ii) Other instances in which NRCS determines there is sufficient assurance of control;

(4) Agree to provide all information to NRCS as determined to be necessary to assess the merits of a proposed project and to monitor the compliance of a participant with a cost-share agreement; and (5)Agree to grant to NRCS or its representatives access to the land for purposes related to application, assessment, monitoring, enforcement, or other actions required to implement this part.

(b) *Ineligible land*. NRCS shall not provide cost-share assistance with respect to practices on land:

(1) Enrolled in a program where wildlife habitat objectives have been sufficiently achieved through other forms of assistance or without assistance, as determined by NRCS.

(2) With on-site or off-site conditions which NRCS determines would undermine the benefits of the habitat development or otherwise reduce its value;

(3) Where NRCS determines that the wildlife habitat development benefits attainable are of lessor value than would occur on other lands; or

(4) Owned by the United States, except where there is a direct Tribal, State, or private benefit; or

(5) On which habitat for threatened or endangered species would be adversely affected.

(c) All other land except as provided in paragraph (b) of this section is eligible.

### § 636.5 Establishing priority for enrollment in WHIP.

(a) In response to national and regional needs, the Chief may limit program implementation in any given year to specific geographic areas or to address specific habitat development needs of targeted species of special concern.

(b) The State Conservationist, in consultation with the State Technical Committee, may limit implementation of WHIP to address unique species, habitats, or special geographic areas of the State. Subsequent cost-share agreement offers that would complement previous cost-share agreements due to geographic proximity of the lands involved or other relationships may receive priority consideration for participation.

(c) NRCS will evaluate the applications and make enrollment decisions based on the wildlife habitat need using some or all of the following criteria:

(1) Contribution to resolving an identified habitat problem of national, regional, or state importance;

(2) Relationship to any established wildlife or conservation priority areas;

(3) Duration of benefits to be obtained from the habitat development practices;

(4) Self-sustaining nature of the habitat development practices;

(5) Availability of other partnership matching funds or reduced funding request by the person applying for participation;

(6) Estimated costs of wildlife habitat development activities; and

(7) Other factors determined appropriate by NRCS to meet the objectives of the program.

(d) Notwithstanding the criteria set forth in paragraph (c) of this section, the State Conservationist, in consultation with the State Technical Committee, may deny an application if it is not cost effective or does not sufficiently meet program requirements:

### § 636.6 Cost-share payments.

(a) NRCS may share the cost with a participant for implementing the practices as provided in the WHDP; NRCS shall offer to pay no more than 75 percent of the cost of establishing such practices. The cost-share payment to a participant shall be reduced proportionately below 75 percent to the extent that direct Federal financial assistance is provided to the participant from sources other than NRCS, except for certain cases that merit additional cost-share assistance to achieve the intended goals of the program, as determined by the State Conservationist.

(b) Cost-share payments may be made only upon a determination by the NRCS that an eligible practice or an identifiable unit of the practice has been established in compliance with appropriate standards and specifications. Identified practices may be implemented by the participant or other designee.

(c) Cost-share payments may be made for the establishment and installation of additional eligible practices, or the maintenance or replacement of an eligible practice, but only if NRCS determines the practice is needed to meet the objectives of the program, or that the failure of the original practice was due to reasons beyond the control of the participant.

### § 636.7 The Wildlife Habitat Development Plan (WHDP).

(a) The participant develops a WHDP with the assistance of NRCS or other public or private natural resource professionals, and the WHDP is approved by the participant, NRCS, and the local conservation district. A WHDP encompasses the parcel of land that has the wildlife habitat conditions that are of concern to the participant.

(b) The WHDP forms the basis for the agreement and is incorporated therein. The WHDP includes a schedule for installation of the wildlife habitat development practices, maintenance, and related requirements to maintain the habitat for the life of the cost-share agreement.

(c) The WHDP may be modified in accordance with § 636.9.

### § 636.8 Cost-share agreements.

(a) To apply for WHIP cost-share assistance, a person must submit an application for participation in the WHIP at a USDA office or to an NRCS representative.

(b) A WHIP cost-share agreement shall:

(1) Incorporate all portions of a WHDP;

(2) Be for a period of 5 to 10 years, unless provisions of paragraph (c) of this section apply;

(3) Include all provisions as required by law or statute;

(4) Specify the requirements for operation and maintenance of applied wildlife habitat development practices;

(5) Include any participant reporting and recordkeeping requirements to determine compliance with the cost-share agreement and program;

(6) Be signed by the participant. When the participant is not the owner, concurrence from the owner is required; and,

(7) Include any other provision determined necessary or appropriate by the NRCS representative.

(c) The Chief may allow a cost-share agreement period for less than five years in situations where wildlife habitat is threatened as a result of a disaster and emergency measures are necessary to address the potential for dramatic declines in one or more wildlife populations.

(d) Notwithstanding any limitation of this part, NRCS may enter into a cost-share agreement or contract that:

(1) Is for a term of at least 15 years;

(2) Protects and restores plant and animal habitat; and

(3) Provides cost-share payments in addition to amounts provided under § 636.6 of this part.

[62 FR 49365, Sept. 19, 1997, as amended at 67 FR 48353, July 24, 2002]

### § 636.9 Modifications.

(a) NRCS, with the concurrence of the conservation district, may approve modifications to a WHDP where such modifications are acceptable to the parties.

(b) NRCS may approve modifications to the cost-share agreement where such modifications are acceptable to the parties.

(c) Any modifications made under this section must meet WHIP program objectives, and must be in compliance with this part.

### § 636.10 Transfer of interest in a cost-share agreement.

(a) (1) If the ownership or operation of the land changes during the term of the cost-share agreement, NRCS shall modify the cost-share agreement to reflect the new interested persons and new divisions of payments. NRCS shall make eligible cost-share payments upon presentation of an assignment of rights or other evidence that title had passed.

(2) With respect to any and all payments owed to participants who wish to transfer ownership or control of land subject to a cost-share agreement, the division of payment shall be determined by the original party and that party's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending a settlement or adjudication on the rights to the funds.

(b) (1) If such new owners or operators are not willing to assume the responsibilities posed in an existing WHIP cost-share agreement, NRCS shall terminate the cost-share agreement and may require that all cost-share payments may be forfeited, refunded, or both.

(2) The signatories to the cost-share agreement shall be jointly and severally responsible for refunding the cost-share payments pursuant to paragraph (b)(1) of this section.

### § 636.11 Termination of cost-share agreements.

(a) The State Conservationist may, by mutual agreement with the parties to the cost-share agreement, consent to the termination of the contract where:

(1) The parties to the cost-share agreement are unable to comply with the terms of the cost-share agreement as the result of conditions beyond their control;

(2) Compliance with the terms of the cost-share agreement would work a severe hardship on the parties to the contract; or,

(3) Termination of the cost-share agreement would, as determined by the State Conservationist, be in the public interest.

(b) If a cost-share agreement is terminated in accordance with the provisions of this section, the State Conservationist may allow the participants to retain any cost-share payments received under the cost-share agreement in a porportion appropriate to the effort the participant has made to comply with the cost-share agreement, or, in cases of hardship, where forces beyond the participant's control prevented compliance with the cost-share agreement.

### § 636.12 Violations and remedies.

(a) (1) If NRCS determines that a participant is in violation of a cost-share agreement or documents incorporated by reference into the cost-share agreement, NRCS may give the parties to the cost-share agreement reasonable notice and an opportunity to voluntarily correct the violation within 30 days of the date of the notice, or such additional time as NRCS may allow.

(2) If the participant fails to cure the violation of a cost-share agreement within the period provided under paragraph (a)(1) of this section, NRCS may terminate the agreement and require the participant to refund all or part of any assistance earned under that cost-share agreement, plus interest, as well as require the participant to forfeit all rights for future payment under the agreement.

(b) [Reserved]

### § 636.13 Misrepresentation and scheme or device.

(a) A person who is determined by NRCS to have erroneously represented any fact affecting a program determination made in accordance with this part shall not be entitled to cost-share agreement payments and must refund all payments, plus interest as determined by NRCS.

(b) A person who is determined to have knowingly:

(1) Adopted any scheme or device that tends to defeat the purpose of the program;

(2) Made any fraudulent representation; or,

(3) Misrepresented any fact affecting a program determination shall refund to NRCS all payments, plus interest as determined by NRCS, with respect to all NRCS cost-share agreements. The person's interest in all NRCS cost-share agreements may be terminated.

### § 636.14 Offsets and assignments.

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person shall be made without regard to questions of title under State law and without regard to any claim or lien against the land, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found in part 3 of this title shall be applicable to cost-share agreement payments.

(b) Any person entitled to any cash payment under this program, may assign the right to receive such payments in whole or in part.

### § 636.15 Appeals.

(a) Any person may obtain reconsideration and review of determinations affecting participation in this program in accordance with part 614 Part C of this title, except as provided in paragraph (b) of this section.

(b) In accordance with the provisions of the Department of Agriculture Reorganization Act of 1994, Pub. L. 103–354 (7 U.S.C. 6901), the following decisions are not appealable:

(1) Payment rates, payment limits, and cost-share percentages;

(2) The designation of approved wildlife priority areas, habitats or practices;

(3) NRCS program funding decisions;

(4) Eligible conservation practices; and

(5) Other matters of general applicability.

(c) Before a person may seek judicial review of any action taken under this part, the person must exhaust all administrative appeal procedures set forth in paragraph (a) of this section.