

DEPARTMENT OF AGRICULTURE**Natural Resources Conservation Service****7 CFR Part 636**

RIN 0578-AA21

Wildlife Habitat Incentives Program

AGENCY: Natural Resources Conservation Service, United States Department of Agriculture.

ACTION: Final rule.

SUMMARY: The Natural Resources Conservation Service is issuing a final rule for the Wildlife Habitat Incentives Program (WHIP). A proposed rule for WHIP was published in the **Federal Register** on December 13, 1996 (61 FR 65485) and comments were solicited from the public. This final rule establishes the process by which NRCS will administer WHIP, responds to comments received from the public during the 45-day comment period, and incorporates clarifications to improve implementation of the program.

EFFECTIVE DATE: September 19, 1997.

ADDRESSES: This final rule may be accessed via Internet. Users can access the Natural Resources Conservation Service (NRCS) homepage at <http://www.ftw.nrcs.usda.gov>; select 1996 Farm Bill Conservation Programs from the menu.

FOR FURTHER INFORMATION CONTACT: Warren M. Lee, Director, Watersheds and Wetlands Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890. 202-720-3534. Fax: 202-720-2143.

SUPPLEMENTARY INFORMATION:**Executive Order 12866**

The Office of Management and Budget (OMB) determined that this final rule is significant and was reviewed by OMB under Executive Order 12866. Pursuant to section 6(a)(3) of Executive Order 12866, NRCS conducted a benefit-cost assessment of the potential impacts associated with this proposed rule and concluded from the benefit-cost assessment that the overall impacts of WHIP will be beneficial. NRCS determined that the development of partnerships to provide expert technical assistance will ensure customers are afforded the best opportunity for success. In this manner, NRCS believes that WHIP will provide for wildlife habitat, help improve the quality of life for participants, and have a neutral to positive impact on local economies. Copies of the benefit-cost assessment are available upon request from Jeanne

Christie, Program Manager, Watersheds and Wetlands Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890.

Regulatory Flexibility Act

The Regulatory Flexibility Act is not applicable to this rule because NRCS is not required by 5 U.S.C. 533 or any other provision of law to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

Environmental Analysis

It has determined through an amendment to the "Environmental Assessment for the Wildlife Habitat Incentives Program, August 22, 1996" that the issuance of this final rule will not have a significant effect on the human environment. Copies of the Environmental Assessment, the amendment, and the finding of no significant impact may be obtained from Jeanne Christie, Watersheds and Wetlands Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890.

Paperwork Reduction Act

No substantive changes have been made in this final rule which affect the recordkeeping requirements and estimated burdens previously reviewed and approved under OMB control number 0560-0174. The recordkeeping requirements and estimated burdens for WHIP were transferred to OMB control number 0578-0013.

Executive Order 12988

This final has been reviewed in accordance with Executive Order 12988. The provisions of this final rule are not retroactive. Furthermore, the provisions of this final rule preempt State and local laws to the extent such laws are inconsistent with this final rule. Before an action may be brought in a Federal court of competent jurisdiction, the administrative appeal rights afforded persons at 7 CFR parts 614 and 11 must be exhausted.

Unfunded Mandates Reform Act of 1995

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, Pub. L. 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.

Discussion of Program

The Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act) (Pub. L. 104-127, April 4, 1996) provides authority for several conservation programs. Section 387 of the 1996 Act authorizes the Wildlife Habitat Incentives Program (WHIP) under the supervision of the NRCS. The primary purpose of WHIP is to help landowners "develop upland wildlife, wetland wildlife, threatened and endangered species, fish, and other types of wildlife habitat."

Section 387 of the 1996 Act provides that up to \$50 million is available to implement WHIP. These funds were formerly available to implement the Conservation Reserve Program, 16 U.S.C. 3831-3836. WHIP will be under the general supervision and direction of the Chief of NRCS.

Through WHIP, NRCS will utilize CCC funds to provide cost-share assistance to those landowners who wish to integrate wildlife considerations into the overall management of their operations, or who simply desire to do more for wildlife. NRCS will implement WHIP in harmony with other programs to achieve more comprehensive advancement of wildlife objectives.

WHIP offers an opportunity to encourage development of improved wildlife habitat on eligible lands. As participants make decisions about the wildlife habitat development plan for their land, they will gain a greater awareness about their farming and ranching activities. NRCS believes that the efforts made by participants in this program will serve as a catalyst for improving wildlife conditions throughout the Nation.

On December 13, 1996, a proposed rule was published with request for comments. The proposed rule described the program requirements, administrative processes, and eligibility criteria that NRCS would use to implement WHIP. Nearly 53 individual responses containing about 377 specific comments were received during the 45-day comment period: 5 from agricultural organizations; 19 from environmental organizations; 18 from State and local agencies; and, 11 from individuals and other organizations.

Additional responses were received from Federal agencies and employees, but are not included in the following analysis of public comments. These responses are being treated as inter- and intra-agency comments and are being considered along with the public comments where appropriate.

All comments received are available for review at United States Department

of Agriculture, Room 6029-S, South Building, 14th and Independence Ave., SW., Washington, DC., during regular business hours (8 a.m. to 5 p.m.) Monday through Friday.

Analysis of Public Comment

Overall, almost all respondents expressed appreciation with the proposed rule and the various means by which the public could comment. Many offered valuable suggestions for improving or clarifying specific sections of the proposed rule. Some of these suggestions were group efforts, whereas individual responses used similar or identical language to identify and describe their interests, concerns, and recommended modifications to the proposed rule.

The majority of comments centered on six major issues: the ranking of projects; practices that required recurring implementation; cost-share provisions; length of the contract; plan development; and, land eligibility. Several comments either commended or criticized specific statutory requirements. These comments were considered as part of the rulemaking record to the extent that they were relevant to the provisions of the rulemaking. Numerous minor editorial and other changes in the text were suggested; these comments are not included in the following analysis but all were considered, and many of the minor changes were included in the final rule.

General Comments on 7 CFR Part 1470

Under the proposed rule, NRCS proposed to set out WHIP regulations in CFR title 7, part 1470. However, NRCS later determined that it is more appropriate to include the final rule in part 636. Therefore, NRCS organized the comments according to the section number as found in the proposed rule but in its responses provided the new section number as found in the final rule where appropriate. The following summarizes comments received on the proposed rule and NRCS' response to them.

1. Preamble Language in the Proposed Rule

Comment. Thirty-six comments expressed support for the WHIP program as proposed. Of these, 10 comments indicated that there were existing wildlife problems which WHIP could address. These wildlife problems varied across the country. Four comments expressed concern that the preamble did not give sufficient emphasis to the decline of wildlife species in the southeast, while three

other comments indicated that wildlife has already benefited from existing USDA programs.

Response. In the preamble to the proposed rule, NRCS did not intend to provide an exhaustive description of the various wildlife declines that each region has experienced or how programs of the Department have helped to stem these declines. The NRCS recognizes that there exist special wildlife concerns all across the country and hopes that programs such as WHIP will help reverse these troubling trends.

Comment. Eight comments supported using partnerships to implement WHIP. Four comments recommended that procedures should be kept simple and that USDA should try to maximize landowner participation.

Response. The NRCS appreciates these comments and will adopt the recommendations when possible. In developing the program, the NRCS determined that a simple and flexible approach could best meet the varied wildlife concerns that exist across the country. The final rule provides the necessary flexibility to accommodate input from the landowner and to obtain assistance from other entities with wildlife expertise, and to address specific wildlife concerns.

Privacy

Comment. Nine comments focused on concern over privacy issues. Four comments stated that pre-cost-share agreement information should be confidential—specifically, if the cost-share agreement is not later awarded. Two suggested that participants should be able to terminate the cost-share agreement if the NRCS violated confidentiality with no obligation to return dollars already expended. Two comments supported full disclosure of all partners who would be involved in the cost-share agreement prior to obtaining final signatures. Three comments requested that the participant receive notification regarding any site visits by any partners and access to any information gathered during the site visit. One comment stated that the WHIP plan and cost-share agreement should not be subject to FOIA or used in an environmental audit as part of discovery.

Response. The public's concern with the confidentiality of information made available to NRCS in connection with WHIP is understandable. There is significant apprehension that compliance with applicable Federal Statutes may hinder some uses of private lands. NRCS' policy is to not release information obtained from WHIP applicants or participants to other

members of the public or other Federal agencies unless required to do so by law. In practice, this means that NRCS will not contact other Federal agencies offering information it obtains from WHIP participants or regarding the participant's land.

NRCS may be required to release information about threatened and endangered or listed species or critical habitat pursuant to a request made under the Freedom of Information Act or as part of NRCS' Endangered Species Act (ESA) compliance requirements. In deciding whether to participate in WHIP, prospective applicants will need to consider whether the benefits of participating in the program outweigh the concern that the potential release of information to the public about listed species or habitat may lead to a legally mandated restriction of any degree on the participant's land. NRCS will disclose to WHIP applicants all public and private entities that may be involved in a partnership in administering WHIP in a particular area.

Notification to prospective participants concerning the involvement of partnership organizations will generally occur as part of the application and planning process before NRCS enters into a cost-share agreement with the applicant. After the cost-share agreement is signed, NRCS will attempt to contact the participant before follow-up site visits occur.

ESA and related Federal Law

Comment. Fifteen comments addressed the relationship of WHIP to other Federal laws and regulations, 13 of these comments were directed to concerns over compliance with the ESA. Two other comments raised concerns that ESA compliance requirements could be triggered by the identification of endangered species on an applicant's land, while two different comments recommended that lands under contract with WHIP should not be subject to ESA. Two comments stated that at the conclusion of the contract participants should be allowed to return to pre-contract conditions without regard to provisions of the ESA, section 404 of the Clean Water Act (CWA) or any related laws, rules, or regulations. Five comments suggested that WHIP should not be implemented in critical habitats for threatened and endangered species absent safe harbor agreement with the Fish and Wildlife Service, while one comment suggested that such a safe harbor agreement should be included as a component of the WHIP cost-share agreement. Even so, one comment raised the concern that the rule failed to address incidental take permits and

related ESA matters. The remaining three comments discussed the relationship to section 404 of the CWA and the ineligibility provisions for USDA programs under the Food Security Act of 1985, as amended.

Response. The public's interest in the relationship between WHIP and other environmental statutes, particularly the Endangered Species Act (ESA), is understandable in light of the public's general interest in and concern about endangered species and WHIP's goal of developing wildlife habitat. The United States Fish and Wildlife Service (FWS) is responsible for administering the ESA and the Army Corps of Engineers and Environmental Protection Agency is responsible for administering section 404 of the CWA. Questions regarding the applicability of these statutes to a WHIP participant's land, including questions about the application of the statutes after a WHIP cost-share agreement expires, should be addressed to the agency responsible for the statute. However, NRCS intends to provide assistance to persons interested in WHIP and therefore, offers to facilitate discussion with the applicable agency when asked.

NRCS has no authority to issue safe harbor agreements for an individual's land or issue incidental take permits ('incidental take permits' allow for the incidental take of species or habitat incidental to a Habitat Conservation Plan and section 10 of ESA). Therefore, NRCS will refer applicants to the FWS on these important issues. NRCS will satisfy its consultation responsibilities as required by ESA.

The WHIP will reflect a concern for threatened and endangered species by providing for the termination of any WHIP cost-share agreement if the participant unlawfully adversely modifies critical habitat or otherwise harms a threatened or endangered species. The adverse action may involve an area on the participant's farm that is outside the site of habitat development specified in the cost-share agreement. Section 636.11 of the final rule provides for cost-share agreement termination if the State Conservationist determines that the termination is in the public interest. NRCS believes it is in the public's interest to terminate a WHIP cost-share agreement when the program participant unlawfully harms a threatened or endangered species.

NRCS will also support threatened or endangered species through WHIP by not approving a cost-share agreement for a practice that may help one threatened or endangered species but harm another.

Funding

Comment. The NRCS received thirteen comments on the subject of WHIP program funding. These comments did not focus on any particular aspect of funding but included such varied topics as the availability of technical assistance moneys to NRCS and non-USDA entities, the policy option to obligate the majority of WHIP program funds over the next two years, and the suggested ability of NRCS to set a \$5000 cap per year per contract. One comment recommended that habitat conservation plans receive priority for threatened and endangered species funding. One comment suggested that conservation partners should donate technical assistance. Another comment advised that NRCS should spend WHIP funds on implementation of cost-share practice and not on technical assistance.

Response. The NRCS did not address funding matters in the rule. However, as a policy matter the NRCS recognizes the importance of using WHIP funds to implement wildlife habitat practices that yield real benefits for wildlife. NRCS will also work with other public and private wildlife interests to provide assistance for the program from other resources. This may include both technical assistance and funding where there are voluntary and mutual interests between program applicants, partners, and the NRCS. In addition, the 1996 Act provided that \$50,000,000 shall be made available to carry out WHIP. The NRCS intends to distribute these funds to priority projects that maximize environmental returns and participation in the program. Therefore, the NRCS does not anticipate a need to set a \$5000 per year limitation, especially given the projected high demand for program funding. However, NRCS does anticipate that most cost-share agreements will cost less than \$10,000 and will only enter in a cost-share agreement in excess of that amount if superior wildlife habitat benefit warrants greater Federal investment.

Paperwork Reduction Act

Comment. The Department received three comments on the Paperwork Reduction Act during the public comment period for the proposed rule. These comments expressed concern regarding: the level of bureaucracy involved with the local work groups; the need to simplify the paperwork; and that a greater amount of technical assistance will be needed to implement the program.

Response. The NRCS has striven to simplify the process for the participant

by only requiring the minimum of paperwork, assuming most of the administrative burden, and providing flexibility to incorporate the Wildlife Habitat Development Plan (WHDP) into other conservation plans that the participant may have. Based on the information currently available, NRCS believes that its recordkeeping and reporting burden estimates are valid, but will re-evaluate their accuracy after the program is fully implemented.

2. Section-by-Section Comments on 7 CFR Part 1470

Several modifications to improve the clarity of the rule have resulted in some of the section numbers being redesignated in the final rule. The following discussion of the public comments relates to the section numbers as indicated in the proposed rule.

Section 1470.1 Applicability

Comment. One comment supported the purpose of WHIP to "help participants develop habitat for upland wildlife, wetland wildlife, threatened and endangered species, fish and other types of wildlife."

Response. The purpose stated in the rule mirrors the statutory purposes. The NRCS welcomes the opportunity to work with landowners to improve wildlife habitats throughout the nation.

Section 1470.2 Administration

Comment. Under the proposed rule, section 1470.2 addressed the general framework for WHIP implementation. The NRCS received 28 comments on this section. Ten of these comments expressed support for the utilization of cooperative agreements with other entities with interests in wildlife habitat while one comment disapproved of the use of such arrangements. Three comments suggested the NRCS clarify whether non-profit organizations or other entities could enter into agreements under WHIP. One comment wanted the NRCS to delegate implementation authority for the program to a State agency.

Response. The NRCS believes that the opportunity to work with other Federal agencies, local and State partners, and the private sector, will improve delivery of the program. The language in the proposed rule encompassed many types of organizations who have wildlife concerns, including non-profit organizations, land trusts, and hunting clubs. The final rule language has been simplified regarding these agreements.

Comment. The NRCS received two other comments related to cooperative agreements: one comment

recommended that the rule expressly provide for agreements which reimburse partners for salaries and expenses; and the other comment recommended that a one-to five year time frame for agreements be included in the rule.

Response. Any agreement the NRCS enters into must be in accordance with the appropriate authorities.

Comment. Six comments supported a strong role for the State Technical Committees, while two other comments supported review of State Technical Committee membership by the NRCS National Office, and two other comments recommended particular agencies for membership on the State Technical Committee.

Response. Section 3861 of Title 16 of the United States Code authorizes the establishment of State Technical Committees, describes their advisory role, and describes the entities eligible to participate on such a committee. NRCS intends to publish a rule on the structure and purpose of the State Technical Committees in a separate rulemaking, and shall consider these recommendations regarding committee representation as it develops that rule.

Comment. One comment expressed concern that Habitat Conservation Plans were not explicitly mentioned in this section.

Response. The term "habitat conservation plan" is a term of art recognized under the ESA. As described above, the NRCS does not have enforcement authority under the ESA and does not want to create any confusion between such plans and the plans developed under WHIP. The WHIP participant may use one plan or another method to satisfy this requirement under both statutes.

Section 1470.3 Definitions

There were seven comments received on this section.

Authorized CCC Representative

Comment. One comment recommended adding a definition for this term in the rule.

Response. The CCC is a government-owned and operated corporation, chartered in the 1930s to help stabilize and support farm prices and income, and to maintain balanced supplies and orderly distribution of agricultural commodities. The 1996 Act expanded the mission of the CCC to include the power to carry out conservation or environmental programs authorized by law.

Although CCC will provide most of the funds to implement the program, the NRCS has the administrative responsibility to manage the program. The term "authorized CCC

representative" has been removed from the final rule.

Conservation Plan

Comment. One comment wanted this term defined within the rule and clarification of its role in WHIP relative to other NRCS programs.

Response. The NRCS added a definition for "conservation plan" in the final rule. However, the term "Wildlife Habitat Development Plan (WHDP)", as found in this rule, can constitute an entire conservation plan if the participant does not intend to implement any non-WHIP practices, or the WHDP can constitute a component of a conservation plan for a larger management unit or a broader set of conservation activities under other programs.

Habitat Development

Comment. One comment wanted to narrow this definition based on the assumption that a broader definition makes targeting more difficult.

Response. The NRCS believes that a broad definition is necessary to encompass the range of possible program opportunities that merit funding. Therefore, no change has been made to this definition.

Wildlife

Comment. Four comments were received indicating that this definition should be changed. One of these comments suggested adding amphibians and three of these comments recommended a less inclusive definition while adding a definition for "wildlife habitat".

Response. The NRCS agrees with these recommendations and has modified the definition for "wildlife" in the final rule to mean "birds, fishes, reptiles, amphibians, invertebrates, and mammals, along with all other animals" and has added a new definition for "wildlife habitat" to mean "the aquatic and terrestrial environments required for wildlife to complete their life cycles, including air, food, cover, water, and spatial requirements."

Cost-Share Agreement

To better reflect the nature of the relationship between NRCS and a participant, the term "contract" has been changed to "cost-share agreement."

Section 1470.4 Program requirements.

Section 1470.4 (a):

Comment. There were 19 comments regarding the length of contracts. Ten comments supported the terminology within the proposed for a 10-year minimum. One of these comments supported allowing cost-share

agreements to extend up to 15 years, similar to an existing state wildlife program, and another of these comments supported perpetual cost-share agreements. Nine comments supported shorter time-spans. Of these, seven supported annual cost-share agreements and one comment recommended tying the life of the practice to the length of the cost-share agreements, as appropriate, ranging from three to five to ten years.

Response. The NRCS decided to provide greater flexibility in the length of the cost-share agreement. Therefore, the rule has been revised to provide for cost-share agreement lengths of five to ten years and in special emergency circumstance to provide the flexibility to enter into one-year cost-share agreements. From a wildlife standpoint, the longer wildlife habitat is retained on the landscape, the greater the wildlife benefits. While certain wildlife species such as birds, can find alternative nesting sites, many wildlife species are much less mobile and will not be able to relocate. Even many bird species display a strong preference for returning to the same site year after year. Therefore, NRCS will continue to place priority on working with applicants who express an interest in long-term cost-share agreements. However, the cost-share agreement period applies to the time that it takes to install a practice or practices and verify that they have been successfully installed. For certain wildlife practice or combinations of wildlife practices it may not require 10 years to achieve desired benefits. In all cases, after completion of the cost-share agreement period, program participants will still be required to be in compliance with an associated operations and maintenance agreement to maintain the WHIP practice or practices for the life of each practice. Practice life varies, and may or may not extend beyond the actual cost-share agreement period, but for some practices such as impoundment structures, practice lifespans can range up to 20 or 30 years. This operations and maintenance agreement is consistent with the way other Departmental programs, such as the Agriculture Conservation Program, Great Plains Conservation Program, and Colorado River Basin Salinity Control Programs operated in the past. All of these programs had wildlife components. The NRCS believes the five to ten year cost-share agreement period is appropriate because it allows NRCS to monitor the wildlife practices on an annual basis for

the first several years after the practice is installed and thus evaluate whether they are providing the benefits anticipated. Wildlife management is complex; wildlife science is changing as our understanding of wildlife and its interactions increase. Successful implementation of wildlife habitat practices requires ongoing monitoring and the ability to respond by modifying the agreement where appropriate and acceptable to the parties involved.

In addition, an emergency event may necessitate NRCS's quick intervention to minimize or remove a threat to critical wildlife habitat. For example, wildlife populations threatened with overcrowding and disease because of a severe drought might require the implementation of habitat practices which ameliorate the drought's immediate and deleterious impacts. An emergency practice, such as the pumping of water, may need to be in place for only one year to realize its wildlife habitat goals, and therefore a five to ten-year cost-share agreement requirement would eliminate such a critical opportunity from funding.

NRCS believes it would prove more cost-effective to undertake short-term practices which prevent the loss of wildlife habitat and wildlife populations, than to undertake the expense of subsequent efforts which would attempt to re-establish wildlife populations. This concern applies particularly to wildlife species already in decline and under consideration for nomination as a candidate, threatened or endangered species listing under the Endangered Species Act.

NRCS anticipates the application of this provision will only occur on a very limited basis. The State Conservationist, in consultation with the State Technical Committee, must identify the existence of a wildlife emergency and request authority from the Chief, or designee, to enter into agreements for periods shorter than 5 years. If approved, the State Conservationist may enter into emergency agreements during a six-month time period. If there is a continuing need to enter into agreements after the six-months has elapsed, then the State Conservationist may request a six-month extension.

NRCS incorporated the ability to respond to emergencies into this final rule. To improve the organization and clarity of the final rule, the WHDP and cost-share agreements were reorganized into separate sections.

Section 1470.4 (c):

Comment. There were 15 responses to land eligibility requirements. Eleven comments supported limiting eligible lands primarily or exclusively to private

lands. One comment supported making State lands ineligible along with Federal lands, while allowing local, tribal, and private lands to remain eligible.

Response. The NRCS will focus the majority of WHIP funds towards private lands. However, the NRCS State Conservationist, in consultation with the State Technical Committee, can allow exceptions where significant wildlife habitat gains can only be achieved by installing practices on non-Federal public land. For example, practices for aquatic habitat restoration may require such an exception because the State owns the stream or lake bottom. In another case, it may be cost effective to include State or local lands adjoining or interspersed with a number of private lands enrolled in WHIP, particularly where State agencies are providing significant in-kind or monetary resources to the success of the overall project. In addition, Tribal lands, regardless of their status in terms of Federal trust lands, continue to be eligible and Federal lands are eligible in those very limited circumstances where the benefit is primarily on the private lands, but must include some Federal land to meet the WHIP objective. Therefore, this section has been revised to clarify which lands are eligible.

Comment. One comment wanted the NRCS to obtain the State Fish and Game agency's concurrence on all eligible land determinations. One respondent requested clarification of whether Federal land is confined to lands held in title by the U.S. or includes lands held by other entities but originally purchased with Federal funds. One comment requested clarification of the term "other lands" in § 1470.4(c)(3).

Response. The final rule provides the flexibility to work with partners including State Fish and Game agencies in the implementation of WHIP. Land eligibility determinations are derived from identifying who holds title to the land. To specifically require concurrence on eligible land determinations would add unnecessary administrative complexity to the program without providing a specific benefit. The term "other lands" in § 636.4(c)(3) of the final rule refers to the other lands offered for enrollment in WHIP at the time the application is considered or in the future.

Section 1470.5 Application Procedures

Comment. The NRCS received three comments about application procedures. One comment wanted partners to accept applications for WHIP, one comment requested that only qualified biological professionals should make wildlife habitat assessments, and

one comment recommended the release of existing information in a State's Natural Heritage database to NRCS.

Response. Partners can provide copies of applications to interested individuals, but should inform such prospective applicants of the need to contact NRCS to complete and submit final applications. Acceptance of applications will need a determination of land eligibility that will generally require a visit to the NRCS field office before the application can be processed. Persons trained in the appropriate assessment procedures will conduct all the biological assessments, but such professionals may not hold a degree in biology. Partners with biological expertise can provide assessment assistance or information to NRCS, including non-privileged information such partner may have regarding the range or habitat requirements of a particular species. No change was made in the rule in response to these recommendations. However, § 1470.5 in the proposed rule has been revised and divided into two sections in the final rule: "§ 636.7, The Wildlife Habitat Development Plan" and "§ 636.8, Cost-share Agreements" to improve clarity.

Section 1470.6 Establishing Priority for Enrollment in WHIP

Sections 1470.6 (a) and (b):

Comment. The NRCS received 53 comments directed to establishment of priorities for enrollment in WHIP. Forty-two of these comments concerned the establishment of State and national priorities while 11 concerned establishment of criteria for evaluating individual applications. Thirteen comments supported geographic targeting at either the state or national level as proposed in the rule, while eight comments opposed geographic targeting but supported instead targeting by specific wildlife habitats, wildlife species, or wildlife practices.

Three comments supported placing national priorities in the final rule, while one comment requested clarification about how national priorities should be developed. Sixteen comments recommended particular species or habitats for priority treatment: five comments recommended fish as an equal priority to terrestrial species; seven comments recommended grassland wildlife habitat in various parts of the country; three recommend habitats for neotropicals; and one comment recommend utilizing wellhead protection areas. Three comments stated that State Fish and Game agencies should establish priorities.

Response. Although the Chief has been given the ability to target or limit

the scope of WHIP, the rule states that this is in response to national and regional needs. These national and regional needs are identified in part by the NRCS State office in consultation with the State Technical Committee. Each NRCS State office has the ability to prioritize the allocation made to its administrative area and has been given the option of targeting by geographic areas, wildlife habitat types, or specific wildlife practices.

NRCS intends to allow targeting based upon local priorities through a locally-led process or by the State Technical Committee, and therefore, has not included specific national priorities in the final rule. In the locally-led process, local groups and individuals are given the ability to identify any wildlife issue of concern, terrestrial or aquatic. NRCS has explicitly included fish in its definition of wildlife and believes that fish shall receive priority treatment in many areas of the country.

WHIP provides an opportunity to prevent declines in wildlife populations and to achieve stable and diverse wildlife habitats. The NRCS believes the locally-led process will increase the likelihood of the program meeting these Federal goals. Throughout the process, NRCS will gain local knowledge, experience, and expertise from the participating groups and individuals, and will benefit from their involvement and commitment to program objectives. The proposed rule set forth the flexibility for locally-identified priorities and no changes were made in this regard in the final rule.

Section 1470.6(c):

Comment. Four comments supported the existing criteria found in section 1470.6(c) with respect to the evaluation of individual applications. Several comments recommended adding criteria to the list, including emphasis upon declining species in the context of an ecosystem approach (three comments); cost-share agreement duration (two comments); public access for hunting (one comment); threatened and endangered species habitat (one comment); and net improvement in on-site wildlife habitat (one comment). Several comments recommended either removing particular items as priority criteria or caution regarding the application of existing criteria, including removing sustainability and maintenance (one comment), cautioning that a practice that benefits one species may harm other species (one comment), and removing any priority dependent on the amount of cost-share provided by the participant (one comment). One comment suggested that the whole unit of land owned by the applicant must be

included in the WHIP contract to be the eligible for cost share funds.

Response. The NRCS believes that the criteria listed in the proposed rule adequately focused WHIP funds towards the projects that will most benefit the habitat needs of wildlife. The criteria in the rule provides the NRCS with the flexibility to further refine criteria as appropriate to achieve specific wildlife habitat goals identified as important in specific areas. This flexibility will allow for the development of ranking criteria to evaluate applications and to fund those requests that will best address the specific wildlife concerns identified by NRCS in consultation with the State Technical Committee or through the locally led process. The criteria was revised to clarify that wildlife habitat need was an overriding requirement. No other additions or deletions were made to the list.

Section 1470.6(d): Comment. One comment recommended deleting this section because its provisions are already covered in 1470.4.

Response. Though this paragraph refers to eligibility, the paragraph serves as an administrative tool for eliminating projects that are technically eligible but do not meet the wildlife habitat goals of WHIP.

Comment. Another comment cautioned against placing WHIP cost-share agreements on public land unless special criteria applied such as a demonstration project.

Response. The NRCS intends to focus WHIP funds on private lands and will only enroll public lands in special situations, such as aquatic restoration, where the public land is a small component of a larger habitat restoration effort, or where there is a direct private benefit. The language was simplified to better describe the circumstances when an application could be denied.

Section 1470.7 Cost Share Payments

The NRCS received a total of 97 comments on this section of the rule.

Section 1470.7 (a): Comment. The NRCS received 13 comments on the percentage of cost-share provided under WHIP: five comments stated the cost-share percentage should not exceed 75 percent from any source; three comments stated the cost-share percentage should not exceed 75 percent from Federal sources; two comments supported the cost-share provisions in the rule; and, one comment stated that cost-share should be allowed up to 100 percent. One comment suggested that in-kind services such as time and labor could count toward the landowners 25 percent cost-share assistance and one comment

recommended the participants should receive graduated payments over the life of the contract.

Response. The 1996 Act does not allow incentive payments under WHIP. In response to comments, the final rule is revised to state that WHIP shall not pay more than 75 percent of the cost for a habitat development practice. In addition, WHIP payments, in combination with other direct Federal sources, shall not exceed 75 percent of the cost for a habitat development practice. For practices that receive funds directly from other Federal sources, the WHIP cost-share payment shall be reduced proportionately, except in special cases where circumstances merit additional cost-share assistance to achieve the intended goals of the project. Generally, other direct Federal sources such as the Fish and Wildlife Service's Partners for Wildlife program can contribute part of the 75 percent maximum direct Federal cost-share assistance. The 25 percent cost-share assistance can be met from other sources such as State, private, or nonprofit sources. This assistance may include in-kind matches from the program participant, but such arrangements must be worked out in development of the agreement and must be appropriate to meeting the objectives of the project. The final rule has been modified so that a participant may receive an incentive payment for an activity from a different source. The NRCS recognizes it will not fund some activities that are necessary to the restoration of a particular habitat, and will not interfere with other organizations assisting participants in those endeavors.

Section 1470.7(b): Comment. There were many concerns raised concerning the adequacy of the standards and specifications for wildlife practices currently used by NRCS. Eleven comments recommended the State Wildlife Agencies approve wildlife standards and specifications. In addition, seven comments stated the State Technical Committees should approve all wildlife practices used in WHIP. Eighteen comments referred to the NRCS Field Office Technical Guide (FOTG), nine of which recommended updating the FOTG, one comment suggested adapting NRCS Technical Notes as eligible wildlife practices in WHIP, and the remaining eight indicated that some practices in the FOTG should not be eligible for WHIP. Several other comments identified individual practices that should be eligible for WHIP, including nesting platforms, screening diversion channels to enhance water quality, managing pesticides and nutrients, establishing

and sustaining biodiversity along field edges and rights of way, managing early successional grasslands, leaving grain standing in the field for wildlife, seasonal flooding of cropland for migratory birds, and establishing crawfish impoundments. One comment suggested developing WHIP practice guidelines for threatened or endangered species.

Response. The NRCS National office is adding technical guidance for the FOTG related to wildlife practices and management. These revisions include adding a wildlife component to many existing practices and new specifications designed to aid conservation planning. The NRCS State Conservationist, in consultation with the State Technical Committee, can develop interim standards and specifications for practices not currently in the FOTG. Practices included in WHIP cost-share agreements should focus on achieving benefits for wildlife, therefore, it is not necessary to identify practices that are ineligible for WHIP in the FOTG. NRCS Biological Technical Notes as well as existing standards and specifications developed by State Wildlife Agencies or other suitable sources may be used as the basis for developing interim wildlife practices. The flexibility already exists to address the concerns described above. Therefore, no changes were made in the final rule.

Comment. Five comments referred to the time frame for cost-share payments, two of which supported the language as proposed, two of which requested clarification whether payment will be made prior to or after the installation of a practice, and one of which suggested prior payment for limited resource farmers.

Response. As outlined in the proposed rule, cost-share payments shall be made after the installation of a practice per WHIP specifications and the submission of appropriate records and receipts. Although there is no authority in the WHIP statute to offer advance payments, WHIP payments are assignable to third parties and as such, are able to be paid directly to vendors providing services. In addition, many of the partnerships formed at the State level between NRCS and those interested in having a successful WHIP in their respective States, provide that certain financial or technical assistance or services will be provided to participants by the partners. In some cases, the partners will establish the practice at no charge to the participant. No changes were made in the final rule in response to these comments.

Comment. One comment provided that WHIP could provide significant wildlife habitat improvements if allowed on CRP lands.

Response. The 1996 Act added a wildlife emphasis to the CRP and provided substantial funds towards implementation. The NRCS does not believe the limited WHIP funds should be used to obtain wildlife benefits on acreage enrolled in a program established to achieve similar benefits.

Section 1470.7 (c): Comment. Ten comments described how many wildlife habitats require recurring practices (such as prescribed burning, disking, or mowing) to mimic the natural events that formerly maintained grassland habitats.

Response. The NRCS recognizes the special management needs of critical grassland habitats and will provide cost-share for recurring practices. Therefore, the NRCS has added a definition for "recurring practices" in this final rule and has changed this section to make funding of recurring practices possible.

Section 1470.7(d): Comment. The NRCS received 21 comments on this paragraph related to incentive payments, eleven of which stated incentive payments provided by partners should not be subject to the limit that specifies a participant cannot receive in excess of 100 percent cost-share assistance for a practice, nine of which recommended changing the rule to allow for incentive payments, and one comment suggesting that Wallop-Breaux funds should be eligible for matching with WHIP funds.

Response. The NRCS removed the language regarding the 100 percent limitation to clarify that its terms apply only to 75 percent of the cost-share payments received by a participant; and the remaining provisions of § 1470.7(d) were incorporated into § 636.6(a). Because the NRCS encourages cooperation between entities that share wildlife objectives, the National office recommends that the WHIP ranking system developed within a State not penalize an applicant's ability to receive cost-share assistance from other sources.

Comment. One comment recommended clarifying the meaning of the assistance versus payment so that the salaries of NRCS and other partners are not included in the cost-share the landowner is required to match.

Response. The NRCS resolves this concern with the revision described above by addressing only the 75 percent cost-share provided by NRCS or from direct Federal funds in § 636.7(a).

Section 1470.8 The Wildlife Habitat Development Plan (WHDP)

Comment. Forty comments were received on the Wildlife Habitat Development Plan (WHDP), thirteen of which expressed approval for the inclusion of partners in the planning process. Two comments wanted conservation district partners to have approval authority, one of which felt that the approval authority should be more than a "rubber stamp". One comment asked whether the NRCS would reimburse partners for technical assistance provided during the planning process. Two comments stated that hunting rights should not be affected by the implementation of the WHDP. Six comments related to WHDP requirements, two stated that hunting rights should remain unaffected, one stated that the plan should address State priority goals, three indicated there should not be requirements on adjacent land not subject to the cost-share agreement. One of these six comments requested the NRCS not to require a full Resource Management System. Six additional comments wanted existing management plans (e.g. SWCD conservation plans, Resource Management Systems, Stewardship Incentives Program, Forestry Incentives Program, and Habitat Conservation Plans) to be allowed as the basis for the WHDP, while one comment recommended integrating WHDP with other NRCS conservation planning efforts. Two comments supported the WHDP as described in the proposed rule.

Response. The NRCS supports using of conservation partners in all aspects of WHIP, including assessments, planning, monitoring, and evaluation activities. The NRCS also supports efficiency of efforts and will adapt, as appropriate, for use in WHIP any plans developed which provide the needed information. As stated earlier, the WHDP may be the entire conservation plan or one of several components of a conservation plan depending on the desires and priorities of the program participant. In general, it is not anticipated that the NRCS will reimburse partners for technical assistance during the planning process. However, there may be special cases where such arrangements are made. These arrangements will generally be subject to the availability of NRCS resources. No change was made in the final rule because the rule contains sufficient flexibility to address these concerns as they are raised through the locally-led process and in consultation with the State Technical Committee.

Comment. Seven comments were related to monitoring of the WHIP plan, three of which stated that monitoring and evaluation were important activities, two of which encouraged the use of partners in monitoring and measure success of the program, one of which wanted monitoring to be included in the plan, and the remaining comment wanted monitoring to be conducted only by NRCS and restricted to ensure compliance with Federal laws, rules, standards and specifications.

Response. The NRCS agrees that monitoring and evaluation are important for measuring success and identifying failures. Initially, each NRCS State office shall determine the monitoring method to use, as appropriate for the different types of wildlife habitat enrolled in the program. However, the NRCS has identified the need to develop a national standard for measuring wildlife habitat improvement in order to track wildlife habitat benefits achieved under the program. No such methodology currently exists, and it is the intent of NRCS to work with other wildlife interests to develop one. These comments are beyond the scope of this rule and are being addressed more appropriately in a broader context.

Section 1470.9 Modifications

Comment. Two comments were received concerning modifications to a WHIP plan. One comment wanted to allow changes to a plan at anytime based on unforeseen circumstances while the other comment wanted all modifications approved by the local work group in conjunction with the local conservation district.

Response. The local work group is comprised of Federal, State, County, tribal or local government representatives at the local level. The local work group serves as a recommending body only and will not have approval authority of WHIP cost-share agreements or modifications to such cost-share agreements. WHIP will accommodate, to the extent that funding allows, unforeseen technical modifications to a plan. The cost-share agreement modification provisions for WHIP are similar to those in other USDA conservation programs. The program handbook will provide procedural guidance for modifying cost-share agreements, and will have the flexibility to enable a participant to modify a cost-share agreement several years into its implementation as long as the WHDP is revised according to program requirements.

Section 1470.10 Transfer of Interest in a Contract

Comment. The NRCS received four comments on this topic. Two comments recommended funds should not be returned if a cost-share agreement is terminated. One comment recommended the return of all or a portion of the funds if a cost-share agreement is terminated through a change in ownership. One comment requesting clarification of the terms for a transfer of cost-share agreement and whether an easement was involved.

Response. NRCS does not have the authority to acquire easements from WHIP participants, and therefore there are no easements involved in a WHIP cost-share agreement. The NRCS added language to this section to include provisions when a subsequent owner is unwilling to assume responsibility under the WHIP cost-share agreement.

Section 1470.11 Termination of cost-share agreements

Comment. The NRCS received six comments on this section of the rule. Two comments requested clarification of the terms "public interest" and "severe hardship". One comment wanted the ability to end the cost-share agreement without obligation for the participant to return any funds. One comment wanted less harsh language in this section.

Response. The NRCS will utilize standard cost-share agreement procedures in the implementation of this section. The "public interest" and "severe hardship" standards have been implemented in many Departmental programs and such standards require fact-intensive determinations. A particular summary of such determinations would not prove insightful. There were no changes made to this section.

Section 1470.12 Violations and Remedies

Comment. The NRCS received one comment on this section requesting clarification of the terms "reasonable notice" and "additional time as CCC may allow."

Response. Written notice mailed to the last known address of the participant constitutes reasonable notice, but there exist other methods that also qualify. The NRCS will allow additional time beyond 30 days to correct a violation in those cases where an extension is determined reasonable, such as inclement weather, or other extenuating circumstances. In addition, language was added to clarify the difference between situations where the

participant sought to come back into compliance and those where the participant elected not to do so.

Section 1470.13 Misrepresentation and Scheme or Device

Comment. The NRCS received one comment on this section raising the concern that a program participant could be penalized for unknowingly violating the terms of the cost-share agreement.

Response. Section 636.13 in the final rule focuses upon misrepresentations and knowing violations, and thus the NRCS considers a person's state of mind when applying the terms of this section. Language was added in § 636.13 clarifying the outcomes possible under this section.

Section 1470.15 Appeals

Language was added to this section identifying activities that are not subject to appeal, consistent with the Department of Agriculture Reorganization Act of 1994.

Accordingly, Title 7 of the Code of Federal Regulations, subchapter D, is amended by adding a new part 636 to read as follows:

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. 3836a.

§ 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 lesser 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.

§ 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 proportion 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.

Signed at Washington, D.C. on September 12, 1997.

Gary A. Margheim,

Acting Chief, Natural Resources Conservation Service.

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