# Rules and Regulations

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## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

### 7 CFR Part 636

**RIN 0578–AA49**

### Wildlife Habitat Incentive Program

**AGENCY:** Commodity Credit Corporation, Natural Resources Conservation Service, United States Department of Agriculture.

**ACTION:** Final rule.

**SUMMARY:** The Natural Resources Conservation Service (NRCS), an agency of the United States Department of Agriculture (USDA), is issuing a final rule for the Wildlife Habitat Incentive Program (WHIP). This final rule sets forth how NRCS, using the funds, facilities, and authorities of the Commodity Credit Corporation (CCC), will implement WHIP in response to changes made by the Food, Conservation, and Energy Act of 2008 (2008 Act). NRCS published an interim final rule with request for comment in the **Federal Register** on January 16, 2009, an amendment was published on March 12, 2009, with a request for public comment, and another amendment was published on July 15, 2009, with a request for public comment. NRCS is publishing a final rule that addresses the comments received on the interim final rule and to clarify policies to improve program implementation.

**DATES:** *Effective Date:* The rule is effective November 23, 2010.

**FOR FURTHER INFORMATION CONTACT:** Gregory K. Johnson, Director, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237 South Building, Washington, DC 20250; Telephone: (202) 720–1844; Fax: (202) 720–4265.

Persons with disabilities who require alternative means for communicating (Braille, large print, audiotape, etc.) should contact the USDA Target Center at (202) 720–2600 (voice and TDD).

**SUPPLEMENTARY INFORMATION:**

## Regulatory Certifications

*Executive Order 12866*

Pursuant to Executive Order 12866, this final rule has been determined to be a significant regulatory action. The administrative record is available for public inspection at the Department of Agriculture, 1400 Independence Avenue, SW., Room 5241 South Building, Washington, DC 20250. In accordance with Executive Order 12866, NRCS conducted an economic analysis of the potential impacts associated with this program. A summary of the economic analysis can be found at the end of the regulatory certifications of the preamble, and a copy of the analysis is available upon request from Gregory K. Johnson, Director, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237 South Building, Washington, DC 20250.

*Regulatory Flexibility Act*

The Regulatory Flexibility Act is not applicable to this final rule because NRCS is not required by 5 U.S.C. 553, or by any other provision of law, to publish a notice of proposed rulemaking with respect to the subject matter of this rule.

*Environmental Analysis*

In compliance with the National Environmental Policy Act, a Programmatic Environmental Assessment (EA) was prepared in association with the interim final rule. The analysis determined there will not be a significant impact to the human environment and as a result, an Environmental Impact Statement was not required to be prepared (40 CFR 1508.13). The Programmatic EA and Finding of No Significant Impact (FONSI) were made available for public review for 60 days, which also coincided with the public review timeframe for the interim final rule. Comments were received on the Programmatic EA and FONSI, and responses to those comments have been prepared and can be reviewed along with a copy of the EA and FONSI from the following Web site: *http://www.nrcs.usda.gov/programs/Env_Assess/*. Additional program requirements that were not in the interim final rule, and that are now in the final rule, are minor program element changes that do not affect the overall effects or analysis in the Programmatic EA. As a result, preparation of a supplemental Programmatic EA has been determined not to be necessary.

*Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that this final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. Outreach and communication strategies are in place to ensure all producers will be provided the same information to allow them to make informed compliance decisions regarding the use of their lands that will affect their participation in USDA programs. WHIP applies to all persons equally regardless of their race, color, national origin, gender, sex, or disability status. Therefore, this final rule will not result in adverse civil rights implications for women, minorities, and persons with disabilities.

Copies of the Civil Rights Impact Analysis are available from Albert Cerna, National Wildlife Habitat Incentive Program Manager, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5233 South Building, Washington, DC 20250, or electronically at *http://www.nrcs.usda.gov/Programs/farmbill/2008/civilrightsimpact.html*.

*Paperwork Reduction Act*

Section 2904 of the 2008 Act requires that the implementation of programs authorized under Title II of the Act be made without regard to the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 et seq.). Therefore, NRCS is not reporting recordkeeping or estimated paperwork burden associated with this final rule.

*Government Paperwork Elimination Act*

NRCS is committed to compliance with the Government Paperwork

Elimination Act and the Freedom to E-File Act, which requires government agencies in general, to provide the public the option of submitting information or transacting business electronically to the maximum extent possible. To better accommodate public access, NRCS has developed an online application and information system for public use.

*Executive Order 12988*

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

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

Pursuant to section 304 of the Federal Crop Insurance Reform Act of 1994 (Pub. L. 103–354), USDA classified this rule as non-major. Therefore, a risk analysis was not conducted.

*Unfunded Mandates Reform Act of 1995*

NRCS assessed the affects of this final rule on State, local, and tribal governments, and the public. This action does not compel the expenditure of $100 million or more in any one year (adjusted for inflation) 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.

*Executive Order 13132*

This final rule has been reviewed in accordance with the requirements of Executive Order 13132, Federalism. USDA has determined that this final rule conforms with the Federalism principles set forth in the Executive Order; would not impose any compliance costs on the States; and would not have substantial direct effects on the States, on the relationship between the Federal Government and the States, or on the distribution of power and responsibilities on the various levels of government. Therefore, USDA concludes that this final rule does not have Federalism implications.

*Executive Order 13175*

This final rule has been reviewed in accordance with the requirements of Executive Order 13175, Consultation and Coordination with Indian Tribal Governments. NRCS has assessed the impact of this final rule on Indian tribal governments and concluded that this final rule will not negatively affect Indian tribal governments or their communities. The rule neither imposes substantial direct compliance costs on tribal governments nor preempts tribal law. However, NRCS plans to undertake a series of at least six regional tribal consultation sessions before December 30, 2010, on the impact of NRCS conservation programs and services on tribal governments and their members to establish a baseline of consultation for future actions. Reports from these sessions will be made part of the USDA annual reporting on Tribal Consultation and Collaboration. NRCS will respond in a timely and meaningful manner to all tribal governments' requests for consultation.

*Small Business Regulatory Enforcement Fairness Act of 1996*

Section 2904(c) of the 2008 Act requires that the Secretary use the authority in section 808(2) of Title 5, U.S.C., which allows an agency to forego the Small Business Regulatory Enforcement Fairness Act of 1996 usual 60-day congressional review delay of the effective date of a regulation if the agency finds that there is a good cause to do so. NRCS hereby determines that it has good cause to do so in order to meet the congressional intent to have the conservation programs authorized or amended by Title II of the 2008 Act in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the Federal Register.

*Section 2708 of the 2008 Act*

Section 2708, "Compliance and Performance," of the 2008 Act added a paragraph to section 1244(g) of the Food Security Act of 1985, as amended entitled, "Administrative Requirements for Conservation Programs," which states the following: "(g) Compliance and performance.—For each conservation program under Subtitle D, the Secretary shall develop procedures—

(1) To monitor compliance with program requirements;

(2) To measure program performance;

(3) To demonstrate whether long-term conservation benefits of the program are being achieved;

(4) To track participation by crop and livestock type; and

(5) To coordinate activities described in this subsection with the national conservation program authorized under section 5 of the Soil and Water Resources Conservation Act of 1977 (16 U.S.C. 2004)."

This new provision presents in one place the accountability requirements placed on the agency as it implements conservation programs and reports on program results. The requirements apply to all programs under Subtitle D, including the Wetlands Reserve Program, the Conservation Security Program, the Conservation Stewardship Program, the Farm and Ranch Lands Protection Program, the Grassland Reserve Program, the Environmental Quality Incentives Program (including the Agricultural Water Enhancement Program), the Wildlife Habitat Incentive Program, and the Chesapeake Bay Watershed Initiative. These requirements are not directly incorporated into these regulations, which set out requirements for program participants. However, certain provisions within these regulations relate to elements of section 1244(g) of the Food Security Act of 1985, as amended and the agency's accountability responsibilities regarding program performance. NRCS is taking this opportunity to describe existing procedures that relate to meeting the requirements of section 1244(g) of the Food Security Act of 1985, as amended and agency expectations for improving its ability to report on each program's performance and the achievement of long-term conservation benefits. Also included is reference to the sections of these regulations that apply to program participants and that relate to the agency accountability requirements as outlined in section 1244(g) of the Food Security Act of 1985, as amended.

*Monitor compliance with program requirements.* NRCS has established application procedures to ensure that participants meet eligibility requirements and follow-up procedures to ensure that participants are complying with the terms and conditions of their contractual arrangement with the government, and that the installed conservation measures are operating as intended. These and related program compliance evaluation policies are set forth in agency guidance (CPM–440–512 and CPM–440–517) (*http://directives.sc.egov.usda.gov/*).

The program requirements applicable to participants that relate to compliance are set forth in these regulations in § 636.4 "Program requirements," § 636.8 "WHIP Plan of Operations," and § 636.9 "Cost-share agreements." These sections make clear the general program eligibility requirements, participant obligations for implementing a WHIP plan of operations, participant cost-share agreement obligations, and

requirements for operating and maintaining WHIP-funded conservation improvements.

*Measure program performance.* Pursuant to the requirements of the Government Performance and Results Act of 1993 (Pub. L. 103–62, Sec. 1116) and guidance provided by OMB Circular A–11, NRCS has established performance measures for its conservation programs. Program-funded conservation activity is captured through automated field-level business tools, and the information is available at *http://ias.sc.egov.usda.gov/PRSHOME/.* Program performance also is reported annually to Congress and the public through the annual performance budget, annual accomplishments report, and the USDA Performance Accountability Report. Related performance measurement and reporting policies are set forth in agency guidance (GM–340–401 and GM–340–403) (*http://directives.sc.egov.usda.gov/*).

The conservation actions undertaken by participants are the basis for measuring program performance—specific actions are tracked and reported annually, while the effects of those actions relate to whether the long-term benefits of the program are being achieved. The program requirements applicable to participants that relate to undertaking conservation actions are set forth in these regulations in § 636.8 "WHIP Plan of Operations," and § 636.9 "Cost-share agreements." These sections make clear participant obligations for implementing, operating, and maintaining WHIP-funded conservation improvements, which in aggregate result in the program performance that is reflected in agency performance reports.

*Demonstrate whether long-term conservation benefits of the program are being achieved.* Demonstrating the long-term natural resource benefits achieved through conservation programs is subject to the availability of needed data, the capacity and capability of modeling approaches, and the external influences that affect actual natural resource condition. While NRCS captures many measures of "output" data, such as acres of conservation practices, it is still in the process of developing methods to quantify the contribution of those outputs to environmental outcomes. NRCS currently uses a mix of approaches to evaluate whether long-term conservation benefits are being achieved through its programs. Since 1982, NRCS has reported on certain natural resource status and trends through the National Resources Inventory (NRI), which provides statistically reliable, nationally consistent land cover/use and related natural resource data. However, a connection between these data and specific conservation programs (with the exception of the Conservation Reserve Program, since 1987 the NRI has reported acreage enrolled in CRP) has been lacking. In the future, the interagency Conservation Effects Assessment Project (CEAP), which has been underway since 2003, will provide nationally consistent estimates of environmental effects resulting from conservation practices and systems applied. CEAP results will be used in conjunction with performance data gathered through agency field-level business tools to help produce estimates of environmental effects accomplished through agency programs, such as WHIP. In 2006, a Blue Ribbon panel evaluation of CEAP strongly endorsed the project's purpose, but concluded "CEAP must change direction" to achieve its purposes. (See Soil and Water Conservation Society. 2006. Final Report from the Blue Ribbon Panel Conducting an External Review of the U.S. Department of Agriculture Conservation Effects Assessment Project. Ankeny, IA: Soil and Water Conservation Society. This review is available at *http://www.nrcs.usda.gov/technical/NRI/ceap/.*) In response, CEAP has focused on priorities identified by the Panel and clarified that its purpose is to quantify the effects of conservation practices applied on the landscape. Information regarding CEAP, including reviews and current status, is available at *http://www.nrcs.usda.gov/technical/NRI/ceap/.*

Since 2004 and the initial establishment of long-term performance measures by program, NRCS has been estimating and reporting progress toward long-term program goals. Natural resource inventory and assessment and performance measurement and reporting policies are set forth in agency guidance (GM–290–400; GM–340–401; and GM–340–403) (*http://directives.sc.egov.usda.gov/*).

*Demonstrating the long-term conservation benefits of conservation programs is an Agency responsibility.* Through CEAP, NRCS is in the process of evaluating how these long-term benefits can be achieved through the conservation practices and systems applied by participants under the program. The program requirements applicable to participants that relate to producing long-term conservation benefits are described previously under "measuring program performance," *i.e.,* § 636.8 "WHIP Plan of Operations," and § 636.9 "Cost-share agreements." These and related program management procedures supporting program implementation are set forth in agency guidance (CPM–440–512 and CPM–440–515).

*Coordinate these actions with the national conservation program authorized under the Soil and Water Resources Conservation Act (RCA).* The 2008 Act reauthorized and expanded on a number of elements of the RCA related to evaluating program performance and conservation benefits. Specifically, the 2008 Act added a provision stating, "Appraisal and inventory of resources, assessment and inventory of conservation needs, evaluation of the effects of conservation practices, and analyses of alternative approaches to existing conservation programs are basic to effective soil, water, and related natural resources conservation."

The program, performance, and natural resource and effects data described previously will serve as a foundation for the next RCA, which will also identify and fill, to the extent possible, data and information gaps. Policy and procedures related to the RCA are set forth in agency guidance (GM–290–400; CPM–440–525; and GM–130–402) (*http://directives.sc.egov.usda.gov/*).

The coordination of the previously described components with the RCA is an agency responsibility and is not reflected in these regulations. However, it is likely that results from the RCA process will result in modifications to the program and performance data collected, to the systems used to acquire data and information, and potentially to the program itself. Thus, as the Secretary proceeds to implement the RCA in accordance with the statute, the approaches and processes developed will improve existing program performance measurement and outcome reporting capability and provide the foundation for improved implementation of the program performance requirements of section 1244(g) of the Food Security Act of 1985, as amended.

*Economic Analysis—Executive Summary*

WHIP provides direct technical and financial assistance to improve fish and wildlife habitat on eligible agricultural, nonindustrial private forest land (NIPF), and Indian land. The focus of the program is on national, regional, and State-directed fish and wildlife priorities, including rare and declining species. These priorities are established with input from the regional, State, and local stakeholders through the State Technical Committee. Because these efforts involve both onsite and offsite specific impacts, and these impacts

affect a host of non-market valued attributes ecosystem services, performing a traditional benefit-cost analysis is challenging. Even with these limitations, a benefit-cost analysis offers a means to identify the main costs and benefits and explore policy and program alternatives.

The primary costs associated with WHIP include the cost-share outlays by NRCS and the matching funds of the participant to fully pay for the restoration and improvements in fish and wildlife habitat within the agricultural, forestry operation, or Indian land. These primary costs must then be compared with the benefits of the habitat improvement realized through these efforts, mainly the improvements of the flow of ecological goods and services and provision of non-market valued amenities, such as more scenic views, as well as providing fish and wildlife habitat.

The results of this benefit-cost analysis suggest that the WHIP assistance to participants will result in positive net benefits, especially in areas where fish and wildlife habitat is deteriorating or being lost. The changes to WHIP made by the 2008 Act do not change this conclusion. Copies of the economic analysis may be obtained from Gregory K. Johnson, Director, Financial Assistance Programs Division, Department of Agriculture, Natural Resources Conservation Service, 1400 Independence Avenue, SW., Room 5237 South Building, Washington, DC 20250.

**Discussion of Program**

WHIP is a voluntary program administered by NRCS using the funds and authorities of the CCC. WHIP is available in any of the 50 States, District of Columbia, Puerto Rico, Guam, the Virgin Islands of the United States, American Samoa, and the Commonwealth of the Northern Mariana Islands. Through WHIP, NRCS provides technical and financial assistance to participants to develop upland, wetland, and aquatic wildlife habitat, as well as fish and wildlife habitat on other areas and to develop habitat for at-risk species, including threatened and endangered species. NRCS first allocated funds for WHIP in 1997. Over the life of the program, NRCS has entered into over 29,000 cost-share agreements that cover over 4.7 million acres.

WHIP was originally authorized under section 387 of the Federal Agriculture Improvement and Reform Act of 1996 (Pub. L. 104–127). In 1997, NRCS published regulations to implement WHIP at 7 CFR part 636. Section 2502 of the Farm Security and Rural Investment Act of 2002 (Pub. L. 107–171) repealed the original WHIP authority and established a new WHIP under section 1240N of the Food Security Act of 1985, as amended. Section 2602 of the 2008 Act made further changes to WHIP.

These recent changes included restricting eligible lands to private agricultural land, NIPF, and Indian land; clarifying the phrase "other types of habitat" to include habitat developed on pivot corners and irregular areas; increasing the proportion of annual funds available for long-term agreements that are 15 years or longer to not more than 25 percent; providing the Secretary with discretionary authority to address State, regional, and national conservation initiatives; and establishing a $50,000 annual payment limitation per person or legal entity. The WHIP statute uses tribal, but NRCS will use Indian and tribal interchangeably to be consistent with other programs.

**Registration and Reporting Requirements of the Federal Funding and Transparency Act of 2006**

The Office of Management and Budget recently published two regulations, 2 CFR part 25 and 2 CFR part 170, to assist agencies and recipients of Federal financial assistance comply with the Federal Funding Accountability and Transparency Act of 2006 (FFATA) (Pub. L. 109–282, as amended). Both regulations have implementation requirements beginning October 1, 2010.

The regulations at 2 CFR part 25 require, with some exceptions, recipients of Federal financial assistance to apply for and receive a Dun and Bradstreet Universal Numbering System (DUNS) number and register in the Central Contractor Registry (CCR). The regulations at 2 CFR part 170 establish new requirements for Federal financial assistance applicants, recipients, and sub recipients. The regulation provides standard wording that each agency must include in its awarding of financial assistance that requires recipients to report information about first-tier sub awards and executive compensation under those awards.

NRCS has determined that 2 CFR part 25 and 2 CFR part 170 apply to certain awards of financial assistance provided under WHIP. Therefore, NRCS has incorporated, by reference, these registration and reporting requirements at § 636.4 and will include the requisite provisions as part of the WHIP contract.

**Analysis of Public Comment**

On January 16, 2009, NRCS published an interim final rule in the **Federal Register**. On March 12, 2009, NRCS published an amendment to the interim final rule addressing the incorrect application of the $50,000 annual payment limitation to joint operations and requesting public comment on how USDA's conservation programs can further the Nation's ability to increase renewable energy production and conservation, mitigate the effects and adapt to climate change, and reduce net carbon and greenhouse gas (GHG) emissions.

Following this amendment and request for comment, NRCS published an additional amendment to the interim final rule, with a request for comment, on July 15, 2009, redefining the term agricultural lands to be more inclusive of lands that have the potential to produce agricultural products or livestock. The comments received on the interim final rule and amendments were consolidated and are addressed in this public comment analysis. In total, 43 comments were received during the comment periods; 3 were from individuals, 15 from State agencies, 2 from Federal agencies, 2 from Indian tribes, and 23 from nongovernmental organizations. All comments received are available for review at *http://www.nrcs.usda.gov/programs/farmbill/2008/public-comments.html.*

The discussion that follows is organized in the same sequence as the interim final rule.

*Section 636.1 Applicability*

Section 636.1 sets forth WHIP's purpose and scope, stating that "the purpose of the program is to help participants develop fish and wildlife habitat on private agricultural land, NIPF, and Indian land."

*Comments:* One respondent expressed concern about NRCS proposing to strike the term species from the program's purpose statement, shifting the program focus from species to land and water resources.

*Response:* The interim final rule replaced the phrase "for upland wildlife, wetland wildlife, threatened and endangered species, fish, and other types of wildlife" with the phrase "develop fish and wildlife habitat on private agricultural land, NIPF, and Indian land," in an effort to be consistent with the program's statutory authority. The simplified language provided the appropriate broad interpretation for the types of habitat to be developed on eligible lands, including a new statutory requirement to encourage the development of habitat for native and managed pollinators. No changes were made to the final rule.

*Comments:* Numerous respondents requested that NRCS extend WHIP's

program purpose and scope to pollinators, specifically. Five respondents requested that NRCS reference native and managed pollinator habitat, while four of the five respondents wanted WHIP to focus on native pollinators and their habitats and not managed pollinators, leaving managed pollinator habitat to other conservation programs like the Environmental Quality Incentives Program (EQIP).

*Response:* Section 1244(h) of the Food Security Act of 1985, as amended states:

"In carrying out any conservation program administered by the Secretary, the Secretary may, as appropriate, encourage (1) the development of habitat for native and managed pollinators; and (2) the use of conservation practices that benefit native and managed pollinators."

Section 1244(h) includes both managed and native pollinators. In section 1244(h), WHIP's authority focuses on wildlife habitat with no distinction made between native and managed species. As part of the development of habitats in many projects, WHIP plants grasses, forbs, shrubs, and trees that provide habitats for pollinator species as a consequence of providing habitats for prioritized wildlife. NRCS chooses to retain the interim final rule's original language which follows the intent of section 1244(h) and WHIP's legislative authority that makes no distinction between restoring or enhancing native and managed pollinator species' habitats.

*Comments:* Several respondents requested that NRCS focus its technical assistance efforts on improving pollinator habitat. One respondent wanted NRCS to designate a national coordinator to advance habitat for honey bees and expand its outreach to potential participants. Another respondent expressed concern that with a lack of emphasis in a regulation, pollinator habitat may be disregarded by individual States. Another respondent wanted to ensure that expedited efforts were made to update and revise the conservation practice standards and technical notes, assuring that these standards and technical notes were appropriate and relevant to the local habitat and species' needs. Moreover, the respondent wanted NRCS to provide input to the National Institute of Food and Agriculture and Agricultural Research Service about additional research needed to improve the science regarding wildlife habitat and conservation practices that are best for native and managed pollinators.

*Response:* No changes were made to the rule in response to these comments. State Conservationists have been encouraged to establish pollinator species as State priorities, and they have done so. In fiscal year (FY) 2009, NRCS funded 54 projects to restore and improve pollinator habitat through the WHIP and the Conservation Innovation Grants (CIG) program. Interim conservation practice standards and technical notes have been and are in the process of being established. State Conservationists are providing information to producers that conservation practices which benefit pollinator species are eligible for cost-share. NRCS does not conduct research, but has established partnerships with agencies that provide information from research.

*Section 636.2 Administration*

Section 636.2 sets forth the policies related to NRCS and its agreements with partners.

*Comments:* Two respondents requested that NRCS include marketing and outreach as eligible work for partner agreements, also known as contribution agreements. Several respondents supported the flexibility to enter into agreements with Federal and State agencies and Indian tribes to assist with program implementation.

*Response:* Since WHIP's inception, NRCS has used partnership agreements with Federal, State, and local agencies to implement the program. NRCS has the ability to include marketing and outreach in these agreements.

Aside from working through contribution agreements, NRCS also has the ability to enter into agreements with Technical Service Providers (TSPs) to assist in implementing conservation programs. Section 2706 of the 2008 Act amended the Food Security Act of 1985, as amended to authorize payments to TSPs for related technical assistance services that accelerate program delivery. Related technical assistance services include, but are not limited to, conservation planning documentation, payment scheduling, and documentation. Technical standards for certifying other services like outreach and marketing TSPs will be formulated during FY 2010.

As in the case of other Title XII conservation programs, a WHIP participant or NRCS may use the services of a qualified TSP to install and implement conservation practices. Technical services provided may include conservation planning; conservation practice survey, layout, design, installation, and certification; and related technical assistance services as described above. To clarify that TSPs may be used to expedite WHIP conservation program delivery, NRCS has added related technical assistance services to § 636.18(c): "Technical services provided by qualified personnel not affiliated with USDA may include, but is not limited to, conservation planning; conservation practice survey, layout, design, installation, and certification; and related technical assistance services as defined in 7 CFR part 652."

*Section 636.3 Definitions*

When NRCS published the WHIP interim final rule, it revised many of WHIP's definitions to be consistent with other NRCS conservation programs and to avoid confusion among NRCS field personnel and customers. A majority of the comments received during the interim final rule's request for comment period were definitions contained in section 636.3. Following are definitions received from public comments.

**Agricultural Lands**

*Comments:* Over 20 respondents commented on the agricultural lands definition. The majority of respondents stated that the definition of agricultural lands was too limited. The respondents requested that NRCS expand the definition to include "lands on which agricultural and forest products may be produced or have the potential to be produced." They cited that many rural, privately owned lands offer significant wildlife habitat potential, despite the fact that they are not currently used for agricultural production.

*Response:* NRCS concurs with this recommendation and on July 15, 2009, published an amendment to the interim final rule which defined agricultural lands as: "Cropland, grassland, rangeland, pastureland, and other land determined by NRCS to be suitable for fish and wildlife habitat development on which agricultural and forest-related products or livestock are or have the potential to be produced. Agricultural lands may include cropped woodland, wetlands, waterways, streams, incidental areas included in the agricultural operation, and other types of land used for or have the potential to be used for production."

Under WHIP, NRCS has the discretion to define agricultural lands in order to meet the program objectives. In the past, WHIP served as a niche program through its ability to improve wildlife habitat on areas that were not otherwise eligible for NRCS conservation assistance. NRCS believes that the interim final rule's agricultural lands definition was too narrow in its interpretation of the statute, especially since lands that are not currently under

production oftentimes can most readily be improved for wildlife habitat, and that there are many active conservationists who wish to enhance wildlife habitat but may not be actively producing a commodity or raising livestock. As noted above, this change was adopted in the amendment to the interim final rule.

*Comments:* Two respondents requested that NRCS add specific language to modify the agricultural lands definition to make it consistent with the Farm Credit Administration's (FCA) definition of agricultural land. The intent behind making the WHIP definition consistent with FCA's definition was similar to the rationale described above —expand the types of eligible lands to those that have the potential or are available to produce a crop, fruits, timber, or livestock.

*Response:* Based upon the rationale set forth above, NRCS concurs with this recommendation and on July 15, 2009, published an amendment to the interim final rule which changed the definition of agricultural lands.

*Comments:* Nearly a dozen respondents requested that specific areas be identified in the definition of agricultural lands. Areas mentioned included wetlands, riparian areas, aspen groves, streams, canals, shelterbelts, buffer strips, and waterways.

*Response:* NRCS has chosen to retain the current definition of agricultural lands with the slight modification of changing marshes to wetlands, since wetlands is a more inclusive term to describe areas WHIP seeks to restore and enhance. NRCS has also chosen to add the terms waterways and streams. NRCS believes areas like canals, shelterbelts, aspen groves, and buffer strips would be determined to be eligible since they would be considered lands incidental to the agricultural or forestry operation.

**Applicant**

*Comments:* Six respondents requested changing the definition of applicant. As currently defined, an applicant must have an interest in an agricultural operation. Such a requirement prohibits NIPF landowners and others who own or operate agricultural land with the potential to produce an agricultural crop or livestock from participating.

*Response:* NRCS accepts this recommendation to revise the term applicant, and modifies the definition in this final rule as follows: "Applicant means a person, legal entity, joint operation, or Indian tribe that has an interest in agricultural land, NIPF, Indian land, or other lands identified in § 636.4(c)4, who has requested in writing to participate in WHIP."

**At-Risk Species**

*Comments:* In the interim final rule published on January 16, 2009, NRCS specifically requested comment on its definition of at-risk species. Approximately 20 individuals and organizations responded to this request, providing suggestions on how NRCS could modify this definition.

Fifteen respondents suggested using the definition that exists in the Memorandum of Understanding (MOU) with the U.S. Fish and Wildlife Service (USFWS), NRCS, and the Association of Fish and Wildlife Agencies. As stated in the MOU, "at-risk species refers to plant and animal species in that area listed as threatened or endangered under the Endangered Species Act (ESA); proposed or candidates for listing under ESA: likely to become candidates for listing in the near future; species listed as endangered or threatened (or similar classification) under State law; and State species of conservation concern (*i.e.,* those species identified by State fish and wildlife agencies in State wildlife action plans or other State agency conservation strategies and plans that include species identified as being in greatest need of conservation concern)."

One respondent suggested that State agencies determine at-risk species, while another respondent suggested that NRCS retain the interim final rule definition as follows: "Any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, needing direct intervention to halt its population decline." Another respondent wanted NRCS to take into account global species of concern generated by The Nature Conservancy and a similar list generated by the International Union of Conservation of Nature. One respondent recommended that consideration should also be extended to ecosystems at-risk as well as species.

One respondent suggested using the MOU definition, in conjunction with NRCS' definition, specifically rewording the definition as follows: "At-risk species refers to (1) any plant or animal species listed as threatened or endangered under ESA, (2) proposed for listing under ESA, (3) a candidate for listing in the near future, (4) likely to become a candidate for listing in the near future, (5) listed as endangered or threatened (or similar classification) under State law, (6) a species of conservation concern, or (7) other species determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline." Another respondent suggested that NRCS expand the definition beyond the MOU definition by adding the following sentence to the MOU definition: "At-risk species may also include native species identified by the Chief, in consultation with the State Conservationist and State Technical Committee, and with advice from the USFWS, National Marine Fisheries Service, or other experts as at-risk because of population vulnerability due to climate change, catastrophic events, or pest/pathogen outbreaks."

Two respondents defined at-risk species more broadly stating at-risk means any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, the USFWS, the State agency responsible for fish and wildlife, and in consultation with the State wildlife action plan to include species listed as endangered or threatened under ESA and proposed or candidate species for listing under ESA (this allows determination by the State Conservationist), while another respondent requested that NRCS allow for a localized area to give a designation.

*Response:* Section 636.3 in the interim final rule defines at-risk species as "any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline." NRCS developed this definition to provide maximum flexibility and allow the State Conservationist to enroll acres for any type of species, provided it is experiencing population decline. For example, the at-risk definition has enabled NRCS to restore wildlife habitat for species that have experienced population decline from a natural disaster or other situation, without the requirement that the species be included on a list.

NRCS determined, based on the public comments, to revise its definition to read as follows: "At-risk species means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the ESA; a species listed as threatened or endangered under State law or tribal law on tribal land; State or tribal land species of conservation concern; or other plant or animal species or community, as determined by the State Conservationist, with advice from the State Technical Committee and Tribal Conservation Advisory Council (for tribal land), that has undergone, or likely to undergo, population decline

and may become imperiled without direct intervention."

**Habitat Development**

*Comments:* Two respondents requested that NRCS modify the habitat development definition solely to address native conditions for fish and wildlife habitat.

*Response:* WHIP's authority focuses on wildlife habitat with no distinction made between native and managed species and no distinction made on native or managed conditions. NRCS chooses to retain the flexibility afforded by the program's enabling legislation and leave it to the discretion of the State Conservationist, with advice from the State Technical Committee, to restore or enhance wildlife for those species that are deemed to need habitat restoration or enhancement in that geographic area or State. No changes were made to the final rule.

**Historically Underserved Producer**

*Comments:* Three respondents requested that NRCS expand WHIP's applicability to include NIPF landowners or family forest owners, along with farmers and ranchers, in the definition of historically underserved producer.

*Response:* NRCS' current definition of historically underserved producer is as follows: "Historically underserved producer means an eligible person, joint operation, or legal entity who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, or limited resource farmer or rancher."

NIPF landowners are eligible for the increased WHIP cost-share rates afforded to historically underserved agricultural producers, provided they meet the same quantifiable criteria contained within the separate definitions for beginning farmer or rancher, limited resource farmer or rancher, or socially disadvantaged farmer or rancher. Section 636.3 defines each of these terms.

To clarify that NIPF landowners can qualify for the increased cost-share rates, NRCS revises the historically underserved producer definition as follows: "Historically underserved producer means an eligible person, joint operation, legal entity, or Indian tribe who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or NIPF landowner who meets the beginning, socially disadvantaged, or limited resource qualifications set forth in § 636.3."

**Livestock**

*Comments:* Two respondents request that NRCS revise the definition of livestock to limit the terminology to "all domesticated animals kept on farms and ranches for the production of agricultural goods, as determined by the Chief."

*Response:* NRCS retains the interim final rule's definition since some animals raised on a farm or ranch such as bison, fish, or emus may not be considered domesticated species. As defined, "livestock means all animals produced on farms and ranches, as determined by the Chief."

**Resource Concern**

*Comments:* Four respondents requested that NRCS modify the definition of resource concern, striking the phrase by producers and replacing it with by participants.

*Response:* NRCS accepts this recommendation since the term participant is the term used to describe a person, joint operation, or legal entity that has responsibility to implement the contract. Therefore, the final rule definition is as follows: "Resource concern means a specific natural resource problem that represents a significant concern in a State or region, and is likely to be addressed successfully through the implementation of the conservation activities by participants."

**Wildlife**

*Comments:* Four respondents requested that NRCS include mollusks in the definition of wildlife.

*Response:* Mollusks are considered invertebrates; therefore, NRCS retains the definition of wildlife as stated in the interim final rule: "Wildlife means non-domesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals."

*Section 636.4 Program Requirements*

Section 636.4 articulates program eligibility requirements. In the interim final rule, NRCS made several adjustments to § 636.4(b) to incorporate the 2008 Act changes to land eligibility and to conform the eligibility language to the new definitions described in § 636.3. In particular, NRCS identified in § 636.4(b) that eligible lands included agricultural land, NIPF, and Indian land as defined in § 636.3. Most of the comments received for this section focused on eligible lands and the role of other agencies in determining what lands are eligible for WHIP assistance.

**Land Eligibility**

*Comments:* Several respondents were disappointed that NRCS limited the program to private agricultural lands, NIPF, and tribal lands, stating that a lot of wildlife benefits can occur on public lands. Another respondent recommended that the public lands restriction be revised when significant habitat gains can accrue on public lands, while another respondent suggested that NRCS allow public lands if it is a working component of the participant's agricultural or forestry operation, and where an at-risk species on private land would benefit. Ten respondents suggested that public lands leased by private landowners who have control over the land for the contract period be eligible. Nine of those respondents also wanted NRCS to allow public lands that were held in trust for the beneficiaries of a State's education system. Another respondent requested that WHIP allow for a small number of strategically located projects on private non-agricultural land, State, or locally-owned public lands.

*Response:* The 2008 Act amended section 1240N of the Food Security Act of 1985, as amended to limit WHIP's scope to "wildlife habitat on private agricultural land, NIPF, and tribal lands." Consequently, public lands are ineligible for WHIP assistance, even those leased by private landowners or States' education systems. Based on this authority, WHIP's activities on streams and waterways are limited to the extent that these lands are considered private lands. The final rule is being revised to provide that certain trust lands are eligible for assistance.

**Hawaii and Other Pacific Trust Lands**

*Comments:* Several respondents requested that NRCS allow public leaseholder land in the State of Hawaii to be eligible for WHIP cost-share assistance. In addition to Hawaii homelands, several respondents also requested that NRCS expand the definition of Indian land beyond tribal and trust land held by Alaska Natives to include trust lands in the Pacific.

*Response:* The respondents accurately note that many public trust lands in Hawaii and other Pacific locations operate as the equivalent of private land and leaseholders hold such land under very long-term leases (99 years in the case of Hawaii) and often without any payment to the government at issue including any requirement to share any profits made from agricultural operations. While such trust lands cannot fall under the statutory definition of tribal lands as urged by the

respondents, as set forth below, the rule is being revised to make such trust lands eligible for WHIP assistance when the Chief determines trust land is held under a long-term lease by a person or nongovernmental entity and when the Chief determines that (i) By the nature of the lease, such land is tantamount to private agricultural land; (ii) the duration of the lease is at least the length of any WHIP agreement; and (iii) no funds under the WHIP program are paid to a governmental entity.

*Comments:* Ten respondents requested that NRCS allow stream systems, including stream bottoms, to be eligible, while another respondent requested that NRCS allow streams to be eligible if the activity is for dam removal. Six respondents requested that NRCS allow stream systems to be eligible when the landowner who operates the land within these landscapes is willing to participate. Two respondents supported the rationale to allow streams to be enrolled, particularly if it is public land that remains under private control during the contract period. Two respondents stated that the intent of WHIP was to limit WHIP's use in State Parks and wildlife areas, not where private land surrounds the stream or waterway.

*Response:* NRCS will enroll streams and stream bottoms provided the governmental entity with authority over State or Federal waters provides documentation certifying that the stream and the stream bottom are considered private land. The processes for obtaining this approval will be outlined in 440 Conservation Programs Manual, Part 517, Section 517.22 Eligibility.

*Comments:* Section 1240N(b) directs the Secretary to "make cost-share payments to owners of lands referred to in subsection (a) to develop (A) upland wildlife habitat; (B) wetland wildlife habitat; (C) habitat for threatened and endangered species; (D) fish habitat; and other types of wildlife habitat approved by the Secretary, including habitat developed on pivot corners and irregular areas." One respondent supported Congress' addition of pivot corners into WHIP.

*Response:* Prior to the 2008 Act, the existing WHIP regulation encompassed habitats on areas such as pivot corners; therefore, NRCS determined that it did not need to amend the final rule, although the preamble clarified that pivot corners were considered eligible lands.

*Comments:* Several respondents requested that NRCS involve other agencies in the determination of public lands. Specifically, four respondents recommended that NRCS modify 636.4(c), to allow the USFWS and State agencies to be involved in determining land that is ineligible. Specifically, they request that NRCS revise paragraph (c) as follows: "Ineligible land. NRCS will not provide cost-share assistance if after coordination with the State fish and wildlife agency and USFWS with respect to conservation practices on land * * *"

*Response:* NRCS chooses to retain the interim final rule's language in § 636.4 which does not specify consultation with State fish and wildlife agencies or USFWS. The State Conservationist may consult with the State fish and wildlife agency and USFWS on ineligible land determinations as stated in 440 Conservation Programs Manual, Part 517, Section 517.22; however, the final decision rests with the State Conservationist.

*Comments:* One respondent requested that NRCS broaden the scope of § 636.4(c)(3) to include not just threatened and endangered species, but also at-risk species. In essence, the respondent requested that NRCS not provide assistance on land where at-risk species may be adversely affected, while two additional respondents requested that NRCS expand the list to proposed or candidates for listing under ESA or likely to become candidates under ESA or similar classification under State law.

*Response:* NRCS retains the reference to threatened and endangered species in § 636.4(c)(3), since the proposed categorized species are broader categories of species that are experiencing population decline and such species may not undergo the same scrutiny and information gathering process in their labeling as threatened or endangered species.

*Comments:* Section 636.4(c)(4) sets forth the types of lands ineligible for WHIP assistance. Three respondents requested that NRCS revise § 636.4(c)(4) regarding ineligible land to read: "Lands owned in fee title by an agency of the United States, other than land held in trust for Indian tribes, and (ii) lands owned in fee title by a State, including an agency or subdivision of a State or a unit of government."

*Response:* NRCS supports the recommended wording change and adopts it.

**Person Eligibility**

*Comments:* Several respondents commented on person eligibility. One respondent supported NRCS' ability to grant waivers for persons and legal entities who exceed the Adjusted Gross Income (AGI) limitation as specified in 7 CFR part 1400. Section 1400.500 allows the Chief to grant a waiver "for the protection of environmentally sensitive land of special significance." Such a waiver proves helpful to States like Hawaii, where high real estate prices, wealthy landowners, and critical natural resources exist. Two respondents questioned whether tribes were exempt from the AGI limitation.

*Response:* Tribes are exempt from AGI limits in accordance with 7 CFR part 1400, "Farm Program Payment Limitation and Payment Eligibility for 2009 and Subsequent Crop, Program, or Fiscal Years."

*Comments:* One respondent requested that WHIP should reflect the policy outlined in 7 CFR part 1466, EQIP, which clearly exempts Indian tribes or Indians represented by the Bureau of Indian Affairs (BIA) from the limitations.

*Response:* 7 CFR 1400.4 excludes tribes from payment limitation and eligibility provisions related to the AGI: "Provisions of this part do not apply to Indian tribes as defined in section 1400.3." The regulation's corresponding preamble states the following:

> "In this rule, section 1400.4 exempts Indian tribes, as defined in 1400.3, from all requirements of this part. Provisions of this part apply to persons or legal entities. Indian tribes are not included under the definition of person or legal entity as provided by the 2008 Act for the application of payment eligibility and payment limitation provisions. The 2008 Act does not impose any limitations or restrictions on programs payments and benefits to federally recognized Indian tribes. This exemption to the provisions of this part only applies to Indian tribes. The payment eligibility and payment limitation requirements remain applicable to individual American Indians or Alaska Natives receiving program payment and benefits as individuals, or through a group in which all members of the group are American Indians or Alaska Natives."

For this reason, persons and legal entities within the tribe will be subject to limitations in accordance with § 636.4(a)(9); however, payments made to tribal groups may exceed the payment limitation if the BIA or a tribal official certifies that no one individual will receive more than the established payment limitation.

*Comments:* As it relates to tribes, one respondent requested that NRCS form a partnership via a Memorandum of Agreement or MOU between NRCS and the tribe to ensure that tribal members comply with tribal law before applying for WHIP benefits as well as operational consideration. An individual tribal member must comply with a tribal management plan and be able to show proper documentation for land control pursuant to the tribal nation.

*Response:* The NRCS policy is to work with all tribes to meet all of their resource needs. No changes were made to the final rule.

*Comments:* Related to payment matters, one respondent requested that NRCS rephrase § 636.9(c) to add: "Deferment will be eligible for payments for foregone income when deferment of use is needed to meet habitat need and achieve program objectives."

*Response:* Section 1240N identifies that NRCS is to provide cost-share assistance to private agricultural landowners to develop wildlife habitat. The statutory authority does not restrict cost-share assistance to any particular identified aspect of the cost of habitat development. As can be gleaned from other financial assistance programs, the costs associated for implementing a conservation practice, activity, or other fish and wildlife habitat development action includes the income forgone from its implementation, and thus, income foregone is an appropriate consideration for determining the level of cost-share assistance that should be made available under the program. Therefore, NRCS will review and develop payment rates wildlife habitat development actions where the income foregone by the WHIP participant to implement those actions is appropriate to be included in the cost-share payments made under the WHIP contract. NRCS has made editorial adjustments throughout the final rule to clarify that cost-share assistance is available for the implementation of cost-share practices, activities, and other habitat development actions, and that such cost-share assistance includes income foregone. Therefore, NRCS has added a new term, "conservation activities," to encompass the range of habitat development actions eligible for cost-share assistance, and incorporated the term throughout the final rule where appropriate.

*Comments:* One respondent suggested that NRCS clarify when the operation and maintenance (O&M) agreement will be signed.

*Response:* The O&M agreement will continue to be signed at the time that the WHIP plan of operations cost-share agreement is signed. In accordance with § 636.8, the WHIP plan of operations forms the basis for the WHIP cost-share agreement, along with the O&M agreement. The WHIP plan of operations includes a schedule for the implementation and maintenance of the conservation activities, as determined by NRCS.

*Section 636.5 National Priorities*

Section 636.5 provides that NRCS will establish national priorities to guide funding to the State offices, selection of WHIP cost-share agreements, and implementation priority for WHIP conservation practices.

*Comments:* NRCS received over 20 comments pertaining to WHIP's national priorities. Nine respondents supported WHIP's national priorities outlined in section 636.5(a). Several others supported WHIP's priorities, but wanted to see pollinators addressed as part of the priorities. Several of those respondents wanted only native pollinators to be considered national priorities. Another respondent wanted honey bees to be a national priority. Six respondents requested giving priority to unique habitats or special geographic areas identified by the State, while two other respondents requested that natural disasters, such as catastrophic wildfires, insect and disease outbreaks, invasive, and other natural disasters be considered a national priority. Several respondents requested that WHIP address these priorities and other additional priorities identified in section 8001 of the 2008 Act.

*Response:* Although these are good comments, they are too specific. The existing WHIP national priorities are broad and include these recommendations.

*Comments:* One respondent requested that WHIP address State, regional, or national conservation initiatives in its list of national priorities.

*Response:* NRCS believes that it is not necessary to add this last recommendation to § 636.5, since State, regional, and national conservation initiatives are already addressed in § 636.6, "Establishing priority for enrollment in WHIP."

*Comments:* One respondent requested that NRCS add the following to its list of priorities: "(a)(5) Protect, restore, develop, or enhance important migration and other movement corridors for wildlife."

*Response:* NRCS has added the above-mentioned migration or movement corridor to 636.5 (a)(5) as WHIP's fifth national priority since it is neither species nor land-use specific.

*Comments:* Several organizations commented on WHIP's priority setting process. One respondent would like the process for establishing national priorities promulgated in the regulation, while others requested outside agency input.

*Response:* NRCS is not making changes to the final rule in response to these comments because the rulemaking process enables respondents to comment on WHIP's national priorities. In addition, § 636.5(b) articulates the policy to undertake periodic review of the agency's national priorities.

*Section 636.6 Establishing Priority for Enrollment in WHIP*

Section 636.6 establishes the policies and procedures for enrolling lands in WHIP at the State and local levels.

*Comments:* A majority of the comments received focused on priority setting, requesting that NRCS name specific priorities and policies in the regulation, while others commented on specific ranking criteria. Other respondents supported NRCS' emphasis on local input, while others raised concern about the Chief being able to limit the program to specific geographic areas. Finally, some respondents requested specific wording changes.

For example, several respondents requested amending § 636.6 to add after paragraph (a): "These conservation initiatives may include such things as the North American Waterfowl Management Plan, the National Fish Habitat Action Plan, the Greater Sage-Grouse Conservation Strategy, the State Comprehensive Wildlife Conservation Strategies (also referred to as the State Wildlife Action Plan), the Northern Bobwhite Conservation Initiative, and State forest resource strategies." One respondent requested adding "and other conservation plans designated by the Chief" to the list. Three other respondents requested that NRCS amend § 636.6(c) to include priority forest areas or regions identified in the State Forest Resource Assessments and Strategies required by section 8002 of the 2008 Act.

*Response:* In order to maintain flexibility when addressing wildlife habitat needs, the State Conservationist, with input from the State Technical Committee, identifies appropriate ranking criteria and uses the agency-approved Application Evaluation and Ranking Tool (AERT) to prioritize all eligible applications. Ranking priority is given to those applications that complement the goals and objectives of relevant fish and wildlife conservation initiatives at the State, regional, and national levels, including the current and successor plans of the initiatives identified by the respondents.

*Comments:* Several respondents suggested specific wording revisions in § 636.6(a) by changing the word "and" to "or." Another respondent suggested that NRCS change the word limit to focus.

*Response:* NRCS accepts these recommendations and has reworded paragraph (a) as follows: "NRCS, in consultation with Federal and State agencies, tribal, and conservation partners, may identify priorities for

enrollment in WHIP that will complement the goals and objectives of relevant fish and wildlife conservation initiatives at the State, regional, tribal land, or national levels. In response to national, tribal, regional, or State fish and wildlife habitat concerns, the Chief may focus program implementation in any given year to specific geographic areas or to address specific habitat development needs.''

*Comments:* As it relates to § 636.6(c)(1), several respondents recommended the paragraph be revised as follows: ''Contribution to resolving an identified habitat concern of national, regional, or State importance, including habitat to benefit at-risk species.'' One respondent supports NRCS' change in terminology from needs to concern.

*Response:* NRCS accepts these suggestions and has incorporated them into the final rule.

*Comments:* NRCS received several comments on the 2-year-completion criteria. Several respondents expressed concern that giving priority to applicants who are willing to complete all conservation practices within 2 years discriminates against more complex projects. Three respondents suggest offering a higher cost-share rate during the first 2 years of the contract to motivate completion of a contract. Two respondents say that completing a contract will be difficult in 2 years, but that higher cost-share rates during the first 2 years would promote completion. One respondent supports NRCS emphasis on a 2-year agreement.

*Response:* Section 636.6(c) of the interim final rule states the following: ''(c) NRCS will evaluate the applications and make enrollment decisions based on the fish and wildlife habitat need using some or all of the following criteria * * * (8) Willingness of the applicant to complete all conservation improvements during the first 2 years of the WHIP cost-share agreement.'' The State Conservationist, with advice from the State Technical Committee, has discretion to use one or more of the criteria listed in § 636.6(c). Depending on the needs of the particular geographic area or State, the State Conservationist may or may not use a participant's willingness to complete the application within the first 2 years. However, to ensure more complex projects have an opportunity to be funded, at-risk species is added to 636.6 (c)(1). NRCS amends § 636.6(c)(1) in the interim final rule to read as follows: ''Contribution to resolving an identified habitat concern of national, tribal, regional, or State importance including at-risk species.''

*Section 636.7 Cost-Share Payments*

Section 636.7 sets forth the payment rates, payment limitations, and requirements for receiving payments under WHIP. In the interim final rule, NRCS adopted a number of payment policies to address the 2008 Act requirements and to make WHIP consistent with other NRCS conservation programs. These policies included: Revising WHIP cost-share rates, stipulating that NRCS will offer to pay no more than 75 percent of the costs of establishing conservation practices; adding a new provision as § 636.7(a)(2) to allow NRCS to provide additional cost-share incentives to historically underserved producers that include limited resource farmers or ranchers, beginning farmers or ranchers, and socially disadvantaged farmers or ranchers; and instituting a payment limitation of $50,000 per person or legal entity per year as required under section 1244(a)(2) of the Food Security Act of 1985, as amended.

*Comments:* Several respondents requested that NRCS make WHIP consistent with other NRCS programs, like EQIP, by paying for activity plans and income foregone. They specifically suggested rewording § 636.7(d) as follows: ''NRCS, in consultation with the State Technical Committee, will identify and provide public notice of the conservation practices eligible for payment under the program. Conservation practices eligible for payment include development and implementation of conservation activity plans including grazing, haying, forestry, and stubble management.''

In line with compensating producers for income foregone, one respondent supported a payment that recognized game damage.

*Response:* NRCS does not have authorization in WHIP to make payments based on any method other than cost-sharing to develop upland wildlife habitat, wetland wildlife habitat, habitat for threatened and endangered species, fish habitat, and other types of wildlife habitat approved by the Secretary, including habitat developed on pivot corners and irregular areas. Accordingly, NRCS cannot provide payments for conservation activity plans. However, as discussed above, NRCS is modifying this final rule to include income foregone as a cost element of wildlife habitat development that will be included in payment rates.

*Comments:* Several respondents requested that WHIP's payments be flexible based on the type of species targeted. Specifically, 10 respondents requested to allow waivers to the 75 percent Federal cost-share cap when dealing with at-risk species, while several of these respondents specifically requested that the cost-share rate be raised up to 90 percent for threatened and endangered species, pollinators, and other species considered to be at-risk or declining. One respondent recommended specific wording changes to § 636.7. The comment called for a change in the 15-year minimum contract to 5 years for 90 percent cost-share for Federal or State threatened and endangered recovery plans.

*Response:* NRCS chooses to retain the language in the interim final rule which gives flexibility to the State Conservationist to establish cost-share rates up to 75 percent and up to 90 percent for specified cost-share agreements. Section 636.7(a)(1) sets forth that NRCS will not pay more than 75 percent of the costs to develop fish and wildlife habitat, including those that target at-risk or declining species. For cost-share agreements that are 15 years or more and whose habitat development actions have been determined to protect essential plant or animal habitat, NRCS may provide up to 90 percent of those habitat development actions. For participants who are considered historically underserved, NRCS may issue payments not less than 25 percent above the applicable payment rate, provided that this increase does not exceed 90 percent of the estimated incurred costs associated with the conservation practice.

*Comments:* NRCS received several comments on the 25 percent set-aside for cost-share agreements exceeding 15 years.

*Response:* Section 1240N(b)(2)(B) of the Food Security Act of 1985, as amended specifies NRCS may use up to 25 percent of WHIP funds to carry out cost-share agreements that extend 15 years or more. Prior to the 2008 Act, NRCS had the legislative authority to use up to 15 percent of WHIP funds to carry out these longer-term agreements.

*Comments:* One respondent suggested NRCS should track the 25 percent set-aside for cost-share agreements described in § 636.9(c) at the national level, instead of requiring 25 percent of all State funds for these projects, since annual allocations are typically small amounts.

*Response:* NRCS already tracks the 25 percent annual reserve for longer-term agreements on a State and national level. NRCS uses its contracting software to track this and all other information about its cost-share agreements. Tracking is an

administrative action; therefore, no changes were made to the final rule.

*Comments:* NRCS received numerous comments on the $50,000 annual payment limitation. Several of the respondents requested that NRCS waive the $50,000 annual payment limitation for a variety of reasons including waiving the limitation for non-profit entities; at-risk and declining species; or projects, not landowners. Five respondents requested that NRCS clarify how the $50,000 annual payment limitation works over multi-years. They stated that the payment limitation should be clarified as follows: "A multiple contract may exceed $50,000 provided the payments made or attributed to a participant, directly or indirectly, may not exceed, in the aggregate, $50,000 per year."

*Response:* NRCS has no authority to waive the annual payment limitation. Section 1240N(e) directs the Secretary to limit payments not to exceed $50,000 per year. Therefore, NRCS retains the payment limitation as set forth in § 636.7(f).

A WHIP project may exceed $50,000 provided no one individual exceeds the annual payment limitation. This may extend to a project with multiple landowners or to where there is one landowner who wishes to extend his payment over multiple years. For example, for one landowner who wishes to install 45,000 trees and plants, 5,000 trees per year at a cost of $10.00 per tree (including labor), the payments may be as follows: $50,000 annual payment limitation for a 10-year contract beginning with FY 2009 with 75 percent cost-share. A total of 45,000 trees will be planted at a rate of 5,000 trees per year with a cost of $10.00 per tree including labor:

FY 2009

FY 2010 = $50,000

FY 2011 = $50,000

FY 2012 = $50,000

FY 2013 = $50,000

FY 2014 = $50,000

FY 2015 = $50,000

FY 2016 = $50,000

FY 2017 = $50,000

FY 2018 = $50,000 = Total payments = $450,000

FY 2019 = all plantings were completed in FY 2018 and no payment this year as this is a maintenance year.

However, under the annual payment limitation, if the same participant elects to complete all plantings in one fiscal year, *i.e.,* FY 2009, the participant will be limited to one payment of $50,000.

*Section 636.8 WHIP Plan of Operations*

Section 636.8 sets forth the WHIP plan of operation's basic requirements, including habitat types that should be addressed under a WHIP plan of operations.

*Comments:* Most of the comments generated in this section focused on what types of habitats should receive emphasis in a WHIP plan of operations. While some respondents requested that NRCS amend § 636.6 to prioritize habitats that have been impacted by natural disasters, such as catastrophic wildfires, insect and disease outbreaks, and invasive species, a majority of respondents requested that NRCS place a priority on restoring and enhancing pollinator habitat.

*Response:* NRCS has chosen to leave its regulation species neutral so that species are not inadvertently ignored by highlighting some and not others. In accordance with § 636.6, the Chief or State Conservationist has the discretion to address initiatives. NRCS accepts the recommendation to amend § 636.8(a)(2) and reference § 636.6(a); however, NRCS chooses to not identify specific land uses within WHIP's national priorities. Specifically, § 636.8(a)(2) is revised as follows: "Fish and wildlife habitat concerns identified in State, regional, tribal land, or national conservation initiatives, as referenced in § 636.6(a)."

NRCS placed the NRCS Conservation Practice Standards in the **Federal Register** request for comments. A number of suggestions dealt with better inclusion of concern for pollinators and pollinator habitat within the practice standard. NRCS anticipates that many of the suggestions will be incorporated into revised Conservation Practice Standards. Increased concern for pollinator habitat is evident through both national and State-specific technical notes over the past few years concerning the enhancement and protection of pollinator habitat.

Currently, 23 State offices have identified to the public through their Web page that pollinator habitat is a priority in their State. Fifteen States have FY 2009 pollinator WHIP contracts. NRCS State offices have been encouraged to provide incentives in appropriate conservation programs (*e.g.,* EQIP, WHIP, and CSP) for the creation of pollinator habitat, and a recently approved NRCS Pollinator Initiative will implement increased attention to pollinators through an agency pollinator policy, additional conservation program incentives, new and stronger pollinator-focused partnerships, and far-reaching informational and educational outreach efforts.

*Comments:* In addition to requesting that pollinator habitat be emphasized in the WHIP plan of operations, one respondent requested that NRCS ensure that its updates and revisions to conservation practice standards and the development of its technical notes for native and managed pollinators move forward on an expedited basis. The respondent also requested that NRCS increase outreach to producers on methods in which they can address pollinator habitat through its cost-share assistance and requested that NRCS use WHIP to create conservation corridors.

*Response:* NRCS will continue to address pollinator needs, as appropriate, in the WHIP plan of operations, but has chosen to leave the regulation species neutral, so that species are not inadvertently ignored by highlighting some and not others. NRCS has taken and will continue to take a proactive approach to addressing pollinator habitat, including the development of wildlife corridors. State Conservationists have been encouraged to establish pollinator species as State priorities, and they have been proactive in establishing pollinator habitat as State priorities and interim conservation standards and technical notes related to pollinator species and their habitat. NRCS has also established partnerships with agencies that provide information on pollinator research. In 2008, NRCS funded a bat habitat enhancement project through the CIG program. In 2009, CIG funded 5 pollinator projects and WHIP funded 49 pollinator contracts nationwide.

*Comments:* As it relates to practice life spans, one respondent requested that NRCS codify that management practices have a one-year minimum and establish a 5-year minimum for structural and vegetative practices.

*Response:* NRCS is not including in this rulemaking practice life spans, because NRCS' existing practice is to set forth such information in the NRCS Field Office Technical Guide (FOTG). The FOTG is supported by national standards based upon USDA's scientific and technical findings.

*Comments:* Several other respondents requested that NRCS accept conservation plans, such as a forest management plan, which may be developed by another agency as a foundation to the WHIP plan of operations and ensure that such plans complement one another.

*Response:* NRCS agrees that habitat, forestry, and other natural resource plans should complement one another. Section 636.8 enables NRCS to consult

with "other public or private natural resource professionals," such as State or regional foresters, to develop a WHIP plan of operations that may be compatible with a forest management plan. Therefore, no changes were made to the final rule.

*Section 636.9 Cost-Share Agreements*

Section 636.9 sets forth the duration of the cost-share agreement. Prior to the interim final rule, all long-term WHIP agreements were 5 to 10 years in duration. The interim final rule established a minimum duration of one year after the completion of all conservation practices and a maximum of 10 years, with the exception of longer-term agreements as established under § 636.9(c). This revised contract length provided the flexibility needed for establishing agreement lengths based on wildlife habitat needs and other factors.

*Comments:* One respondent expressed confusion about NRCS' intent to implement shorter-term WHIP contracts and simultaneously encourage longer-term cost-share agreements, while another respondent supported setting aside 25 percent for longer-term agreements. Several respondents expressed concern that giving priority to applicants who are willing to complete all conservation practices within 2 years discriminates against more complex projects.

*Response:* Section 1240N(b)(2) enables the Secretary to provide up to 25 percent of the funds made available for cost-share agreements that are at least 15 years in length. NRCS is retaining the original language of the interim final rule because it encourages both shorter and longer-term cost-agreements. Such language provides the State Conservationists flexibility to address resource concerns based on both the short and long-term needs of the State or geographic area. Furthermore, a State Conservationist has the discretion to raise or lower cost-share rates to create an incentive to complete the contract in a timely manner.

*Section 636.10 Modifications*

Section 636.10 sets forth the policies and procedures to modify a cost-share agreement.

*Comments:* One respondent supported WHIP's modification provisions. Another respondent requested that NRCS recognize the right of contract holders to control wildlife in any way possible when animals cause damage to property or threaten personal safety.

*Response:* NRCS respects the need to modify a contract where a health or safety issue exists. To accommodate instances where public health or safety is jeopardized, NRCS adds paragraph (d) to § 636.10: "Where circumstances beyond the participant's control or when it is in the public interest, such as a matter of health or safety, the State Conservationist may independently or by mutual agreement with the parties, modify or terminate the cost-share agreement as provided for in stated in § 636.12."

*Section 636.11 Transfer of Interest in a Cost-Share Agreement*

Section 636.11 sets forth the policies and procedures regarding the transfer of interest in a cost-share agreement.

*Comments:* Five respondents requested that NRCS change producer to participant to be more inclusive of the type of individuals and entities that participate in WHIP.

*Response:* NRCS accepts this recommendation and rewords § 636.11(b) as follows: "The participant and NRCS may agree to transfer a cost-share agreement to another potential participant. The transferee must be determined by NRCS to be eligible to participate in WHIP and must assume full responsibility under the cost-share agreement."

*Section 636.12 Termination of Cost-Share Agreements*

Section 636.12 sets forth the conditions and procedures under which a cost-share agreement may be terminated. No comments were received on this section; therefore, no changes were made to the final rule.

*Section 636.13 Violations and Remedies*

Section 636.13 sets forth the policies and procedures as it relates to contract violations and remedies to recoup the Federal investment. No substantive comments were received; therefore, no changes were made to the final rule.

*Section 636.14 Misrepresentation and Scheme or Device*

Section 636.14 establishes the policies and procedures when a participant knowingly misrepresented any fact that affected program determination of their WHIP cost-share agreement. No comments were received on this section; therefore, no changes were made to the final rule.

*Section 636.15 Offsets and Assignments*

Section 636.15 establishes offsets and assignments of payments. No comments were received on this section; therefore, no changes were made to the final rule.

*Section 636.16 Appeals*

Section 636.16 sets forth the policies and procedures regarding program appeals. No comments were received on this section; therefore, no changes were made to the final rule.

*Section 636.17 Compliance With Regulatory Measures*

NRCS added § 636.17 to identify clearly a participant's responsibilities associated with other regulatory measures. This change reflects standard NRCS language applicable to multiple programs.

*Comments:* Seven respondents requested that NRCS not issue payments until the participant has obtained and complied with all applicable local, State, and Federal permits.

*Response:* NRCS does not accept the comment, but instead adjusts 636.17 (a) as follows: "Participants who carry out conservation practices will be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation activities in keeping with applicable laws and regulations. The requirement for the participant to obtain necessary permits is included in the terms and conditions of the contract appendix."

*Section 636.18 Technical Services Provided by Qualified, Non-USDA Personnel*

NRCS added § 636.18 in the interim final rule to incorporate the TSP provisions in place since 2002, but not included in the WHIP regulation.

*Comments:* One respondent supported the use of TSPs.

*Response:* Section 2706 of the 2008 Act amended the Food Security Act of 1985, as amended to authorize payments to third party TSPs or "related technical assistance services that accelerate program delivery." Related technical assistance services include, but are not limited to, conservation planning documentation, payment scheduling and documentation, and other services.

To reflect the new statutory authority that TSPs may be used to expedite WHIP conservation program delivery, NRCS has added "related technical services" to § 636.18(c). As in the case of other Food Security Act of 1985, as amended conservation programs, NRCS or a WHIP participant may use the services of a qualified TSP to install and implement the WHIP plan of operations. Technical services provided may

include conservation planning; conservation practice survey, layout, design, installation, and certification; and related technical assistance services as described above.

Accordingly, NRCS is revising § 636.18(c) as follows: "Technical services provided by qualified personnel not affiliated with USDA may include, but is not limited to, conservation planning; conservation practice survey, layout, design, installation, and certification; and related technical services as defined in 7 CFR part 652."

*Section 636.19 Access to Operating Unit*

Section 636.19 establishes the policies shared by all NRCS programs about access to a participant's operating unit.

*Comments:* Four respondents want to add including TSPs after NRCS representatives to clarify that TSPs have the right to enter the premises. They also request that NRCS revise the language from agricultural operation or tract to a participant's property.

*Response:* Under WHIP and other NRCS conservation programs, a participant or NRCS may use the services of a qualified TSP to plan, design, install, and check-out conservation practices. TSPs are authorized to access the property where they have been delegated authority to conduct NRCS activities via the contract or through an agreement between NRCS and the TSP. Section 636.4(a)(7) provides that participants agree to grant to NRCS, or its representatives, access to the land for purposes related to application, assessment, monitoring, enforcement, verification of certifications, or other actions required to implement this part. To ensure that participant's are aware that TSPs, as a representative of NRCS, may enter the property, NRCS will amend the Appendix to the contract so that participants are fully informed that NRCS or the TSP, acting on behalf of NRCS, may enter a property for program purposes.

*Section 636.20 Equitable Relief*

NRCS added § 636.20, Equitable relief, in the interim final rule to be consistent with other NRCS conservation programs. This section clarified that WHIP participants who acted in good faith based on erroneous information provided by NRCS or its representatives may be granted equitable relief if such action resulted in a violation of the cost-share agreement. No comments were received on this section; therefore, no changes were made to the final rule.

*Section 636.21 Environmental Services Credits for Conservation Improvements*

NRCS included § 636.21, Environmental services credits for conservation improvements, in the interim final rule which acknowledged participants' rights to the environmental benefits achieved by conservation programs like WHIP.

*Comments:* Three respondents supported NRCS' provision pertaining to environmental credits, while another respondent requested that NRCS calculate what portion of the potential credit NRCS has financed and what portion remains that could be sold into an ecosystem services market. The same respondent also requested that NRCS require a compatibility assessment. Seven respondents requested that NRCS add a modification option to the environmental credits provision similar to the Healthy Forest Reserve Program.

*Response:* NRCS retains the interim final rule's provision on environmental credits and adds language to accommodate a possible modification for an environmental credits provision that is consistent with the purposes of the cost-share agreement: "NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through WHIP, and environmental credits may be gained as a result of implementing conservation practices compatible with the purposes of a WHIP cost-share agreement. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure that program purposes are met, maintained, and consistent with §§ 636.8 and 636.9. Where activities required under an environmental credit agreement may affect land covered under a WHIP cost-share agreement, participants are highly encouraged to request an O&M compatibility assessment from NRCS prior to entering into any such credit agreements. The WHIP cost-share agreement may be modified, in accordance with policies outlined in § 636.10, provided the modification meets WHIP purposes and is in compliance with this part."

*Comments:* Another respondent requests that NRCS coordinate this type of activity with the Office of Ecosystem and Markets.

*Response:* As a preliminary matter, NRCS notes that the Office of Ecosystem Services and Markets has changed its name to the Office of Environmental Markets (OEM). No changes were made to the final rule. Development of ecosystems services markets under the WHIP program is beyond the statutory authority of that program. To the extent appropriate, NRCS coordinates with OEM and other relevant offices when formulating policy.

**Climate Change**

*Comments:* On March 12, 2009, NRCS published an amendment to the interim final rule with a request for public comment on how conservation programs, like WHIP, could be used to mitigate climate change, conserve energy, and reduce net carbon emissions. Four respondents provided comments on how WHIP could be used to reduce the impacts of climate change. All respondents stated that WHIP's primary focus should continue to be fish and wildlife habitat since WHIP is the only conservation program focused solely on fish and wildlife habitat. However, each of these respondents believed that practices applied in WHIP may assist in meeting the challenges posed by climate change. One respondent stated that WHIP should promote practices that involve perennial vegetation, draw attention to the energy-conservation value of many WHIP practices, and collaborate with conservation districts. The respondent cited specifically that control of invasive species and removal of wood damaged by pests may help meet the goal of renewable energy.

Another respondent stated it would be inappropriate for NRCS to use WHIP to support projects focused primarily on advancing renewable energy and energy conservation, it should only be supported where such production is a co-benefit of the practice. The same respondent stated that NRCS should consider activities to monitor and measure GHG reductions that are generated by the project, but it should not make extra payments for carbon sequestration. This respondent also reiterated that the enhancement and restoration of wildlife corridors and other forms of perennial vegetation are practices that would provide dual benefits and also help species adapt to climate change.

Two respondents requested that when examining practices such as wildlife migration corridors, NRCS add points in WHIP project selection criteria that would, with other wildlife habitat benefits being equal, provide a preference for projects that reduce net carbon emissions or boost carbon storage. To evaluate this, they suggested making accommodations at the regional level so that if points are awarded, they are based on reasonable expectations for fish or wildlife benefits to the location.

*Response:* NRCS will continue to place its primary focus on fish and wildlife habitat. However, NRCS accepts

the respondents' comments that some practices can serve multiple purposes, such as riparian migration corridors, which not only sequester carbon and provide essential fish and wildlife habitat, but also help species adapt to climate change. NRCS accepts the respondents' suggestions that additional ranking points may be assigned to practices that offer multiple benefits in WHIP's AERT. NRCS also agrees with the respondents that additional WHIP payments should not be issued for practices which are already being compensated under wildlife habitat cost-share.

**List of Subjects in 7 CFR Part 636**

Administrative practice and procedure, Agriculture, Conservation, Endangered and threatened species, Natural resources, Soil conservation, and Wildlife.

■ For reasons stated above, the CCC revises part 636 of Title 7 of the CFR to read as follows:

## PART 636—WILDLIFE HABITAT INCENTIVE PROGRAM

Sec.

636.1 Applicability.
636.2 Administration.
636.3 Definitions.
636.4 Program requirements.
636.5 National priorities.
636.6 Establishing priority for enrollment in WHIP.
636.7 Cost-share payments.
636.8 WHIP plan of operation.
636.9 Cost-share agreements.
636.10 Modifications.
636.11 Transfer of interest in a cost-share agreement.
636.12 Termination of cost-share agreements.
636.13 Violations and remedies.
636.14 Misrepresentation and scheme or device.
636.15 Offsets and assignments.
636.16 Appeals.
636.17 Compliance with regulatory measures.
636.18 Technical services provided by qualified personnel not affiliated with USDA.
636.19 Access to operating unit.
636.20 Equitable relief.
636.21 Environmental services credits for conservation improvements.

**Authority:** 16 U.S.C. 3839bb–1.

### § 636.1 Applicability.

(a) The purpose of the Wildlife Habitat Incentive Program (WHIP) is to help participants develop fish and wildlife habitat on private agricultural land, nonindustrial private forest land (NIPF), and Indian land.

(b) The regulations in this part set forth the requirements for WHIP.

(c) The Chief, Natural Resources Conservation Service (NRCS), may implement WHIP in any of the 50 States, District of Columbia, 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. The funds, facilities, and authorities of the Commodity Credit Corporation (CCC) are available to NRCS to carry out WHIP. Accordingly, where NRCS is mentioned in this part, it also refers to CCC's funds, facilities, and authorities, where applicable.

(b) The State Conservationist may accept recommendations from the State Technical Committee and Tribal Conservation Advisory Council (for tribal land) in the implementation of the program and in establishing program direction for WHIP in the applicable State or tribal land. The State Conservationist has the authority to accept or reject the State Technical Committee and the Tribal Conservation Advisory Council's (for tribal land) recommendation; however, the State Conservationist will give strong consideration to the State Technical Committee and the Tribal Conservation Advisory Council's recommendation.

(c) NRCS may enter into agreements with Federal and State agencies, Indian tribes, conservation districts, local units of government, public and private organizations, and individuals to assist with program implementation, including the provision of technical assistance. NRCS may make payments pursuant to said agreements for program implementation and for other goals consistent with the program provided for in this part.

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

(e) No delegation in this part to lower organizational levels will preclude the Chief, or designee, from determining any issues arising under this part or from reversing or modifying any determination made under this part.

### § 636.3 Definitions.

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

*Agricultural lands* means cropland, grassland, rangeland, pastureland, and other land determined by NRCS to be suitable for fish and wildlife habitat development on which agricultural and forest-related products or livestock are or have the potential to be produced. Agricultural lands may include cropped woodland, wetlands, waterways, streams, incidental areas included in the agricultural operation, and other types of land used for or have the potential to be used for production.

*Applicant* means a person, legal entity, joint operation, or Indian tribe that has an interest in agricultural land, NIPF, Indian land, or other lands identified in 636.4(c)4, who has requested in writing to participate in WHIP.

*At-risk species* means any plant or animal species listed as threatened or endangered; proposed or candidate for listing under the Endangered Species Act (ESA); a species listed as threatened or endangered under State law or tribal law on tribal land; State or tribal land species of conservation concern; or other plant or animal species or community, as determined by the State Conservationist, with advice from the State Technical Committee and Tribal Conservation Advisory Council (for tribal land), that has undergone, or likely to undergo, population decline and may become imperiled without direct intervention.

*Beginning farmer or rancher* means an individual or entity who:

(1) Has not operated a farm or ranch, or who has operated a farm or ranch for not more than 10 consecutive years. This requirement applies to all members of an entity, who will materially and substantially participate in the operation of the farm or ranch.

(2) In the case of a cost-share agreement with an individual, individually, or with the immediate family, material and substantial participation requires that the individual provide substantial day-to-day labor and management of the farm or ranch consistent with the practices in the county or State where the farm is located.

(3) In the case of a cost-share agreement with an entity or joint operation, all members must materially and substantially participate in the operation of the farm or ranch. Material and substantial participation requires that each of the members provide some amount of the management, or labor and management necessary for day-to-day activities, such that if each of the members did not provide these inputs, operation of the farm or ranch would be seriously impaired.

*Chief* means the Chief of NRCS or designee.

*Conservation activities* means conservation systems, practices, or management measures needed to

address a resource concern or improve environmental quality through the treatment of natural resources, and includes structural, vegetative, and management activities, as determined by NRCS.

*Conservation district* means any district or unit of State, tribal, or local government formed under State, tribal, or territorial law for the express purpose of developing and carrying out a local soil and water conservation program. Such district or unit of government may be referred to as a conservation district, soil conservation district, soil and water conservation district, resource conservation district, natural resource district, land conservation committee, or similar name.

*Conservation practice* means one or more conservation improvements and activities, including structural practices, land management practices, vegetative practices, forest management, and other improvements that benefit the eligible land and achieve program purposes. Approved conservation practices are listed in the NRCS Field Office Technical Guide (FOTG).

*Cost-share agreement* means a financial assistance document that specifies the rights and obligations of any participant accepted into the program. A WHIP cost-share agreement is a binding agreement for the transfer of assistance from the Department of Agriculture (USDA) to the participant to share in the costs of applying conservation activities.

*Cost-share payment* means the payments under the WHIP cost-share agreement to develop fish and wildlife habitat or accomplish other goals consistent with the program provided for in this part.

*Designated conservationist* means an NRCS employee whom the State Conservationist has designated as responsible for WHIP administration in a specific area.

*Field Office Technical Guide* means the official local NRCS source of resource information and interpretations of guidelines, criteria, and requirements for planning and applying conservation practices and conservation management systems. It contains detailed information on the conservation of soil, water, air, plant, and animal resources applicable to the local area for which it is prepared.

*Habitat development* means the conservation activities implemented to establish, improve, protect, enhance, or restore the conditions of the land for the specific purpose of improving conditions for fish and wildlife.

*Historically underserved producer* means an eligible person, joint operation, legal entity, or Indian tribe who is a beginning farmer or rancher, socially disadvantaged farmer or rancher, limited resource farmer or rancher, or NIPF landowner who meets the beginning, socially disadvantaged, or limited resource qualifications set forth in § 636.3.

*Indian land* means:

(1) Land held in trust by the United States for individual Indians or Indian tribes, or

(2) Land, the title to which is held by individual Indians or Indian tribes subject to Federal restrictions against alienation or encumbrance, or

(3) Land which is subject to rights of use, occupancy, and benefit of certain Indian tribes, or

(4) Land held in fee title by an Indian, Indian family, or Indian tribe.

*Indian tribe* means any Indian tribe, band, nation, or other organized group or community, including any Alaska Native village or regional or village corporation as defined in or established pursuant to the Alaska Native Claims Settlement Act (43 U.S.C. 1601 et seq.) that is eligible for the special programs and services provided by the United States to Indians because of their status as Indians.

*Joint operation* means, as defined in 7 CFR part 1400, a general partnership, joint venture, or other similar business organization in which the members are jointly and severally liable for the obligations of the organization.

*Legal entity* means, as defined in 7 CFR part 1400, an entity created under Federal or State law that:

(1) Owns land or an agricultural commodity, product, or livestock; or

(2) Produces an agricultural commodity, product, or livestock.

*Lifespan* means the period of time during which a conservation practice is to be operated and maintained for the intended purpose.

*Limited resource farmer or rancher* means:

(1) A person with direct or indirect gross farm sales of not more than $142,000 in each of the previous 2 years (this is the amount for 2010, and adjusted for inflation using Prices Paid by Farmer Index as compiled by National Agricultural Statistical Service); and

(2) Has a total household income at or below the national poverty level for a family of four, or less than 50 percent of county median household income in each of the previous 2 years (to be determined annually using the Department of Commerce Data).

*Liquidated damages* means a sum of money stipulated in the WHIP cost-share agreement that the participant agrees to pay NRCS if the participant fails to adequately complete the terms of the cost-share agreement. The sum represents an estimate of the technical assistance expenses incurred to service the agreement, and reflects the difficulties of proof of loss and the inconvenience or non-feasibility of otherwise obtaining an adequate remedy.

*Livestock* means all animals produced on farms and ranches, as determined by the Chief.

*Natural Resources Conservation Service* is an agency of USDA, which has the responsibility for administering WHIP using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forest land* means rural land, as determined by the Secretary, that has existing tree cover or is suitable for growing trees and is owned by any nonindustrial private individual, group, association, corporation, Indian tribe, or other private legal entity that has definitive decisionmaking authority over the land.

*Operation and maintenance* means work performed by the participant to keep the applied conservation activities functioning for the intended purpose during the conservation practice lifespan. Operation includes the administration, management, and performance of non-maintenance actions needed to keep the completed activity functioning as intended. Maintenance includes work to prevent deterioration of the practice, repairing damage, or replacement of the practice to its original condition if one or more components fail.

*Operation and maintenance agreement* means the document that, in conjunction with the WHIP plan of operations, specifies the operation and maintenance (O&M) responsibilities of the participants for conservation activities implemented with WHIP assistance.

*Participant* means a person, legal entity, joint operation, or Indian tribe that is receiving payment or is responsible for implementing the terms and conditions of a WHIP cost-share agreement.

*Person* means, as defined in 7 CFR part 1400, an individual, natural person and does not include a legal entity.

*Producer* means, as defined in 7 CFR part 1400, a person, legal entity, joint operation, or Indian tribe who has an interest in the agricultural operation or who is engaged in agricultural production or forestry management.

*Resource concern* means a specific natural resource problem that represents a significant concern in a State or region, and is likely to be addressed

successfully through the implementation of the conservation activities by participants.

*Secretary* means the Secretary of USDA.

*Socially disadvantaged farmer or rancher* means a farmer or rancher who has been subjected to racial or ethnic prejudices because of their identity as a member of a group without regard to their individual qualities. Those groups include African Americans, American Indians or Alaskan Natives, Hispanics, and Asians or Pacific Islanders.

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

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

*Technical assistance* means technical expertise, information, and tools necessary for the conservation of natural resources on land active in agricultural, forestry, or related uses. The term includes the following:

(1) Technical services provided directly to farmers, ranchers, and other eligible entities, such as conservation planning, technical consultation, and assistance with design and implementation of conservation practices; and

(2) Technical infrastructure, including activities, processes, tools, and agency functions needed to support delivery of technical services, such as technical standards, resource inventories, training, data, technology, monitoring, and effects analyses.

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

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

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

*Tribal Conservation Advisory Council* means a committee established by a State Conservationist to implement consultation as defined in General Manual 410 Part 405.

*WHIP plan of operations* means the document that identifies the location and timing of conservation activities that the participant agrees to implement on eligible land in order to develop fish and wildlife habitat and provide environmental benefits. The WHIP plan of operations is a part of the WHIP cost-share agreement.

*Wildlife* means non-domesticated birds, fishes, reptiles, amphibians, invertebrates, and mammals.

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

**§ 636.4 Program requirements.**

(a) To participate in WHIP, an applicant must:

(1) Be in compliance with the highly erodible and wetland conservation provisions found in 7 CFR part 12;

(2) Be in compliance with the terms of all other USDA-administered conservation program contracts to which the participant is a party;

(3) Develop and agree to comply with a WHIP plan of operations and O&M agreement, as described in § 636.8;

(4) Enter into a cost-share agreement for the development of fish and wildlife habitat as described in § 636.9;

(5) Provide NRCS with written evidence of ownership or legal control of land for the term of the proposed cost-share agreement, including the O&M agreement. An exception may be made by the Chief in the case of land allotted by the Bureau of Indian Affairs (BIA) or Indian land where there is sufficient assurance of control;

(6) Agree to provide all information to NRCS determined to be necessary to assess the merits of a proposed project and to monitor cost-share agreement compliance;

(7) Agree to grant to NRCS or its representatives access to the land for purposes related to application, assessment, monitoring, enforcement, verification of certifications, or other actions required to implement this part;

(8) Provide a list of all members of the legal entity and embedded entities along with members' tax identification numbers and percentage interest in the entity. Where applicable, American Indians, Alaska Natives, and Pacific Islanders may use another unique identification number for each individual eligible for payment;

(9) With regard to cost-share agreements with individual Indians or Indians represented by the BIA, payments exceeding the payment limitation may be made to the tribal participant if a BIA or tribal official certifies in writing that no one individual, directly or indirectly, will receive more than the payment limitation. The BIA or tribal entity must also provide annually, a listing of individuals and payments made, by tax identification number or other unique identification number, during the previous year for calculation of overall payment limitations. The tribal entity must also produce, at the request of NRCS, proof of payments made to the person or legal entity that incurred costs related to conservation activity implementation;

(10) Supply information, as required by NRCS, to determine eligibility for the program including, but not limited to, information to verify the applicant's status as a limited resource farmer or rancher or beginning farmer or rancher and payment eligibility as established by 7 CFR part 1400, Adjusted Gross Income (AGI);

(11) With regard to any participant that utilizes a unique identification number as an alternative to a tax identification number, the participant will utilize only that identifier for any and all other WHIP cost-share agreements to which the participant is a party. Violators will be considered to have provided fraudulent representation and are subject to § 636.13; and

(12) Comply with applicable registration and reporting requirements of the Federal Funding Accountability and Transparency Act of 2006 (Pub. L. 109–282, as amended) and 2 CFR parts 25 and 170.

(b) Eligible land includes:

(1) Private agricultural land;

(2) NIPF;

(3) Indian land; and

(4) Trust land owned in fee title by a State, including an agency or subdivision of a State, when such trust land is held under a long-term lease by a person or nongovernmental entity and when the Chief determines that (i) by the nature of the lease, such land is tantamount to private agricultural land; (ii) the duration of the lease is at least the length of any WHIP agreement; and (iii) no funds under the WHIP program are paid to a governmental entity.

(c) *Ineligible land.* NRCS will not provide cost-share assistance with respect to land:

(1) Enrolled in a program where fish and wildlife habitat objectives have been sufficiently achieved, as determined by NRCS;

(2) With onsite or offsite conditions which NRCS determines would undermine the benefits of the habitat development or otherwise reduce its value;

(3) On which habitat for threatened or endangered species, as defined in section 3 of the ESA, 16 U.S.C. 1532, would be adversely affected; or

(4) That is owned in fee title by an agency of the United States, other than:

(i) Land held in trust for Indian tribes, and

(ii) Lands owned in fee title by a State, including an agency or subdivision of a State or a unit of government except as provided in § 636.4(b)(4).

**§ 636.5 National priorities.**

(a) The following national priorities will be used in WHIP implementation:

(1) Promote the restoration of declining or important native fish and wildlife habitats;

(2) Protect, restore, develop, or enhance fish and wildlife habitat to benefit at-risk species;

(3) Reduce the impacts of invasive species on fish and wildlife habitats;

(4) Protect, restore, develop, or enhance declining or important aquatic wildlife species' habitats; and

(5) Protect, restore, develop, or enhance important migration and other movement corridors for wildlife.

(b) NRCS, with advice of other Federal agencies, will undertake periodic reviews of the national priorities and the effects of program delivery at the State, tribal, and local levels to adapt the program to address emerging resource issues. NRCS will:

(1) Use the national priorities to guide the allocation of WHIP funds to the State offices;

(2) Use the national priorities in conjunction with State, tribal, and local priorities to assist with prioritization and selection of WHIP applications; and

(3) Periodically review and update the national priorities utilizing input from the public, Indian tribes, and affected stakeholders to ensure that the program continues to address priority resource concerns.

**§ 636.6 Establishing priority for enrollment in WHIP.**

(a) NRCS, in consultation with Federal and State agencies, tribal, and conservation partners, may identify priorities for enrollment in WHIP that will complement the goals and objectives of relevant fish and wildlife conservation initiatives at the State, regional, tribal land, or national levels. In response to national, tribal, regional, or State fish and wildlife habitat concerns, the Chief may focus program implementation in any given year to specific geographic areas or to address specific habitat development needs.

(b) The State Conservationist, with recommendations from the State Technical Committee and Tribal Conservation Advisory Council (for tribal land), may give priority to WHIP projects that will address unique habitats or special geographic areas identified in 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 fish and wildlife habitat need using some or all of the following criteria:

(1) Contribution to resolving an identified habitat concern of national, tribal, regional, or State importance including at-risk species;

(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 fish and wildlife habitat development activities;

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

(8) Willingness of the applicant to complete all conservation improvements during the first 2 years of the WHIP cost-share agreement.

**§ 636.7 Cost-share payments.**

(a) NRCS may share the cost with a participant for implementing the conservation activities as provided in the WHIP plan of operations that is a component of the WHIP cost-share agreement:

(1) Except as provided in paragraph (a)(2) of this section and in § 636.9(c), NRCS will offer to pay no more than 75 percent of the costs to develop fish and wildlife habitat. The cost-share payment to a participant will 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.

(2) Historically underserved producers, as defined in § 636.3, and Indian tribes may receive the applicable payment rate and an additional rate that is not less than 25 percent above the applicable rate, provided that this increase does not exceed 90 percent of the estimated costs associated with WHIP plan of operations implementation.

(b) Cost-share payments may be made only upon a determination by NRCS that a conservation activity or an identifiable component of a conservation activity has been established in compliance with appropriate standards and specifications.

(c) Payments will not be made for a conservation activity that was:

(1) Applied prior to application for the program; or

(2) Initiated or implemented prior to cost-share agreement approval, unless a waiver was granted by the State Conservationist or designated conservationist prior to implementation.

(d) NRCS, in consultation with the State Technical Committee, will identify and provide public notice of the conservation activities eligible for payment under the program.

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

(f) Payments made or attributed to a participant, directly or indirectly, may not exceed, in the aggregate, $50,000 per year.

(g) Eligibility for payment in accordance with 7 CFR part 1400, subpart G, average AGI limitation, will be determined prior to cost-share agreement approval.

(h) Subject to fund availability, the payment rates identified in a WHIP contract may be adjusted by NRCS to reflect increased costs.

(i) A participant will not be eligible for payments for conservation activities on eligible land if the participant receives payments or other benefits for the same activity on the same land under any other conservation program administered by USDA.

(j) Before NRCS will approve and issue final payment, the participant must certify that the conservation activity has been completed in accordance with the cost-share agreement, and NRCS or an approved Technical Service Provider (TSP) must certify that the activity has been carried out in accordance with the applicable FOTG.

(k) NRCS, for a fiscal year, may use up to 25 percent of WHIP funds to carry out cost-share agreements described in § 636.9(c).

**§ 636.8 WHIP plan of operations.**

(a) As a condition of participation, the participant develops a WHIP plan of operations with the assistance of NRCS or other public or private natural

resource professionals who are approved by NRCS. A WHIP plan of operations encompasses the parcel of land where habitat will be established, improved, protected, enhanced, or restored. The WHIP plan of operations will be approved by NRCS and address at least one of the following as determined by NRCS:

(1) Fish and wildlife habitat conditions that are of concern to the participant;

(2) Fish and wildlife habitat concerns identified in State, regional, tribal land, or national conservation initiatives, as referenced in § 636.6(a); or

(3) Fish and wildlife habitat concerns identified in an approved area-wide plan that addresses the wildlife resource habitat concern.

(b) The WHIP plan of operations forms the basis for the WHIP cost-share agreement and will be attached and included as part of the cost-share agreement, along with the O&M agreement. The WHIP plan of operations includes a schedule for implementation and maintenance of the conservation activities, as determined by NRCS.

(c) The WHIP plan of operations may be modified in accordance with § 636.10.

(d) All conservation activities in the WHIP plan of operations must be approved by NRCS and developed and carried out in accordance with the applicable FOTG.

(e) The participant is responsible for the implementation of the WHIP plan of operations.

**§ 636.9 Cost-share agreements.**

(a) To apply for WHIP cost-share assistance, a person, tribe, or legal entity must submit an application for participation at a USDA Service Center to an NRCS representative.

(b) A WHIP cost-share agreement will:

(1) Incorporate the WHIP plan of operations;

(2) Be for a time period agreed to by the participant and NRCS, with a minimum duration of one year after the completion of conservation activities identified in the WHIP plan of operations and a maximum of 10 years, except for agreements entered into under paragraph (c) of this section;

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

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

(5) Be signed by the participant;

(6) Specify payment limits described in § 636.7(f) including any additional payment limitation associated with determinations made under § 636.7(g);

(7) Include an O&M agreement that describes the O&M for each conservation activity and the agency expectation that WHIP-funded conservation activities will be operated and maintained for their expected lifespan; and

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

(c) Notwithstanding any limitation of this part, NRCS may enter into a long-term cost-share agreement that:

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

(2) Protects and restores essential plant or animal habitat, as determined by NRCS; and

(3) Provides cost-share payments of no more than 90 percent of the cost of implementing the WHIP plan of operations to develop fish and wildlife habitat.

**§ 636.10 Modifications.**

(a) The participant and NRCS may modify a cost-share agreement if both parties agree to the modification. The WHIP plan of operations is revised in accordance with NRCS requirements, and the agreement is approved by the designated conservationist.

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

(c) In the event implementation of a conservation activity fails through no fault of the participant, the State Conservationist may modify the cost-share agreement in order to issue payments to re-implement the activity, at the rates established in accordance with § 636.7, provided such payments do not exceed the payment limitation requirements as set forth in § 636.7.

(d) Where circumstances beyond the participant's control or when it is in the public interest, such as matters of health or safety, the State Conservationist may independently or by mutual agreement with the parties modify or terminate the cost-share agreement as provided for in § 636.12.

**§ 636.11 Transfer of interest in a cost-share agreement.**

(a) A participant is responsible for notifying NRCS when he or she anticipates the voluntary or involuntary loss of control of the land covered by a WHIP cost-share agreement during the term of the agreement.

(b) The participant and NRCS may agree to transfer a cost-share agreement to another potential participant. The transferee must be determined by NRCS to be eligible to participate in WHIP and must assume full responsibility under the cost-share agreement.

(c) 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 will 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.

(d) If new participants are not willing or not eligible to assume the responsibilities of an existing WHIP cost-share agreement, including the O&M agreement, and the participant fails to implement the cost-share agreement, then NRCS will terminate the agreement and may require that all cost-share payments be forfeited, refunded, or both, with applicable interest in accordance with § 636.12. Participants may be subject to liquidated damages in accordance with § 636.12.

**§ 636.12 Termination of cost-share agreements.**

(a) The State Conservationist may, independently or by mutual agreement with the parties to the cost-share agreement, terminate the cost-share agreement 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) Termination of the cost-share agreement would, as determined by the State Conservationist, be in the public interest; or

(3) A participant fails to correct a violation of a cost-share agreement within the period provided by NRCS in accordance with § 636.13.

(b) If NRCS terminates a cost-share agreement, in accordance with the provisions of paragraphs (a)(1) and (a)(2) of this section the State Conservationist may allow the participant to retain a portion of any payments received appropriate to the effort the participant has made to comply with the contract.

(1) NRCS may require a participant to provide only a partial refund of the payments received if a previously implemented conservation activity can function independently, and is not adversely affected by the violation or the absence of other conservation activities that would have been implemented under the cost-share agreement; and

(2) The State Conservationist will have the option to waive all or part of the liquidated damages assessed,

depending upon the circumstances of the case.

(c) When making termination decisions, NRCS may reduce the amount of money owed by the participant by a proportion that reflects:

(1) The good faith effort of the participant to comply with the cost-share agreement; or

(2) The existence of hardships beyond the participant's control that have prevented compliance. If a participant claims hardship, that claim must be documented and cannot have existed when the applicant applied for participation in the program.

**§ 636.13 Violations and remedies.**

(a) If NRCS determines that a participant is in violation of a cost-share agreement, NRCS will give the parties to the cost-share agreement notice of the violation and a minimum of 60 days to correct the violation and comply with the terms of the cost-share agreement and attachments thereto.

(b) If the participant fails to correct the violation of a cost-share agreement within the period provided by NRCS under paragraph (a) of this section, NRCS may terminate the agreement and require the participant to refund all or part of any of the funds issued under that cost-share agreement, plus interest, and may assess liquidated damages as indicated in the cost-share agreement appendix, as well as require the participant to forfeit all rights to any future payment under the agreement.

(c) If NRCS terminates a cost-share agreement due to breach of contract, the participant will forfeit all rights to future payments under the agreement, may be required to pay liquidated damages in an amount determined by the State Conservationist in accordance with the terms of the agreement, and will refund all or part of the payments received, plus interest. Participants violating WHIP cost-share agreements may be determined ineligible for future NRCS-administered conservation program funding.

**§ 636.14 Misrepresentation and scheme or device.**

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

(b) A participant will refund to NRCS all payments, plus interest, as determined by NRCS, with respect to all NRCS cost-share agreements to which they are a party if they are 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.

(c) Other NRCS cost-share agreements where this person is a participant may be terminated.

**§ 636.15 Offsets and assignments.**

(a) Except as provided in paragraph (b) of this section, any payment or portion thereof to any person or legal entity will 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 United States Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 of this title will be applicable to cost-share agreement payments.

(b) WHIP participants may assign any payments in accordance with 7 CFR part 1404.

**§ 636.16 Appeals.**

(a) Any participant may obtain reconsideration and review of determinations affecting participation in this program in accordance with 7 CFR parts 11 and 614, except as provided in paragraph (b) of this section.

(b) In accordance with the provisions of the Department of Agriculture Reorganization Act of 1994, Public Law 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 fish and wildlife priority areas, habitats, or activities;

(3) NRCS program funding decisions;

(4) Eligible conservation activities; and

(5) Other matters of general applicability.

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

**§ 636.17 Compliance with regulatory measures.**

(a) Participants who implement the WHIP plan of operations will be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation activities in keeping with applicable laws and regulations. The requirement for the participant to obtain necessary permits is included in the terms and conditions of the contract appendix.

(b) Participants will be responsible for compliance with all laws and for all effects or actions resulting from the participants' performance under the cost-share agreement.

**§ 636.18 Technical services provided by qualified personnel not affiliated with USDA.**

(a) NRCS may use the services of qualified TSPs in performing its responsibilities for technical assistance.

(b) Participants may use technical services from qualified personnel of other Federal, State, and local agencies, Indian tribes, or individuals who are certified as TSPs by NRCS.

(c) Technical services provided by qualified personnel not affiliated with USDA may include, but are not limited to, conservation planning; conservation practice survey, layout, design, installation, and certification; and related technical services as defined in 7 CFR part 652.

(d) NRCS retains approval authority over certification of work done by non-NRCS personnel for the purpose of approving WHIP payments.

**§ 636.19 Access to operating unit.**

As a condition of program participation, any authorized NRCS representative will have the right to enter an agricultural operation or tract for the purposes of determining eligibility and for ascertaining the accuracy of any representations related to cost-share agreements and performance. Access will include the right to provide technical assistance; determine eligibility; inspect any work undertaken under the cost-share agreements, including the WHIP plan of operations and O&M agreement; and collect information necessary to evaluate the habitat development performance specified in the cost-share agreements. The NRCS representative will make a reasonable effort to contact the participant prior to the exercising of this provision.

**§ 636.20 Equitable relief.**

(a) If a participant relied upon the advice or action of any authorized NRCS representative and did not know, or have reason to know, that the advice or action was improper or erroneous, NRCS may grant relief in accordance with 7 CFR part 635. Where a participant believes that detrimental reliance on the advice or action of a NRCS representative resulted in an

ineligibility or program violation, the participant may request equitable relief under 7 CFR 635.3. The financial or technical liability for any action by a participant that was taken based on the advice of a NRCS certified non-USDA TSP is the responsibility of the certified TSP and will not be assumed by NRCS when NRCS authorizes payment.

(b) If during the term of a WHIP cost-share agreement a participant has been found in violation of a provision of the cost-share agreement, the O&M agreement, or any document incorporated by reference through failure to fully comply with that provision, the participant may be eligible for equitable relief under 7 CFR 635.4.

**§ 636.21 Environmental services credits for conservation improvements.**

USDA recognizes that environmental benefits will be achieved by implementing conservation activities funded through WHIP, and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a WHIP cost-share agreement. NRCS asserts no direct or indirect interest on any such credits. However, NRCS retains the authority to ensure that program purposes are met and the requirements for WHIP funded improvements are met and maintained consistent with §§ 636.8 and 636.9. Where activities required under an environmental credit agreement may affect land covered under a WHIP cost-share agreement, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such agreements. The WHIP cost-share agreement may be modified, in accordance with policies outlined in § 636.10, provided the modification meets WHIP purposes and is in compliance with this part.

Signed this 17th day of November, 2010, in Washington, DC.

**Dave White,**

*Vice President, Commodity Credit Corporation and Chief, Natural Resources Conservation Service.*

[FR Doc. 2010–29394 Filed 11–22–10; 8:45 am]

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## DEPARTMENT OF AGRICULTURE

### Food Safety and Inspection Service

### 9 CFR Parts 317 and 381

**[Docket No. FSIS–2010–0031]**

**RIN 0583–AD**

## Uniform Compliance Date for Food Labeling Regulations

**AGENCY:** Food Safety and Inspection Service, USDA.

**ACTION:** Final rule.

**SUMMARY:** The Food Safety and Inspection Service (FSIS) is establishing January 1, 2014, as the uniform compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2011, and December 31, 2012. FSIS periodically announces uniform compliance dates for new meat and poultry product labeling regulations to minimize the economic impact of label changes.

**DATES:** This rule is effective November 23, 2010. Comments on this final rule must be received on or before December 23, 2010.

**ADDRESSES:** FSIS invites interested persons to submit comments on this final rule. Comments may be submitted by either of the following methods:

- *Federal eRulemaking Portal:* This Web site provides the ability to type short comments directly into the comment field on this Web page or attach a file for lengthier comments. Go to *http://www.regulations.gov.* Follow the online instructions at that site for submitting comments.
- *Mail, including floppy disks or CD–ROMs, and hand- or courier-delivered items:* Send to Docket Clerk, USDA, FSIS, Room 2–2127, George Washington Carver Center, 5601 Sunnyside Avenue, Mailstop 5272, Beltsville, MD 20705.

*Instructions:* All items submitted by mail or electronic mail must include the Agency name and docket number FSIS–2010–0031. Comments received in response to this docket will be made available for public inspection and posted without change, including any personal information, to *http://www.regulations.gov.*

*Docket:* For access to background documents or comments received, go to the FSIS Docket Room at the address listed above between 8 a.m. and 4:30 p.m., Monday through Friday.

**FOR FURTHER INFORMATION CONTACT:** Rosalyn Murphy-Jenkins, Food Safety and Inspection Service, USDA, Room 2–2125, George Washington Carver Center, Beltsville, MD 20705 (*telephone:* 301–504–0879; *fax:* 301–504–0872).

**SUPPLEMENTARY INFORMATION:**

### Background

FSIS periodically issues regulations that require changes in the labeling of meat and poultry food products. Many meat and poultry establishments also produce non-meat and non-poultry food products subject to the jurisdiction of the Food and Drug Administration (FDA), and FDA periodically issues regulations that require changes in the labeling of such products.

On December 14, 2004, FSIS issued a final rule that provided that the Agency will set uniform compliance dates for new meat and poultry product labeling regulations in 2-year increments and will periodically issue final rules announcing those dates. The final rule also established January 1, 2008, as the uniform compliance date for meat and poultry product labeling regulations that were issued between January 1, 2005, and December 31, 2006 (69 FR 74405). Consistent with the 2004 final rule, FSIS subsequently issued final rules on March 5, 2007, and December 18, 2008, that established uniform compliance dates of January 1, 2010, and January 1, 2012, for meat and poultry product labeling regulations issued between January 1, 2007, and December 31, 2008, and January 1, 2009, and December 31, 2010, respectively (72 FR 9651) (73 FR 75564).

### The Final Rule

This final rule establishes January 1, 2014, as the uniform compliance date for new meat and poultry product labeling regulations that are issued between January 1, 2011, and December 31, 2012, and is consistent with the previous final rules establishing uniform compliance dates.

FSIS's approach for establishing uniform compliance dates for new food labeling regulations is consistent with FDA's approach in this regard. FDA is also establishing January 1, 2014, as the uniform compliance date for new food labeling regulations that are issued between January 1, 2011, and December 31, 2012.

A uniform compliance date of January 1, 2014, for all food product labeling regulations issued between January 1, 2011, and December 31, 2012, will ensure that changes take effect on a timely basis and will minimize the economic impact of those changes on the industry because companies will not have to respond separately to each labeling change as it occurs (69 FR 74406). This policy also serves consumers' interests because the cost of the multiple short-term label revisions that would otherwise occur would