

consignment will be ineligible for interstate movement from Hawaii.

(Approved by the Office of Management and Budget under control number 0579-0198)

#### § 318.13-24 Sweet potatoes from Puerto Rico.

Sweet potatoes from Puerto Rico may be moved interstate to Atlantic Coast ports north of and including Baltimore, MD, under limited permit if treated in accordance with part 305 of this chapter or if the following conditions are met:

(a) The sweet potatoes must be certified by an inspector of Puerto Rico as having been grown under the following conditions:

(1) Fields in which the sweet potatoes have been grown must have been given a preplanting treatment with an APHIS-approved soil insecticide.

(2) Before planting in such treated fields, the sweet potato draws and vine cuttings must have been dipped in an APHIS-approved insecticidal solution.

(3) During the growing season an approved insecticide must have been applied to the vines at prescribed intervals.

(b) An inspector of Puerto Rico must certify that the sweet potatoes have been washed.

(c) The sweet potatoes must be graded by inspectors of Puerto Rico in accordance with Puerto Rican standards which do not provide a tolerance for insect infestation or evidence of insect injury and found by such inspectors to comply with such standards prior to movement from Puerto Rico.

(d) The sweet potatoes must be inspected by an inspector and found to be free of the sweet potato scarabee (*Euscepes postfasciatus* Fairm.).

#### § 318.13-25 Sweet potatoes from Hawaii.

(a) Sweet potatoes may be moved interstate from Hawaii in accordance with this section only if the following conditions are met:<sup>5</sup>

(1) The sweet potatoes must be treated in accordance with the vapor heat treatment schedule specified in § 305.24.

(2) The sweet potatoes must be sampled, cut, and inspected and found to be free of the ginger weevil (*Elytrotreinus subtruncatus*). Sampling, cutting, and inspection must be performed under conditions that will prevent any pests that may emerge from the sampled sweet potatoes from infesting any other sweet potatoes

intended for interstate movement in accordance with this section.

(3) The sweet potatoes must be inspected and found to be free of the gray pineapple mealybug (*Dysmicoccus neobrevipes*) and the Kona coffee-root knot nematode (*Meloidogyne konaensis*).

(4)(i) Sweet potatoes that are treated in Hawaii must be packaged in the following manner:

(A) The cartons must have no openings that will allow the entry of fruit flies and must be sealed with seals that will visually indicate if the cartons have been opened. They may be constructed of any material that prevents the entry of fruit flies and prevents oviposition by fruit flies into the fruit in the carton.<sup>6</sup>

(B) The pallet-load of cartons must be wrapped before it leaves the treatment facility in one of the following ways:

(1) With polyethylene sheet wrap;

(2) With net wrapping; or

(3) With strapping so that each carton on an outside row of the pallet load is constrained by a metal or plastic strap.

(C) Packaging must be labeled with treatment lot numbers, packing and treatment facility identification and location, and dates of packing and treatment.

(ii) Cartons of untreated sweet potatoes that are moving to the mainland United States for treatment must be shipped in shipping containers sealed prior to interstate movement with seals that will visually indicate if the shipping containers have been opened.

(5)(i) *Certification on basis of treatment.* Certification shall be issued by an inspector for the movement of sweet potatoes from Hawaii that have been treated in accordance with part 305 of this chapter and handled in Hawaii in accordance with this section.

(ii) *Limited permit.* A limited permit shall be issued by an inspector for the interstate movement of untreated sweetpotato from Hawaii for treatment on the mainland United States in accordance with this section.

(b) [Reserved]

(Approved by the Office of Management and Budget under control number 0579-0281)

#### Subpart—Fruits and Vegetables From Puerto Rico or Virgin Islands [Removed]

■ 7. Subpart—Fruits and Vegetables From Puerto Rico or Virgin Islands,

consisting of §§ 318.58 through 318.58-16, is removed.

#### Subpart—Guam [Removed]

■ 8. Subpart—Guam, consisting of §§ 318.82 through 318.82-3, is removed.

Done in Washington, DC, this 9th day of January 2009.

Kevin Shea,

Acting Administrator, Animal and Plant Health Inspection Service.

[FR Doc. E9-762 Filed 1-15-09; 8:45 am]

BILLING CODE 3410-34-P

## DEPARTMENT OF AGRICULTURE

### Natural Resources Conservation Service

#### 7 CFR Part 636

RIN 0578-AA49

#### Wildlife Habitat Incentive Program

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

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** Section 2602 of the Food, Conservation, and Energy Act of 2008 (2008 Act) amended the Wildlife Habitat Incentive Program (WHIP) by: Narrowing the program's applicability to private agricultural lands, nonindustrial private forestland, and Indian land; identifying habitat on pivot corners and irregular areas as "other types of wildlife habitat" eligible for cost-share; increasing, from 15 to 25, the percentage of funds that may be used for agreements that have a term of at least 15 years; providing the Secretary of the United States Department of Agriculture (USDA) authority to give priority to projects that would address issues raised by State, regional, and national conservation initiatives; and instituting an annual \$50,000 in direct or indirect aggregate payment limitations per person or legal entity. The Natural Resources Conservation Service (NRCS), an agency of USDA, issues this interim final rule with request for comment to incorporate statutory changes resulting from the 2008 Act authorization. The Agency is also using this rule to simplify the regulation and make administrative changes to improve program efficiency. Cost-share agreements entered into on or following January 16, 2009 will be administered according to this interim final rule.

**DATES:** *Effective date:* The rule is effective January 16, 2009. *Comment date:* Submit comments on or before March 17, 2009.

<sup>5</sup> Sweet potatoes may also be moved interstate from Hawaii with irradiation in accordance with § 305.34 of this chapter or after fumigation with methyl bromide according to treatment schedule T-101-b-3-1, as provided for in § 305.6(a) of this chapter.

<sup>6</sup> If there is a question as to the adequacy of a carton, send a request for approval of the carton, together with a sample carton, to the Animal and Plant Health Inspection Service, Plant Protection and Quarantine, Center for Plant Health Science and Technology, 1730 Varsity Drive, Suite 400, Raleigh, NC 27606.

**ADDRESSES:** You may send comments, which will be published in their entirety, using any of the following methods:

*Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending comments electronically.

*Mail:* Financial Assistance Programs Division, Natural Resources Conservation Service, Wildlife Habitat Incentive Program Comments, P.O. Box 2890, Room 5237-S, Washington, DC 20013.

*Fax:* 1-202-720-4265.

*Hand Delivery:* Room 5237-S of the USDA South Agriculture Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please ask the guard at the entrance to the South Agriculture Building to call 202-720-4527 in order to be escorted into the building.

**FOR FURTHER INFORMATION CONTACT:**

Director, Financial Assistance Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013-2890. Phone: 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 interim final rule with request for comment is a significant regulatory action. The administrative record is available for public inspection in Room 5831 South Building, USDA, 14th and Independence Avenue, SW., Washington, DC. 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 this preamble and a copy of the analysis is available upon request from the Director, Financial Assistance Programs Division, Natural Resources Conservation Service, Room 5237S, Washington, DC 20250-2890.

*Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA)*

Section 2904(c) of the Food, Conservation, and Energy Act of 2008 requires that the Secretary use the authority in section 808(2) of title 5, United States Code, which allows an agency to forego SBREFA's usual 60-day Congressional Review delay of the effective date of a major 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, in effect as soon as possible. Accordingly, this rule is effective upon filing for public inspection by the Office of the Federal Register.

*Executive Order 13175*

Executive Order 13175 requires agencies to consult and collaborate with tribes, if policies or actions have substantial direct effects on tribes. NRCS has determined that this regulation does not have a substantial direct effect on tribes, since these regulatory provisions are required by statute, and these provisions do not impose unreimbursed compliance costs or preempt Tribal law. As a result, consultation is not required.

*Executive Order 13084*

Executive Order 13084 requires agencies to consult with Indian Tribal governments, if the policies uniquely impact tribes. NRCS has determined that the policies set forth in this regulation are required by statute and do not uniquely impact tribes and Tribal governments; therefore, consultation is not required.

*Regulatory Flexibility Act*

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

*Environmental Analysis*

Availability of the Environmental Assessment (EA) and Finding of No Significant Impact (FONSI). A programmatic environmental assessment has been prepared in association with this rulemaking. The analysis has determined that there will not be a significant impact to the human environment and as a result an Environmental Impact Statement is not required to be prepared (40 CFR 1508.13). The EA and FONSI are available for review and comment for 60 days from the date of publication of this interim final rule in the **Federal Register**. A copy of the EA and FONSI may be obtained from the following Web site: [http://www.nrcs.usda.gov/programs/Env\\_Assess/](http://www.nrcs.usda.gov/programs/Env_Assess/). A hard copy may also be requested from the following address and contact: National Environmental Coordinator, Natural

Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington DC 20250. Comments from the public should be specific and reference that comments provided are on the EA and FONSI. Public comment may be submitted by any of the following means: (1) e-mail comments to [NEPA2008@wdc.usda.gov](mailto:NEPA2008@wdc.usda.gov), (2) e-mail to [egov](mailto:egov) Web site—[www.regulations.gov](http://www.regulations.gov), or (3) written comments to: National Environmental Coordinator, Natural Resources Conservation Service, Ecological Sciences Division, 1400 Independence Ave., SW., Washington DC 20250.

*Civil Rights Impact Analysis*

NRCS has determined through a Civil Rights Impact Analysis that the interim final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. An increased cost-share payment rate for historically underserved producers, as defined in § 636.3, is expected to increase participation among these groups. The data presented indicates producers who are members of the historically underserved groups have participated in NRCS conservation programs at parity with other producers. Extrapolating from historical participation data, it is reasonable to conclude that NRCS programs, including WHIP, will continue to be administered in a non-discriminatory manner. 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, the WHIP rule portends no adverse civil rights implications for women, minorities and persons with disabilities.

*Paperwork Reduction Act*

Section 2904 of the 2008 Act requires that implementation of programs 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 interim final rule.

*Government Paperwork Elimination Act*

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

#### *Unfunded Mandates Reform Act of 1995*

NRCS assessed the affects of this rulemaking action on State, local, and Tribal governments, and the public. This action does not compel the expenditure of \$100 million or more by any State, local, or Tribal governments, or anyone in the private sector, and therefore, a statement under section 202 of the Unfunded Mandates Reform Act of 1995 is not required.

#### *Economic Analysis—Executive Summary*

The Wildlife Habitat Incentives Program (WHIP) provides direct technical and financial assistance to improve fish and wildlife habitat on eligible agricultural and nonindustrial private forest lands. 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. Because these efforts involve both on-site and off-site-specific impacts and these impacts affect a host of non-market valued attributes ecosystem services, performing a traditional benefit-cost analysis (BCA) is challenging. Even with these limitations, a BCA 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 producer to fully pay for the restoration and improvements in fish and wildlife habitat within the agricultural or forestry operation. 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 (EGS) and provision of non-market valued amenities, such as more scenic views, as well as providing fish and wildlife habitat.

The results of this BCA 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 the Director, Financial Assistance Programs Division, Natural Resources Conservation Service, P.O. Box 2890, Washington, DC 20013–2890.

#### *Section 2904 of the Food, Conservation, and Energy Act of 2008*

The Commodity Credit Corporation (CCC) 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. Section 2904 of the 2008 Act requires regulations to be published within 90 days after the date of enactment and authorizes the CCC to promulgate an interim final rule effective upon publication with an opportunity for notice and comment. CCC has determined that an interim final rule is necessary to expedite the effective date of rulemaking in order to meet the intent of Section 2904.

#### **Discussion of Program**

The Wildlife Habitat Incentive Program (WHIP) is a voluntary program administered by NRCS, using the funds and authorities of the Commodity Credit Corporation (CCC). WHIP is available in all 50 states, 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 threatened and endangered species. NRCS first allocated funds for WHIP in 1997. Over the life of the program, NRCS has entered into over 25,600 cost-share agreements that cover over 4 million acres.

WHIP was originally authorized under section 387 of the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act), Public Law 104–127. In 1997, NRCS published regulations to implement WHIP at 7 CFR 636. Section 2502 of the Farm Security and Rural Investment Act of 2002 (the 2002 Act), Public Law 107–171, repealed the original WHIP statute

and established a new WHIP under Section 1240N of the Food Security Act of 1985, as amended (the 1985 Act). Section 2602 of the Food, Conservation, and Energy Act of 2008 (2008 Act) made further changes to WHIP.

In 1997, NRCS published regulations to implement WHIP at 7 CFR Part 636. The 2002 Act authorized WHIP agreements with a duration of at least 15 years, and NRCS amended the 1997 regulation, by incorporating this change in a final rule published on July 24, 2002. NRCS publishes this interim final rule to incorporate the changes in the 2008 Act. In addition, NRCS is using this rulemaking opportunity to implement program improvements based upon NRCS's experience in administering WHIP and other conservation programs, as well as input from program participants and stakeholders.

In addition, the United States Department of Agriculture (USDA) held Farm Bill forums throughout the country in 2005 to solicit input from producers and other stakeholders about future farm policy. USDA received more than 4,000 comments through this process, including recommendations related to WHIP. In summary, NRCS makes changes to the WHIP regulation through this interim final rule, described more fully below, to reflect changes made by the 2008 Act, consideration of public input from the Farm Bill forums, and opportunities identified by NRCS to improve program administration.

#### **Summary of Statutory Changes**

##### *Section 2602(a)—Program Focus*

The original WHIP legislation, published in 1996, contained broad language to promote implementation of wildlife habitat development practices by providing participants cost-share assistance for developing a wildlife management plan and implementing eligible activities under the plan. Prior to the 2008 Act, WHIP was available to develop habitat on private and public lands, and available to landowners and operators, provided that operators gave NRCS evidence they had control of the land for the duration of the WHIP agreement.

NRCS focused the majority of WHIP funds on private lands. However, the NRCS State Conservationist, in consultation with the State Technical Committee, could allow exceptions to the private land focus when significant wildlife habitat gains could only be achieved by installing practices on non-Federal public land. In addition, Indian land, formerly known as Tribal lands,

regardless of their status in terms of Federal trust lands, and Federal lands were eligible in those very limited circumstances where the benefit is primarily on the private lands, but must include some Federal land to meet the WHIP objective.

Section 2602(a) of the 2008 Act amends Section 1240N(a) of the 1985 Act to restrict eligible land to private agricultural land, nonindustrial private forest land, and Indian land. This restriction requires NRCS to make changes to the applicability, definitions, and program requirement sections of the WHIP regulation. In particular, this rulemaking adds definitions for “agricultural lands,” “Indian land,” and “nonindustrial private forest land.” These terms are defined in § 636.3 of this regulation.

NRCS also amends § 636.1(a) to reflect the changes made to land eligibility by the 2008 Act. In § 636.4, NRCS redesignates the existing § 636.4(b) as § 636.4(c), and adds a new § 636.4(b) to identify eligible land as private agricultural land, nonindustrial private forest land, and Indian land.

#### *Section 2602(b) of the 2008 Act—Other Types of Wildlife Habitat*

Section 2602(b) of the 2008 Act amends Section 1240N(b) of the 1985 Act to clarify “other types of habitat” includes habitat developed on pivot corners and irregular areas. The current regulation encompasses these types of habitats, and therefore, NRCS determined that it did not need to amend the WHIP rule to reflect this statutory clarification. NRCS will ensure that its policy guidance identifies such habitat as eligible for enrollment.

#### *2008 Act Section 2602(c)—Cost-Share Rates*

The original WHIP legislation, published in 1996, did not specify either a cost-share rate or an agreement length for WHIP cost-share agreements. However, NRCS, in its 1997 final rule, specified that NRCS would not pay more than 75 percent of the cost of establishing wildlife habitat development practices, except in the case of long-term agreements. Further, NRCS reduced the cost-share payment to a participant proportionately below 75 percent to the extent that direct Federal financial assistance was provided to the participant from other sources. The 1997 WHIP rule also specified that WHIP cost-share agreements would be for a period of 5 to 10 years, unless a shorter period was recommended to address situations where wildlife was threatened as a result of a disaster.

The 2002 Act authorized the Secretary to use up to 15 percent of program funds to provide additional cost-share payments to participants to protect and restore essential plant and animal habitat under long-term agreements with durations of at least 15 years. The 2002 final rule reflected the new authority for entering into long-term agreements while the percentage of funds to be made available for such agreements was addressed in Agency policy. Section 2602(c) of the 2008 Act increases the proportion of annual funds available for long-term agreements to not more than 25 percent but makes no other changes to long-term agreements. In response to Section 2602(c), NRCS adds the provision to allow up to 25 percent of WHIP funds to be used to carry out cost-share agreements that extend 15 years or more.

#### *Section 2602(d) of the 2008 Act—Priority Initiatives*

Section 2602(d) provides the Secretary discretionary authority to give priority to projects that would address issues raised by State, regional, and national conservation initiatives. These State, regional, and national initiatives include, for example: the North American Waterfowl Management Plan, the National Fish Habitat Action Plan, the Greater Sage Grouse Conservation Society, the State Comprehensive Wildlife Conservation Strategies (also referred to as the State Wildlife Action Plans), the Northern Bobwhite Conservation Initiative, the Gulf of Hypoxia Action Plan 2008 (and associated annual operating plans), and State forest resource strategies. This change clarifies discretionary authority provided in the program’s original statutory language. Section 636.5(c)(1) of the 1997 WHIP rule identified criteria that NRCS used to evaluate applications and make enrollment decisions, including “Contribution to resolving an identified habitat problem of national, regional, or state importance.” Section 636.5 is redesignated as § 636.6 and in response to the 2008 Act, NRCS revises § 636.6(c)(1) to read as follows: “Contribution to resolving an identified habitat concern of national, regional, or state importance.” In particular, NRCS replaces the word “problem” with the word “concern” to reflect a broader spectrum of wildlife issues. Further, in § 636.6(a), NRCS replaces the term “national and regional needs” with “national, regional, and State wildlife habitat concerns.” Finally, in § 636.8(a)(2), NRCS states that “wildlife habitat concerns identified in State, regional, and national conservation initiatives” are one of the possible items

required to be addressed in the WHIP plan of operations (WPO).

#### *Section 2602(e) of the 2008 Act—Payment Limitations*

Section 2602(e) of the 2008 Act establishes the following payment limitation: “Payments made to a person or legal entity, directly or indirectly, under [WHIP] may not exceed, in the aggregate, \$50,000 per year.” NRCS incorporates this change in § 636.7(f).

#### **Summary of Changes to the Regulation**

In addition to the amendments being made to address 2008 Act changes, NRCS amends the WHIP regulations at 7 CFR Part 636 through this interim final rule to incorporate administrative changes to simplify the regulatory language, align WHIP policies with other NRCS conservation programs, and improve the efficiency of program administration. NRCS describes these changes below in the section-by-section analysis.

#### *Section 636.1, Applicability*

NRCS amends § 636.1(a) by making several changes. In particular, NRCS replaces 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, nonindustrial private forest land, and Indian land.” NRCS determined that the simplified language provides 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.

#### *Section 636.2, Administration*

NRCS makes several adjustments to § 636.2 to help clarify program administration. In particular, NRCS adds the following statement to § 636.2(a) to clarify the relationship between NRCS and the Commodity Credit Corporation (CCC): “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.” NRCS has had legal authority to use CCC funds to implement WHIP since the 2002 Act. By adding this language to the WHIP rule, NRCS identifies that it may use CCC funds to deliver WHIP.

NRCS makes several changes to § 636.2(c) to align WHIP terminology with the terms used by other NRCS financial assistance programs. In

particular, NRCS replaces the term “cooperative agreements” with the term “agreements” to reflect the full scope of funding arrangements into which NRCS may enter. The change does not alter the authority or opportunities for entering into agreements.

NRCS also adds “Indian tribes,” “private organizations,” and “individuals” to the list of entities with which NRCS may enter into agreements. NRCS merges § 636.2(d) with § 636.2(c) to simplify and clarify the WHIP regulation, eliminating redundant language. Therefore, NRCS redesignates §§ 636.2(e) and (f) as §§ 636.2(d) and (e), respectively. NRCS removes the subjective term “reasonable” in the redesignated § 636.2(d), and revises redesignated paragraph § 636.2(e) to clarify that the Chief can override decisions made by his delegates if necessary to uphold WHIP purposes.

### *Section 636.3, Definitions*

NRCS changes many of the definitions in the WHIP rule to be consistent with other NRCS conservation programs and to avoid confusion among NRCS field personnel and customers. Specifically, NRCS revises the following existing definitions for “Chief,” “Conservation district,” “Cost share agreement,” “Participant,” “Person,” “State Conservationist,” and “Wildlife.”

NRCS adds the following terms and definitions to the WHIP regulation to be consistent with related NRCS conservation programs. In particular, NRCS adds definitions for “Agricultural lands,” “Applicant,” “At-risk species,” “Beginning farmer or rancher,” “Conservation practice,” “Designated conservationist,” “Field office technical guide (FOTG),” “Historically underserved producer,” “Indian tribe,” “Indian land,” “Joint operation,” “Legal entity,” “Lifespan,” “Limited resource farmer or rancher,” “Liquidated damages,” “Livestock,” “Natural Resources Conservation Service (NRCS),” “Nonindustrial private forestland,” “Operation and maintenance,” “Operation and maintenance (O&M) agreement,” “Producer,” “Resource concern,” “Secretary,” “Socially disadvantaged farmer or rancher,” “Technical assistance,” and “Technical service provider (TSP).” Specifically, NRCS requests public comment on how to tailor the current definition of “at-risk species” to assist species in greatest need. As currently defined, “at risk species means 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 removes the terms “Conservation Plan” and “Recurring Practice” since these terms are not used in the WHIP regulation.

NRCS revises several existing terms to clarify WHIP program purposes. In particular, NRCS revises the definition of “Cost-share payment” to be more comprehensive by including the language “other goals consistent with the program.” NRCS revises the definition of “Habitat development” to clarify that “conservation practices” are undertaken to establish, improve, protect, enhance, or restore land to improve conditions for wildlife. NRCS replaces the term “Practice” with “Conservation practice” and defines the term consistent with the definition used in related NRCS conservation programs. NRCS adds the definitions of “Historically underserved producer” to reference applicants who may be eligible for additional cost-share assistance as described in § 636.7(a)(2) as a beginning farmer or rancher, a limited resource farmer or rancher, or a socially disadvantaged farmer or rancher. Correspondingly, definitions are added for “Beginning farmer or rancher,” “Limited resource farmer or rancher,” and “Socially disadvantaged farmer or rancher.” The gross farm sales criterion in the “Limited resource farmer or rancher” definition is updated to reflect the adjustment for inflation. These definitions for are consistent with the changes to definitions in other NRCS conservation programs.

Finally, NRCS replaces the term “Wildlife habitat development plan” with the term “WHIP plan of operations (WPO)” in § 636.7, and consequently adds “WPO” to § 636.3. This change further aligns § 636.3 with the definitions in related NRCS conservation programs that identify a plan of operations rather than a development plan. NRCS replaces the terms “wildlife habitat development plan” and “WHDP” to “WHIP plan of operations” and “WPO,” respectively throughout the entire regulation.

### *Section 636.4, Program Requirements*

NRCS amends § 636.4 to clarify some of the existing program requirements that have not been identified in the WHIP regulation because they apply through other statutory requirements. However, NRCS finds that reference to these requirements in the WHIP regulation is important so that prospective participants are aware of them. In particular, NRCS revises § 636.4(a) to clarify that WHIP participants are subject to the highly erodible and wetland conservation provisions found at 7 CFR Part 12.

Additionally, NRCS includes reference to the Adjusted Gross Income (AGI) limitations, 7 CFR Part 1400, that apply to WHIP participants since WHIP has become a Title XII conservation program. In order to comply with AGI requirements, legal entities must provide to NRCS a list of members, including members in embedded entities, along with their social security numbers and percent interest in the legal entity.

NRCS adds new program requirements through this interim final rule to improve program administration and to ensure that WHIP program goals are met. In particular, NRCS adds paragraph (a)(2) to require WHIP participants to be in compliance with terms of all other USDA-administered conservation program contracts to which they are a party. In this manner, NRCS ensures that a participant who receives NRCS conservation benefits is meeting their existing responsibilities prior to receiving additional assistance.

NRCS also adds paragraph (a)(3) related to the implementation of the WHIP plan of operations and the associated operations and management (O & M) agreement to ensure consistency between § 636.4 and changes made to § 636.3 and § 636.8.

NRCS also adds several provisions related to payment matters. In particular, one paragraph (a)(9) clarifies that payments made to Tribal groups may exceed the payment limitation if the Bureau of Indian Affairs or a Tribal official certifies that no one individual will receive more than the established payment limitation.

Additionally, NRCS adds paragraph (a)(10) to clarify that participants must supply NRCS with information needed to determine program eligibility, including information required to determine an applicant’s status as a limited resource or beginning farmer or rancher. Finally, NRCS adds paragraph (a)(11) that requires participants that use an alternative identifier, rather than a tax identification number, to continue to use that same identifier in all WHIP cost-share agreements.

NRCS makes several adjustments to § 636.4(b) to incorporate the 2008 Act changes to land eligibility and to conform the language to the new definitions described in § 636.3. In particular, NRCS identifies in § 636.4(b) that eligible lands include agricultural land, nonindustrial private forest land, and Indian land, as defined in § 636.3.

NRCS also revises § 636.4(c) to incorporate changes to clarify land ineligibility. In particular, NRCS deletes the phrase “through other forms of assistance or without assistance,” since

the manner in which an applicant achieved habitat objectives is immaterial to the determination that such lands are ineligible for participation in the program. NRCS also deletes reference to the attainability of wildlife habitat on offered lands since that consideration is more appropriately addressed in ranking criteria. In accordance with Section 1240N(a) of the 1985 Act, as amended by Section 2602 of the 2008 Act, public land is ineligible for WHIP assistance.

#### *Section 636.5, National Priorities*

NRCS inserts a new § 636.5, and redesignates the subsequent sections accordingly. The new § 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. This new section also states that the national priorities will be reviewed annually by NRCS to ensure that the program is addressing priority wildlife habitat concerns. This addition makes WHIP consistent with other NRCS conservation programs.

#### *Section 636.6, Establishing Priority for Enrollment in WHIP*

NRCS amends § 636.6(a) by replacing “needs” with “wildlife habitat concerns.” NRCS also amends § 636.6(a) by adding the following sentence, “NRCS, in consultation with Federal and state agencies 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, and national levels.” These changes clarify that NRCS may focus program implementation in any given year to respond to national, regional, state wildlife habitat concerns, identified by NRCS in partnership with other Federal and State agencies. Local wildlife habitat concerns issues may be elevated to the appropriate State Conservationist in an effort to address specific habitat development needs.

NRCS amends § 636.6(b) by striking the term “species,” consistent with the program purpose of development of wildlife habitat. While the intent of such development is to benefit wildlife species, the program focus is on the land and water resources covered by cost-share agreements entered into under the program.

NRCS adds a new ranking criteria to § 636.6(c) to allow NRCS to consider a participants’ willingness to complete habitat development within two years of the cost-share agreement. This criterion

is intended to encourage quicker implementation of wildlife habitat improvements and reduce the number of modifications and cancellations. NRCS deletes § 636.6(d) since the function of denying applications is better addressed in the application ranking process.

#### *Section 636.7, Cost-Share Payments*

NRCS replaces the term “WHDP” with “WPO,” to correspond with the changes NRCS makes to §§ 636.3 and 636.8. Like the WHDP, WPO is the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to address the priority resource concerns. NRCS has chosen to change this terminology to make it consistent with other financial assistance programs administered by NRCS.

NRCS revises § 636.7(a)(1) to reflect that “NRCS shall offer to pay no more than 75 percent of the costs of establishing conservation practices,” consistent with changes made in § 636.3. NRCS also adds a new provision under § 636.7(a) to allow NRCS to provide additional cost-share incentives to “historically underserved producers” and Indian tribes. “Historically underserved producers” include limited resource, beginning farmers or ranchers, and socially disadvantaged farmers or ranchers. This addition is consistent with the authority provided under Section 1244 of the 1985 Act, as amended by Section 2708 of the 2008 Act, to provide additional incentives for certain farmers, ranchers, and Indian tribes, which reads as follows:

(a) Incentives for Certain Farms and Ranchers and Indian tribes:

(1) Incentives Authorized. In carry out any conservation program administered by the Secretary, the Secretary may provide to a person or entity specified in paragraph (2) incentives to participate in the conservation program—

(i) To foster new farming and ranching opportunities; and

(ii) To enhance long-term environmental goals.

(2) Covered Persons. Incentives authorized by paragraph (1) may be provided to the following:

(i) Beginning farmers or ranchers;

(ii) Socially disadvantaged farmers or ranchers;

(iii) Limited resource farmers or ranchers; and

(iv) Indian tribes.

Under this authority, which applies to all conservation programs implemented by the Secretary, NRCS proposes in this rulemaking to increase WHIP cost-share rates to the participants identified under

Section 1244(a)(2) of the 1985 Act, as amended. Since WHIP’s legislative authority does not establish a definitive payment rate, NRCS is adopting in § 636.7 the Environmental Quality Incentives Program’s cost-share rate policies for historically underserved producers. The payment rate for historically underserved producers is the applicable payment rate and an additional payment rate that is no less than 25 percent above the applicable payment rate, provided this increase does not exceed 90 percent of the estimated incurred costs associated with the conservation practice. This proposal not only enables those who are less capable of matching Federal assistance to receive additional program support, but also supports the NRCS effort to streamline program policies where possible.

NRCS revises § 636.7(b) by relocating to § 636.8(e) the requirement that the participant or designee is responsible for the implementation of the WPO. The reference to the source of implementation is more appropriately in the section related to the WPO.

NRCS also adds new paragraphs (c) and (d) to § 636.7, and redesignates the former § 636.7(c) as (e). NRCS clarifies in the new § 636.7(c) that conservation practices implemented prior to an applicant submitting an application to the program are ineligible for payments. Additionally, NRCS clarifies in § 636.7(c) that conservation practices implemented or initiated prior to the approval of a cost-share agreement are ineligible for payment, unless NRCS grants a waiver in advance. Section 636.7(d) clarifies existing policy that NRCS will identify and provide public notification of the conservation practices eligible for cost-share payments under the program.

NRCS also adds new paragraphs (f) through (j) to § 636.7 to be consistent with related NRCS conservation programs. More particularly, § 636.7(f) incorporates the payment limitation as established by the 2008 Act. Section 636.7(g) states that adjusted gross income (AGI) eligibility will be determined prior to cost-share agreement approval. Section 636.7(h) allows for current year cost-adjustment for conservation practices, subject to the availability of funds. NRCS clarifies in § 636.7(i) that NRCS will not make a payment for a conservation practices under WHIP if the participant has already received a payment for the same practice on the same land under another USDA conservation program. Section 636.7(j) requires that the participant and NRCS, or an approved TSP, certify that the conservation practices have been

carried out in accordance with the cost-share agreement and agency standards prior to issuing final cost-share payments.

Lastly, NRCS adds paragraph (k) in accordance with Section 1240N(b)(2)(B) that specifies the 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, NRCS had the legislative authority to use up to 15 percent of WHIP funds to carry out these longer term agreements.

#### *Section 636.8, WHIP Plan of Operations (WPO)*

NRCS changes the caption, "Wildlife Habitat Development Plan," to "WHIP plan of operations (WPO)," consistent with how related NRCS conservation programs identify the document that contains the information related to practices and activities to be implemented under the program.

NRCS makes several revisions to § 636.8(a) to reduce the administrative burden upon participants. In particular, NRCS removes the language "and the WHDP is approved by participant, NRCS, and the local conservation district" as a result of the need to protect personally identifiable information in accordance with Section 1619 of the 2008 Act. This change also was recommended by comments received by USDA through the Farm Bill forums.

NRCS revises § 636.8(b) to clarify the NRCS expectation that the program participant will maintain WHIP-funded conservation practices as specified in the O&M agreement that is consistent with other NRCS conservation programs. NRCS also removes the requirement that a program participant has to sign both the cost-share agreement and the WPO by adding the following language: "the WPO \* \* \* shall be attached and included as part of the cost-share agreement."

NRCS revises § 636.8(d) to clarify that all conservation practices planned in the WPO are in accordance with the NRCS field office technical guide (FOTG), consistent with related NRCS conservation programs.

Finally, as indicated above, NRCS incorporates into § 636.8(e) the requirement contained previously in § 636.7(b) that a participant is responsible for the implementation of the WPO.

#### *Section 636.9, Cost-Share Agreements*

NRCS amends § 636.9(a) to update the locations available for submitting an application to participate in WHIP. This change serves to notify the public of all

the avenues available for submitting applications.

Under § 636.9(b)(2), NRCS revises the duration of the cost-share agreement from the former 5- to 10-year duration to a minimum duration of one year and a maximum of 10 years, with the exception of long-term agreements as established under § 636.9(c). This new language provides the flexibility needed for establishing agreement lengths based on wildlife habitat needs and other factors.

NRCS removes § 636.9(b)(4) because the operation and maintenance requirements are included in the O&M agreement. Correspondingly, paragraphs (b)(5) and (6) of this section are redesignated as (b)(4) and (5), respectively. NRCS adds a new § 636.9(b)(6) to clarify that payment limits will be specified in the cost-share agreement, consistent with related NRCS conservation programs. NRCS also adds a new § 636.9(b)(7) that states that the O&M agreement expresses the NRCS expectation that participants will operate and maintain conservation practices installed with program assistance for the lifespan of the installed practices. NRCS has developed this O&M agreement for two reasons: (1) To increase the transparency of a participant's contract responsibilities; and (2) to ensure these conservation practices are maintained for the length of time for which they were designed and created. The previous § 636.9(b)(7) has been redesignated as § 636.9(b)(8).

NRCS removes § 636.9(c) pursuant to modifications in the cost-share agreement terms made in § 636.8(b)(2). NRCS redesignates § 636.9(d) as § 636.9(c), and revises § 636.9(c)(3), to establish a maximum cost-share rate of 90 percent for conservation practices installed under long-term cost-share agreements where the duration of the agreement is for 15 years or longer.

#### *Section 636.10, Modifications*

NRCS simplifies the language in § 636.10(a) to reduce the number of steps required to modify a cost-share agreement and protect personally identifiable information. This change also ensures that the WPO and O&M agreement are also modified along with the cost-share agreement. NRCS deletes § 636.10(b) as redundant to § 636.10(a), and redesignates existing § 636.10(c) as § 636.10(b). Section 636.10(c) is added to ensure that in the event a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the conservation practice, in accordance with established payment rates and limitations.

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

NRCS makes several formatting changes in this section to improve its structure. In particular, §§ 636.11(a)(2), (b)(1), and (b)(2) have been redesignated as §§ 636.11(c), (d), and (e), respectively. NRCS makes these changes to simplify the original formatting.

NRCS revises § 636.11(a) to simplify and clarify that participants must notify NRCS if they anticipate loss of control over the land covered by a cost-share agreement, consistent with related NRCS conservation programs. NRCS adds a new § 636.11(b) to address the transfer of responsibilities under WHIP cost-share agreements, consistent with other NRCS conservation programs.

#### *Section 636.12, Termination of Cost-Share Agreements*

NRCS revises § 636.12(a) to clarify that NRCS may unilaterally terminate a cost-share agreement under certain circumstances. NRCS deletes § 636.12(a)(2) because the circumstances identified in that provision are already addressed by § 636.12(a)(1). Accordingly, NRCS redesignates § 636.12(a)(3) as § 636.12(a)(2) and adds a new § 636.12(a)(3) that specifies that a participant's failure to correct a violation within the allowed time period also is cause for termination.

NRCS revises § 636.12(b) related to cost-share agreement termination to clarify that participants also may forfeit rights to future payments, be assessed liquidated damages, or be determined ineligible for further conservation program funding. NRCS also adds § 636.12(c) to specify that NRCS may reduce costs recovered after a termination decision based on a participant's good faith effort. These revisions align WHIP administration with other NRCS conservation program administration policies concerning cost-share agreement termination and the resulting financial consequences and requirements.

#### *Section 636.13, Violations and Remedies*

NRCS reformats some of the provisions in this section to improve the overall structure. Additionally, NRCS deletes the original § 636.13(b), which is identified in the existing regulation as "reserved."

In § 636.13(a), NRCS removes the word "reasonable" in reference to participant violation notification. The term "reasonable" is unnecessary since a 60-day time frame is already provided in which a participant has the opportunity to initiate actions needed to



correct a violation. Section 636.13(a) now provides that "NRCS shall 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."

NRCS revises § 636.13(b) to include, consistent with other NRCS conservation programs, the assessment of liquidated damages as a possible consequence to a violation of a cost-share agreement. Liquidated damages are not a penalty, but a recognition that some of the damages incurred upon the breach of a party's agreement may not be easily calculated, but are known to occur, such as expenses incurred by NRCS to service the cost-share agreement

#### *Section 636.14, Misrepresentation and Scheme or Device*

NRCS amends § 636.14 to be in accordance with the other financial assistance programs administered by NRCS. Specifically, NRCS inserts language concerning the collection of liquidated damages and possible cancellation of all other NRCS contracts if a person is a participant and knowingly misrepresented any fact that affected program determination of their WHIP cost-share agreement.

#### *Section 636.15, Offsets and Assignments*

No changes have been made in this section.

#### *Section 636.16, Appeals*

No changes have been made in this section.

#### *Section 636.17, Compliance With Regulatory Measures*

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

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

NRCS adds § 636.18 to incorporate the Technical Service Provider provisions in place since 2002, but not included in the regulation. This section is consistent with related NRCS conservation programs.

#### *Section 636.19, Access to Operating Unit*

NRCS adds § 636.19 to be consistent with related NRCS conservation programs. This section provides NRCS personnel authorized physical access to projects undertaken by participants in

order to review project progress and give further assistance to participants where it is needed.

#### *Section 636.20, Equitable Relief*

NRCS adds § 636.20 to be consistent with other NRCS conservation programs. This section clarifies that WHIP participants who acted in good faith based on erroneous information provided by NRCS or its representatives are entitled to equitable relief if such action resulted in a violation of the cost-share agreement.

#### *Section 636.21, Environmental Services Credits for Conservation Improvements*

NRCS adds § 636.21, which states that NRCS recognizes that environmental benefits will be achieved by implementing conservation practices funded through WHIP, and that environmental credits may be gained as a result of implementing these activities. NRCS asserts no direct or indirect interest in these credits. However, NRCS retains the authority to ensure that the requirements for WHIP-funded improvements are met and maintained consistent with the terms of the cost-share agreement. Where activities may affect the land covered by a WHIP cost-share agreement, participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into any environmental credit agreements. This section is consistent with the policy that is being adopted in multiple NRCS programs.

Section 2708, "Compliance and Performance," of the 2008 Act added a paragraph to Section 1244(g) of the 1985 Act 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 1985 Act 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 1985 Act, and Agency expectations for improving its ability to report on each program's performance and 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 1985 Act.

*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 (M 440 512 and M 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 made publicly 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, lacking has been a connection between these data and specific conservation programs.<sup>1</sup> 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<sup>2</sup> strongly endorsed the project’s purpose, but concluded “CEAP must change direction” to achieve its purposes. 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 set forth in Agency guidance (GM\_290\_400; GM\_340\_401; 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, “The 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 (M\_440\_512 and M\_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 Farm Bill added a provision stating,

<sup>2</sup> 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/>).

“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; M\_440\_525; 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 1985 Act.

NRCS is amending this rule, 7 CFR part 636, WHIP, republishing it in its entirety and accepting comments until March 17, 2009, on the aforementioned subjects.

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

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

■ For reasons set out in the preamble, NRCS is revising 7 CFR part 636 to read as follows:

#### PART 636—WILDLIFE HABITAT INCENTIVES PROGRAM

- Sec.
- 636.1 Applicability.
  - 636.2 Administration.
  - 636.3 Definitions.
  - 636.4 Program requirements.
  - 636.5 National priorities.
  - 636.6 Establishing priority for enrollment in WHIP.
  - 636.7 Cost-share payments.
  - 636.8 The WHIP Plan of Operation (WPO).
  - 636.9 Cost-share agreements.
  - 636.10 Modifications.

<sup>1</sup> The exception to this is the Conservation Reserve Program; since 1987 the NRI has reported acreage enrolled in CRP.

- 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, non-USDA personnel.
- 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 Incentives Program (WHIP) is to help participants develop fish and wildlife habitat on private agricultural land, nonindustrial private forest land, and Indian land.

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

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

### § 636.2 Administration.

(a) The regulations in this Part will be administered under the general supervision and direction of the Chief, NRCS. 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 the CCC's funds, facilities, and authorities, where applicable.

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

(c) NRCS may enter into 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 shall preclude the Chief of NRCS, or a 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, pasture, 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 produced. Agricultural lands may include cropped woodland, marshes, incidental areas included in the agricultural operation, and other types of land used for production of livestock.

*Applicant* means a person, legal entity or joint operation that has an interest in an agricultural operation, as defined in 7 CFR part 1400, who has requested in writing to participate in WHIP.

*At-risk species* means 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.

*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, and 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, United States Department of Agriculture (USDA), or a designee.

*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.

*Cost-share agreement* means a legal 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 USDA to the participant to share in the costs of applying conservation.

*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 (FOTG)* 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 practices 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, or legal entity that is a beginning farmer or rancher, socially disadvantaged farmer or rancher, or limited resource farmer or rancher.

*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/or 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 or severally liable for the obligations of the organization.

*Legal entity* means, as defined in 7 CFR 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 not more than \$155,200 in each of the previous two years (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 two years (to be determined annually using Commerce Department 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 (NRCS)* is an agency of the USDA, which has the responsibility for administering WHIP using the funds, facilities, and authorities of the CCC.

*Nonindustrial private forestland* 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 decision-making authority over the land.

*Operation and maintenance* means work performed by the participant to keep the applied conservation practice 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 practice 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 (O&M) agreement* means the document that, in conjunction with the WHIP plan of operations, specifies the operation and maintenance responsibilities of the participants for conservation practices installed with WHIP assistance.

*Participant* means a person, legal entity, or joint operation, or 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, or joint operation 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 practices by producers.

*Secretary* means the Secretary of the 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.

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

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

*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 (TSP)* means an individual, private-sector entity, or public agency certified by NRCS to provide technical services to program participants in lieu of or on behalf of NRCS.

*WHIP plan of operations (WPO)* means the document that identifies the location and timing of conservation practices that the participant agrees to implement on eligible land in order to develop fish and wildlife habitat and provide environmental benefits. The WPO 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 WPO 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 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 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 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 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 or sacrificed income related to conservation practice 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; and

(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 be subject to full penalties of § 636.13 of this part.

(b) Eligible land includes:

- (1) Private agricultural land;
- (2) Nonindustrial private forest land; and
- (3) Indian land.

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

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

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

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

(4) That is public land.

#### § 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; and

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

(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 and local level 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 NRCS offices.

(2) Use the national priorities in conjunction with State 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 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 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, and national levels. In response to national, regional, and state fish and wildlife habitat concerns, the Chief may limit program implementation in any given year to specific geographic areas or to address specific habitat development needs.

(b) The State Conservationist, in consultation with the State Technical Committee, 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, regional, or state importance;

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

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

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

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

(6) Estimated costs of 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 two 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 practices as provided in the WPO that is a component of the WHIP cost-share agreement:

(1) Except as provided in paragraph (a)(2) of this section and § 636.9(c), NRCS shall offer to pay no more than 75 percent of the costs of establishing conservation practices to develop fish and wildlife habitat. The cost-share payment to a participant shall be reduced proportionately below 75 percent to the extent that direct Federal financial assistance is provided to the participant from sources other than NRCS, except for certain cases that merit additional cost-share assistance to

achieve the intended goals of the program, as determined by the State Conservationist.

(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 incurred costs associated with the conservation practice.

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

(c) Payments will not be made for a conservation practice 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 practice implementation.

(d) NRCS will identify and provide public notice of the conservation practices eligible for payment under the program.

(e) Cost-share payments may be made for the establishment and installation of additional eligible conservation practices, or the maintenance or replacement of an eligible conservation practice, but only if NRCS determines the conservation practice 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 adjusted gross income limitation, will be determined prior to cost-share agreement approval.

(h) Subject to fund availability, the payment rates for conservation practices scheduled after the year of contract obligation may be adjusted to reflect increased costs.

(i) A participant will not be eligible for payments for conservation practices on eligible land if the participant receives payments or other benefits for the same practice 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

practice has been completed in accordance with the cost-share agreement, and NRCS or an approved TSP must certify that the practice has been carried out in accordance with the applicable NRCS field office technical guide.

(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 The WHIP plan of operations (WPO).**

(a) The participant develops a WPO with the assistance of NRCS or other public or private natural resource professionals, who are approved by NRCS. A WPO encompasses the parcel of land where habitat will be established, improved, protected, enhanced, or restored. The WPO shall be approved by NRCS and address at least one of the following:

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

(2) Fish and wildlife habitat concerns identified in State, regional, and national conservation initiatives; or

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

(b) The WPO forms the basis for the WHIP cost-share agreement and shall be attached and included as part of the cost-share agreement, along with the O&M agreement. The WPO includes a schedule for installation and maintenance of the conservation practices, as determined by NRCS.

(c) The WPO may be modified in accordance with § 636.10.

(d) All conservation practices in the WPO must be approved by NRCS and developed and carried out in accordance with the applicable NRCS FOTG.

(e) The participant is responsible for the implementation of the WPO.

#### **§ 636.9 Cost-share agreements.**

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

(b) A WHIP cost-share agreement shall:

(1) Incorporate the WPO;

(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 practices identified in the WPO 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 operation and maintenance for each conservation practice and the Agency expectation that WHIP-funded conservation practices 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 critical plant or animal habitat, as determined by NRCS; and

(3) Provides cost-share payments of no more than 90 percent of the cost of establishing conservation practices 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 WPO 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 a conservation practice fails through no fault of the participant, the State Conservationist may issue payments to re-establish the practice, 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.

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

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

(b) The participant and NRCS may agree to transfer a cost-share agreement to another producer. 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 shall be determined by the original party and that party's successor. In the event of a dispute or claim on the distribution of cost-share payments, NRCS may withhold payments without the accrual of interest pending a settlement or adjudication on the rights to the funds.

(d) If such new participants are not willing or not eligible to assume the responsibilities of an existing WHIP cost-share agreement including the O&M agreement, NRCS shall terminate the cost-share agreement and may require that all cost-share payments may be forfeited, refunded, or both.

(e) The participants to the cost-share agreement shall be jointly and severally responsible for refunding the cost-share payments with applicable interest pursuant to paragraph (d) of this section.

#### **§ 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, the participant will forfeit all rights to future payments under the agreement, shall pay liquidated damages, in an amount determined by the State Conservationist in accordance with the terms of the agreement, and shall 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.

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

(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, the 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 shall 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 assess liquidated damages, as well as require the participant to forfeit all rights to any future payment under the agreement.

#### **§ 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 shall 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 shall 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 shall be made without regard to questions of title under State law and without regard to any claim or lien against the land, or proceeds thereof, in favor of the owner or any other creditor except agencies of the U.S. Government. The regulations governing offsets and withholdings found at 7 CFR part 1403 of this title shall 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 practices;

(3) NRCS program funding decisions;

(4) Eligible conservation practices;

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 carry out conservation practices shall be responsible for obtaining the authorities, rights, easements, permits, or other approvals necessary for the implementation, operation, and maintenance of the conservation practices in keeping with applicable laws and regulations.

(b) Participants shall be responsible for compliance with all laws and for all effects or actions resulting from the participant's 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 is not limited to: Conservation planning; conservation practice survey, layout, design, installation, and certification; and information; education; and training for producers.

(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 shall 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 shall include the right to provide technical assistance; determine eligibility; inspect any work undertaken under the cost-share agreements, including the WPO and O&M agreement; and collect information necessary to evaluate the conservation practice performance specified in the cost-share agreements. The NRCS representative shall 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 accept the advice or action as meeting program requirements and grant relief because of the good-faith reliance on the part of the participant. 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. 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.

(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 practices 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 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.

Signed in Washington, DC, on January 9, 2009.

**Arlen Lancaster,**

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

[FR Doc. E9-827 Filed 1-15-09; 8:45 am]

**BILLING CODE 3410-16-P**

## **DEPARTMENT OF AGRICULTURE**

### **Natural Resources Conservation Service**

#### **7 CFR Part 652**

**RIN 0578-AA48**

#### **Technical Service Provider Assistance**

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

**ACTION:** Interim final rule with request for comment.

**SUMMARY:** The Natural Resources Conservation Service (NRCS), an agency of the U.S. Department of Agriculture (USDA) is issuing an interim final rule for technical service provider (TSP) assistance as authorized under the Food Security Act of 1985, as amended by the Food, Conservation, and Energy Act of 2008. This interim final rule amends the Technical Service Provider (TSP) regulations to address changes made by the Food, Conservation, and Energy Act of 2008. The Secretary of Agriculture has delegated to NRCS the

responsibility for administering the authority for technical service provider assistance.

**DATES:** *Effective Date:* This rule is effective January 16, 2009.

*Comment Date:* Submit comments on or before March 17, 2009.

**ADDRESSES:** You may send comments (identified by Docket Number NRCS-IFR-08011) using any of the following methods:

- *Government-wide rulemaking Web site:* Go to <http://www.regulations.gov> and follow the instructions for sending comments electronically.

- *Mail:* Technical Service Provider Team, Natural Resources Conservation Service, Technical Service Provider Assistance Comments, P.O. 2890, Room 5234-S, Washington, DC 20013.

- *Fax:* 1-202-720-5334.

- *Hand Delivery:* Room 5234-S of the USDA South Office Building, 1400 Independence Avenue, SW., Washington, DC 20250, between 9 a.m. and 4 p.m., Monday through Friday, except Federal holidays. Please ask the guard at the entrance to the South Office Building to call 202-720-4630 in order to be escorted into the building.

- This interim final rule may be accessed via Internet. Users can access the NRCS homepage at <http://www.nrcs.usda.gov/>; select the Farm Bill link from the menu; select the *Interim final* link from beneath the *Final and Interim Final Rules Index* title. Persons with disabilities who require alternative means for communication (Braille, large print, audio tape, etc.) should contact the USDA TARGET Center at: (202) 720-2600 (voice and TDD).

#### **FOR FURTHER INFORMATION CONTACT:**

Team Leader, Technical Service Provider Team, NRCS, P.O. Box 2890, Washington, DC 20013-2890; phone: (202) 720-6731; fax: (202) 720-5334; or e-mail: [TSP2008@wdc.usda.gov](mailto:TSP2008@wdc.usda.gov).

#### **SUPPLEMENTARY INFORMATION:**

##### **Regulatory Certifications**

##### *Executive Order 12866*

Pursuant to Executive Order 12866, this interim final rule with request for comment has been determined to be a significant regulatory action. The administrative record is available for public inspection in Room 5831 South Building, USDA, 14th and Independence Avenue, SW., Washington, DC. As required by 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 this