

**CIVIL RIGHTS IMPACT ANALYSIS
FOR THE FINAL INTERIM RULE:
WILDLIFE HABITAT INCENTIVES PROGRAM**

Agency: US Department of Agriculture
Natural Resources Conservation Service (NRCS)

Subject: Civil Rights Impact Analysis
Wildlife Habitat Incentives Program Final Interim Rule
2008 Farm Bill

A review of the final interim rule, Wildlife Habitat Incentives Program (WHIP) has been directed towards the identification of actual or potential civil rights issues. In this regard, the review analyzed the rule to ensure compliance with Departmental Regulation (DR) 4300-4, "Civil Rights Impact Analysis"; 7 CFR 15d, "Nondiscrimination in Programs and Activities Conducted by the United States Department of Agriculture"; and DR 1512, "Regulatory Decision Making Requirement." The review reveals no factors indicating the final WHIP rule would have a disproportionate adverse civil rights impact for NRCS producers who are minorities, women or persons with disabilities.

BACKGROUND

The WHIP is a voluntary program implemented under the general supervision and direction of the Chief of NRCS, with funding being provided by the Commodity Credit Corporation (CCC). The 50 United 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 are eligible regions for the WHIP. Through WHIP, NRCS provides cost-share assistance to owners of eligible lands to develop upland, wetland and aquatic wildlife habitat, as well as fish and wildlife habitat on other areas, to develop habitat for threatened and endangered species, and other types of wildlife habitat approved by the NRCS. NRCS first allocated funds for WHIP in 1998. Over the life of the program, NRCS has enrolled over 25,600 agreements on over 4 million acres.

The WHIP was authorized under section 387 of the Federal Agriculture Improvement and Reform Act of 1996 (the 1996 Act), 16 U.S.C. 3836a. Section 2502 of the Farm Security and Rural Investment Act of 2002 (the 2002 Act), Public Law 107-171, repealed the original WHIP statute and amended Title XII of the Food Security Act of 1985 to add a new section, 1240N, as the authority for WHIP. Section 2602 of the 2008 Act further amends section 1240N.

LEGISLATIVE CHANGES

NRCS is issuing an interim final rule, with request for comments, to incorporate the statutory changes resulting from the 2008 Farm Bill deliberations. The Agency is also using this rule to add language to simplify the regulation and make administrative

changes to improve program efficiency and to adhere more closely to the program's statutory framework.

Specifically, Section 2602 of the 2008 Act amended the WHIP by making the following statutory changes:

1. *Section 2602(a)*. This section changes the program's purpose by restricting participation to owners of private agricultural lands, non-industrial private forest land, and Tribal lands.
2. *Section 2602(b)*. This section revises 1240N(b) to identify that the term "other types of habitat" includes habitat developed on pivot corners and irregular areas. This statutory change provides no new authority but clarifies the Secretary's existing authority to provide cost-share on the described lands.
3. *Section 2602(c)*. This section increases, from 15 percent to 25 percent, the percentage of funds that may be used for long-term agreements that have a term of at least 15 years.
4. *Section 2602(d)*. This section provides the Secretary discretionary authority to give priority to projects that would address issues raised by state, regional, and national conservation initiatives.
5. *Section 2602(e)*. This section 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."

The following are amendments being made to the WHIP regulation, 7 C.F.R. Part 636 to conform to the statutory requirements and provide further administrative clarifications:

1. NRCS will maintain the existing policy in Section 636.9(c) that enables NRCS to enter into agreements with a term of at least 15 years and provide additional cost-share assistance for these agreements. NRCS proposes to establish a cost-share limit of 90 percent for these agreements.
2. In Section 636.6, NRCS will continue to place priority on projects that contribute to State, regional, and national conservation initiatives. However, NRCS proposes to change the regulation to read as follows (additions noted in italics, strike-thru indicates deleted language):
 - §636.5(b): "The State Conservationist, in consultation with the State Technical Committee, may limit implementation of *give priority to WHIP to projects that will* address unique habitats, or special geographic areas of *identified in the* State..."
3. In Section 636.7(a)(2), NRCS proposes implementing the following cost-share policy for historically underserved populations:

- Provide that “historically underserved producers” be awarded the “applicable payment rate and an additional rate that is 25 percent above the applicable rate, provided that this increase does not exceed 90 percent of the incurred costs associated with the conservation practice.”

CIVIL RIGHTS IMPACT ANALYSIS

The CRIA is directed towards the identification of actual or potential civil rights issues. The purpose is to identify adverse implications the proposed WHIP rule will have on each affected group and rationally and reasonably dispose of each. The theory of discrimination applied to the rule is disparate impact. Disparate impact is manifested when on the surface the situation appears the same for all, but there is a different effect. The analysis evaluated the extent to which the various populations are affected by the rule, and how the impact is manifested. The review examined: (A) the rule and general provision; (B) administration and development; (C) historical participation data; (D) eligibility criteria; (E) outreach strategy; (F) barrier removal provisions; (G.) conclusion; and (H) NRCS Civil Rights Director’s certification. The examination sought to determine if all the affected groups:

- are provided the same opportunities to participate in the decision-making or rulemaking process for WHIP,
- have historically been provided the same opportunities to participate in NRCS programs, and
- are provided the same information to decide if they wish to participate in the WHIP.

A. Wildlife Habitat Incentives Program Rule and Implementation Plan

Description of the WHIP

WHIP was reauthorized in the 2008 Farm Bill to promote agricultural production and wildlife habitat as compatible national goals. WHIP continues USDA’s commitment to provide technical and financial assistance to landowners and others to develop upland, wetland, riparian, and aquatic habitat areas on their property.

WHIP activities will be carried out according to a WHIP plan of operations (WPO). This plan addresses the conservation and environmental purposes to be achieved through one (1) or more conservation practices. A voluntary program, WHIP offers financial and technical help to perform or implement habitats and management practices called for in cost-share agreements up to ten (10) years on eligible agricultural land. Long term agreements of fifteen (15) years or more are also available to producers who want to protect and restore critical plant or animal habitat. These practices are subject to NRCS technical standards adapted for local conditions.

NRCS may provide payments of up to 75% of the costs associated with conservation practice planning, design, materials, installation, labor, management, or maintenance. For historically underserved producers, NRCS will award the applicable payment rate and an additional rate that is not less than 25 percent above the applicable rate, provided

this increase does not exceed 90 percent of the estimated incurred costs associated with the conservation practice.

B. Administration and Development

Application Evaluation

WHIP applications will be accepted throughout the year. The 2008 WHIP criteria also require that NRCS ensure regional, national, and local conservation initiatives are given priority. Other criteria that may be used to prioritize applications in the application ranking process include:

- The overall level of cost effectiveness to ensure that the conservation practices and approaches proposed are the most efficient means of achieving the anticipated environmental benefits;
- How effectively and comprehensively the project addresses the designated resource concerns;
- Which best fulfills the purpose of the Wildlife Habitat Incentives program; and
- Whether it improves conservation practices or systems in place on the operation at the time the cost-share agreement offer is accepted or that will complete a conservation system.

Program Delivery

WHIP utilizes the state technical committees and local working groups to implement the program to address identified needs and concerns.

Signup Period and Cost-share Agreement Determinations

Any producer who is eligible may submit an application for participation in WHIP at a USDA service center. Information will be provided that explains the process to request assistance. Applications will be accepted throughout the year.

C. Historical Participation Data

Due to the non-availability of sufficient historical compatible data, a barrier analysis on participation was not conducted. Historical data has been maintained, however it has been deemed unreliable due to the fact it does not include information on the number of program participants with disabilities, nor does it differentiate between whether small business entities are male or female owned.

D. Eligibility

Non-agricultural lands, as well as state, county, or local government-owned lands are now ineligible for WHIP. Land eligible for WHIP includes:

- Private agricultural land,
- Non-industrial private forest land, and
- Tribal land.

The 2008 Farm Bill emphasizes that WHIP cost-share payments may be paid to landowners to develop other types of wildlife habitat including habitat developed on pivot corners and irregular areas.

E. Outreach Strategy

The NRCS Director of Communications and the Director of Outreach will provide and coordinate training regarding outreach strategies necessary to inform all segments of the affected public about the WHIP interim final rule. Public notification and outreach will be aggressively expanded to include news releases, radio and TV spots, publications, and brochures to ensure those traditionally under-served will have an equal opportunity to benefit from the proposed rule.

The Financial Assistance Programs Division (FAPD) of NRCS will work in partnership with the NRCS Outreach Division to locate and provide information to protected groups. A press release announcing the issuance of the newly proposed WHIP rule will be electronically sent to universities and colleges specifically identified with a protected group. The press release will contain a contact person for obtaining further information. Mailing lists have been obtained or are being created to reach 52 Land-Grant Universities, seventeen (17) 1890 Land-Grant Universities, 192 HACU colleges and universities located in six (6) U.S. Territories, and 32 Tribal Colleges and Universities.

FAPD will submit information for publication in the national newsletters of several national agricultural organizations. These include American Agri-Women, WAgN (Women's Agricultural Network), MANRRS (Minorities in Agriculture, Natural Resources, and Related Sciences), WIFE (Women Involved in Farm Economics), and the National AgrAbility Project (approximately 22,000-30,000 farmers with disabilities receive the Breaking New Ground Newsletter). Significant media outreach will be undertaken to acquaint under served producers with the newly proposed WHIP rule. Spanish-translated press release and informational materials will be made available.

Encouraging Community Involvement and Locally Led Conservation

Local offices will continue to encourage community involvement and locally led conservation activities they have underway. Locally led conservation is helping community stakeholders to:

- Assess their natural resource conservation needs;
- Set community conservation goals;
- Develop an action plan;
- Obtain resources to carry out the plan;
- Implement solutions; and

- Measure their success.

The locally led process provides for input from a broad range of agencies, organizations, businesses, and individuals in the local area who have an interest in natural resource management and are familiar with the local resource needs and conditions. Through this input process there is the opportunity for minority and socially disadvantaged groups to indicate how to address their natural resource concerns. Outreach efforts are made to ensure that the diversity of residents, landowners, and land operators in the local area are well represented in this process.

F. Barrier Removal Provisions of the final WHIP Rule

The interim final rule incorporates features to address potential disparities for producers who are members of a protected group. The increased funding may result in a much higher application approval rate. Conservation payments generally provide a fairer distribution of benefits among farmers and landowners across the nation than do other farm programs such as commodity subsidies because of:

- payment limitations, and
- habitat improvement and development addresses specific needs of the farming and ranching community.

The interim final rule will address major systemic barriers for producers who have historically experience distinct disadvantages in obtaining USDA program assistance by inducing and helping them to enter farming by providing incentive payments and by assisting with a higher percentage of the cost-share payments to participate. To ensure they will have an equal opportunity to participate, Limited Resource Farmers/Producers (LRF/Ps), Beginning farmers, Socially Disadvantaged Farmers and producers, and Tribes may be eligible for up to 90 percent cost-share for the implementation of conservation practices as compared with up to 75 percent for other farmers.

To meet the economic threshold for designation as LRF/P to qualify for the higher cost-share, a producer will have at least one of the following characteristics:

- Is an individual with direct or indirect gross farm sales not more than \$100,000 in each of the previous two years, and
- Has a total household income at or below national poverty level for a family of four, or has less than 50% of county median household income, in each of the previous two years.

Beginning Farmer or Rancher means a person or legal entity who:

- 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.

- In the case of a contract 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.
- In the case of a contract 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.

A socially disadvantaged farmer or rancher is one 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.

Furthermore, the NRCS taskforce established to collaborate in the creation and implementation of the WHIP interim final rule and other conservation programs emanating from the 2008 Farm Bill consisted of staff members from the Civil Rights Division, the CPTAD, the Outreach Division and members from various State and Field offices. Outreach and communication strategies will be in place to ensure all producers are provided the same information to decide if they wish to participate in WHIP. NRCS will provide benefits to all producers regardless of their status as it relates to race, national origin, gender or disability.

G. Conclusion

Our review of the WHIP interim final rule discloses no disproportionately adverse impacts for minorities, women, or persons with disabilities. An increased cost-share payment rate for participating historically underserved producers is expected to increase participation among these groups. The data presented indicates producers who are members of the protected 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 the 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 interim final rule portends no adverse civil rights implications for women, minorities and persons with disability.

H. Certification

I certify that the review and analysis of the 2008 Wildlife Habitat Incentives Program, Final Interim Rule has been conducted in accordance with Departmental Regulation

4300-4, "Civil Rights Impact Analysis"; 7 CFR 15d, "Nondiscrimination in Programs and Activities Conducted by USDA"; and Departmental Regulation 1512-1, "Regulatory Decision-Making Requirements."



JOSEPH E. HAIRSTON
Director, Civil Rights Division
Natural Resources Conservation Service (NRCS)

9/16/08

Date