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Natural Resources Conservation Service
Wildlife Habitat Incentive Program Comments

FAX NUMBER: 202-720-4265

FROM: Keith Sexson
Assistant Secretary of Operations
Kansas department of Wildlife and Parks

COMMENTS:

Federal Register Docket Number **RIN 0578-AA49**, Interim Final Rule affecting changes to the Wildlife Habitat Incentives Program.

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KANSAS

DEPARTMENT OF WILDLIFE AND PARKS

KATHLEEN SEBELIUS, GOVERNOR
April 16, 2009

Gregory Johnson
Financial Assistance Programs Division
Natural Resources Conservation Service
Wildlife Habitat Incentives Program Comments
PO Box 2890
Room 5237-S
Washington, DC 20013

RE: Federal Register Docket Number RIN 0578-AA49, Interim Final Rule affecting changes to the Wildlife Habitat Incentives Program

Dear Mr. Johnson:

The Kansas Department of Wildlife and Parks (KDWP) appreciates the opportunity to comment on the interim final rule affecting implementation of the Wildlife Habitat Incentives Program (WHIP) as provided by the Food, Conservation, and Energy Act of 2008 (2008 Farm Bill). In addition to our comments, we recognize the comments submitted by Association of Fish and Wildlife Agencies and fully support their findings.

By far, the WHIP is one of the most widely used conservation programs among landowners across the country for addressing concerns and issues related to fish, wildlife, and their habitats. Congress made some dramatic changes to the program in the 2008 Farm Bill that could adversely affect fish and wildlife conservation initiative efforts and landowners' ability to address fish and wildlife concerns on their land. However, we look forward to continuing our working relationship with NRCS to help deliver this important program to Kansas landowners and its benefits to the American taxpayers.

Again, thank you for your consideration of our recommendations for the implementation of the Wildlife Habitat Incentives Program as authorized in the 2008 Farm Bill.

Sincerely,



Keith Sexson
Assistant Secretary of Operations
Kansas Department of Wildlife and Parks

Specific Recommendations by Section of the Rule:

636.2 Administration.

- (c) "... NRCS may make payments pursuant to said agreements for program implementation and for other goals consistent with the program provided for in this Part."

We fully support and appreciate the flexibility granted to enter into agreements with Federal and State agencies as well as Indian tribes to assist with program implementation. We believe WHIP was not utilized more by landowners in the past because of insufficient marketing and outreach efforts. KDWP believes it would be beneficial to landowners, NRCS and its conservation partners to clarify in policy that marketing and outreach components are eligible and should be included in agreements to assist with program implementation.

636.3 Definitions.

- **Agricultural lands:** As written this definition will limit the program's utility on a producer's operation and potentially leave holes where conservation practices and benefits are desperately needed but no tool is available for deployment. We commend NRCS for its use of WHIP to address vital fish habitat restoration work and improve habitat for many threatened and endangered species which was based on strategic habitat conservation goals and needs. These activities not only improve conditions for fish, wildlife, and their habitats but also may help reduce producers' potential threats from regulatory actions associated with threatened and endangered species. The KDWP recommends the following modifications to the definition for incorporation into the final rule and to improve the program's utility across the agricultural landscape:
 - **Agricultural lands** means cropland, grassland, rangeland, pasture, and other associated 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 but is not restricted to associated cropped woodland, marshes, wetlands, riparian areas, and in-stream conditions, and other incidental areas. ~~included in the agricultural operation,~~ and other types of land used for agricultural production of livestock or land that is suitable for the agricultural production of livestock.
- **At-risk species:** The KDWP appreciates its close-working relationship with NRCS and the increased benefits delivered for fish, wildlife, and their habitats through our conservation partnership. To further the ongoing efforts of our relationship and advance our mutual conservation goals and priorities, the KDWP recommends using the definition jointly developed and used in the MOU between AFWA, NRCS and FWS to proactively conserve at-risk species and their habitats. Based on that definition, the KDWP supports the incorporation of the following definition of at-risk species into the final rule:
 - **At-risk species** means any plant and animal species that are listed as endangered or threatened under ESA; proposed or candidates for listing under ESA; likely to become candidates for listing in the near future; species listed as endangered or threatened (or similar classification) under State law; and State species of conservation concern.
- **Habitat development:** The KDWP supports the development of fish and wildlife habitat using WHIP. However, we believe the program should focus on improving native conditions for fish and wildlife because native habitats are essential for conserving at-risk species. Hence, we offer the following modified definition for incorporation into the final rule:
 - **"Habitat development** means...for the specific purpose of improving native conditions for fish and wildlife."

- **Indian land:** Because of the legal complexity of lands owned by Indian tribes and to be as inclusive of those lands as possible across all 50 states, we recommend incorporating the following definition of "Trust land" instead of "Indian land" in the final rule:
 - **Trust lands means:**
 - (A) is held in trust by the United States for Native Americans;
 - (B) is subject to restrictions on alienation imposed by the United States on Indian lands (including native Hawaiian homelands);
 - (C) is owned by a Regional Corporation or a Village Corporation, as such terms are defined in section 3(g) and 3(j) of the Alaska Native Claims Settlement Act, respectively (43 U.S.C. 1602 (g), (j)); or
 - (D) is on any island in the Pacific Ocean if such land is, by cultural tradition, communally-owned land, as determined by the Secretary
- **Resource concern:** The rule utilizes the term "participant" throughout the rule. For consistency with the rest of the rule, we recommend striking "by producers" at the end of the definition and substituting "by participant."
- **Wildlife:** To be as inclusive as possible, we recommend adding "including mollusks" to the definition.

636.4 Program requirements.

- **(b) Eligible land includes:** Because of the complexity and diversity of lands owned by Indian tribes and to be as inclusive of those lands as possible across all 50 states and territories, we recommend adding a new (b)(4) for "Trust land" after "Indian land" in the final rule.
 - **Recommendation, add: "(b)(4) Trust land."**
- **(b) Eligible land includes:** The KDWP has identified some critical gaps in land eligibility that needs to be clarified in the final rule or it could be problematic for both participants and NRCS staff in program implementation. The Manager's Report provides guidance to the Secretary to "provide priority to projects that address issues raised by State, regional, and national conservation initiatives," and "intend the Secretary to consider the goals and objectives identified in relevant fish and wildlife conservation initiatives when establishing State and national program priorities, scoring criteria, focus areas, or other special initiatives." Streams, rivers and waterways on private land provide important habitat for many at-risk species, are vital to ecosystem health, and often require management to provide important at-risk species habitat while maintaining the integrity of a participant's land, field, and profitability which could be affected by erosion, stream bank destabilization and other instream factors. In many circumstances streams can have major negative impacts on agricultural operations, and landowners need a tool to address these issues through WHIP. Therefore, streams, rivers, instream modifications and the like must be included as eligible land because they are an integral part of private lands, the landscape, and must be included in the conservation plan. A landowner who is willing to perform instream modifications and improve aquatic habitat and conduct streambank stabilization that benefits the both the participant and an at-risk species should be eligible for cost-share funds for such activities through WHIP. The KDWP recommends adding the following provision to the final rule to address these problems:
 - **Recommendation, add: "(b)(5) The land and waterways therein is a working component of the participant's agricultural or forestry operation, and is private land on which habitat development would benefit at-risk species."**
- **(b) Eligible land includes:** The KDWP recommends adding the following provision in the final rule in this section to fully encompass the range of agricultural operations and situations encountered where habitat development on private lands would be both mutually beneficial and appropriate.
 - **Recommendation add: "(b)(6) Lands leased by private landowners who have control over the land for the contract period."**

- **(c) Ineligible land.** NRCS does not have the staffing capacity or extensive expertise required to make decisions about land ineligibility that could affect at-risk species conservation without collaboration with state and federal fish and wildlife professionals on the varied, diverse, and often-complicated at-risk species issues. **In cases where NRCS would make ineligible land determinations, the KDWP recommends NRCS coordinate with the state fish and wildlife agency and the FWS to ensure at-risk species, conservation practices or important habitat component would not be adversely affected by a land ineligibility determination. We recommend modifying this provision as follows to reflect the needed coordination with other government agencies who can assist NRCS in this process:**
 - NRCS shall not provide cost-share assistance, **if after coordination with the state fish and wildlife agency and the FWS, with respect to conservation practices on land:**
- **(c)(1)** To clarify eligibility and improve consistency in implementation across the country, we **recommend adding the word "Currently" at the beginning of this provision so that it reads as follows:**
 - **Recommendation:** "Currently enrolled in a program where fish and wildlife habitat objectives have been sufficiently achieved, as determined by NRCS."
- **(c)(3)** To help address issues raised by state, regional and national wildlife conservation initiatives and to preclude the need to list more species under the Endangered Species Act, we recommend modifying this provision so that it reads:
 - "On which habitat for threatened or endangered species, as defined in Section 3 of the Endangered Species Act (ESA); **plant or animal species that are proposed or candidates for listing under the ESA; species likely to become candidates for listing in the near future; species listed as endangered or threatened (or similar classification) under State law; or State species of conservation concern, would be adversely affected.**"
- **(c)(4)** To avoid confusion and increase consistency in implementation, we **recommend changing this provision to read as follows:**
 - "That is public land, **excluding lands owned by a state that are held in trust for the beneficiaries of a state's education system.**"

636.6 Establishing priority for enrollment in WHIP.

- **c(8):** This provision provides for an unenforceable contract and will be impossible for the agency to manage effectively. Furthermore, it doesn't prevent gaming of the system to outcompete competitors. We believe a more constructive approach would be to allow State NRCS offices to offer higher cost-share rates during the first 2 years of survey completion of the contract to encourage landowners to implement and complete conservation practices. In some instances where cultural resources are a concern, a survey for cultural resources may take longer than 2 years to complete; thus putting these participants at an unfair disadvantage. Consequently, **the KDWP recommends striking this provision as written but supports providing the State Conservationist the flexibility to offer a higher cost-share rate during the first 2 years of contract to motivate completion of conservation practices.**

636.7 cost-share payments

- **(a)(1)** WHIP has been successful in assisting in the conservation of threatened or endangered species by implementing conservation practices that are tied to federal or state threatened or endangered species recovery plans and serving a vital role in important or critical habitat development were it is

most needed. It is important to note that the succession of plant communities varies widely across the country, and climates with higher rainfall have faster rates of plant community succession. Consequently, a stringent restriction on higher cost-share rates that apply only to 15-year contracts would unintentionally and adversely affect conservation efforts in the south where rainfall is higher. Because of plant community succession rates, rainfall, and other climate conditions, there are some conservation practices that must be implemented every 5 years in order to maintain their habitat and conservation benefits for target species. The KDWP encourages NRCS to adopt a provision that would continue to facilitate these activities and their associated benefits without penalizing participants because of factors beyond their control. To this end, we recommend modifying this provision as follows for inclusion in the final rule:

- **Recommendation: NRCS shall allow up to 90% cost-share if the conservation practice is tied to a federal or state threatened or endangered species recovery plan, including those cost-share agreements that are 5-15 years or more in length.**
- **(a)(1) The KDWP commends NRCS for the forethought of the language in this provision and strongly supports the flexibility granted to State Conservationists to provide "... additional cost-share assistance to achieve the intended goals of the program" where merits warrant such actions. We recommend maintaining this language as currently written in the final rule.**
- **(d) We recommend NRCS modify this provision to allow input from the State Technical Committee, encompass working lands activities, and to read as follows:**
 - **Recommendation: (d) NRCS, in consultation with the STC, will identify and provide public notice of the conservation practices eligible for payment under the program. Conservation practices eligible for payment under the program may include grazing, haying and stubble management and forestry planning and management.**
- **(f) The KDWP foresees some potential confusion in implementing this provision as currently written. We believe NRCS should clarify in rule and policy that a multiple year contract may exceed \$50,000 provided the "payments made or attributed to a participant, directly or indirectly, may not exceed, in the aggregate, \$50,000 per year." While this annual payment limitation will reduce the program's effectiveness and applicability for some important fish and wildlife conservation priorities and initiatives across the country, the KDWP understands that this change in rule reflects changes in the law made by Congress. However, we would like to work with NRCS to identify methods for coping with this shortfall while trying to conserve at-risk species and their important habitats.**
- **(h) The KDWP commends NRCS for the forethought of the language in this provision and strongly supports its incorporation as written in the final rule. This flexibility is much needed and will be much appreciated by program participants.**
- **(k) Because of the relatively small amount of WHIP funds allocated to each State and the need to have as much flexibility at the state level as possible to address the varying at-risk species issues, the KDWP believes it would be onerous and adversely affect conservation activities to require 25% of State WHIP funds be allocated for contracts that are for a term of at least 15 years. Thus, the KDWP strongly encourages NRCS to subtract the 25 percent designation at the national level from the national pool of WHIP funds and provides the following modification for incorporation into the final rule:**
 - **(k) NRCS, for a fiscal year, may use up to 25 percent of National WHIP funds to carry out cost-share agreements described in Section 636.9(c).**

636.9 Cost-share agreements.

- **(c)(2): The term "critical habitat" often invokes thoughts and actions associated with implementation of the ESA. To reduce confusion, avoid formal "consultations" under the ESA where they are not warranted, and to avoid unintentionally limiting the program to only species listed under the ESA, the KDWP recommends using the phrase "essential or important plant and animal habitat" instead of "critical plant or animal habitat." Furthermore, NRCS actions**

should be coordinated with the State fish and wildlife agency and the FWS, and we offer the following modifications for incorporation into the final rule:

- **Recommendation: (2) Protects and restores essential or important plant and animal habitat, as determined by NRCS, as determined in coordination with the State fish and wildlife agency and the FWS; and**
- **(8) Under this provision, we encourage NRCS to include in policy language articulating that deferment shall be eligible for cost-share when deferment of use is needed to meet habitat needs and achieve the objectives of the program.**
- **To ensure NRCS's compliance with NEPA and the program participant's compliance with local, state and federal permitting laws that are associated with certain conservation practices, the KDWP recommends the following provision be added to the final rule:**
 - **Recommendation, add: (9) No cost share payment shall be made to a participant until all local, state, and federal permits are obtained.**

636.10 Modifications

- **(b) The KDWP commends NRCS for the forethought of the language in this provision and strongly supports its incorporation as written in the final rule. It will ensure that contract modifications must meet and support the programs' purpose and objectives.**

636.11 Transfer of interest in a cost-share agreement.

- **(a) We noted that there is no time limit associated with this provision. In order for NRCS to meet its administrative responsibilities, the KDWP recommends the following modification to facilitate administration of the program:**
 - **Recommendation: "... covered by a WHIP cost-share agreement during the term of the agreement."**
- **(b) The term "participant" is used throughout the rule instead of "producer." For consistency, we recommend changing "producer" to "participant" to be consistent with the rest of the rule.**
- **(d) NRCS should clarify who will be required to refund payment in the case where a cost-share agreement is terminated. For instance, it would be unfair to ask a new landowner to repay funds received by the previous landowner. The KDWP supports the following modifications to the provision:**
 - **Recommendation, add: "...require that all cost-share payments may be forfeited, refunded, or both by the original participant."**

636.17 Compliance with regulatory measures.

(a) It has been the experience of some State fish and wildlife agencies that on occasion, NRCS does not know which state or federal permits are required for conservation practices and activities being implemented by program participants. In some instances, NRCS funded projects without any required permits on file for an associated conservation practice, and this is particularly important and applicable to instream modifications. To facilitate NRCS's ability to meet NEPA requirements as it pertains to paying for activities with federal funds that are pertinent to local, state and federal permitting requirements, the KDWP recommends that no cost-share payment be made to a participant until all necessary permits have been obtained by the applicant and copies of the permits are received and on file by NRCS (see also our recommendation under 636.9 Cost share agreements –add #9: No cost share payment shall be made to participants until all local, state, and federal permits are obtained.).

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

- **(c) The term "participant" is used throughout the rule instead of "producer." For consistency, we recommend changing "producer" to "participant" in this provision to be consistent with the rest of the rule.**

336.19 Access to operating unit.

- For clarification purposes, we recommend adding “including TSPs” after “NRCS representative in the first sentence” so that program participants know TSPs shall have the right to enter the premises.
- We recommend changing “agricultural operation or tract” in the first sentence to “a participant’s property” to more accurately reflect the types of lands eligible.

636.21 Environmental services credits for conservation improvements.

- We recommend utilizing the language issued in the Healthy Forest Reserve Program rule in this section because of its inclusive nature provided it is modified to reflect WHIP cost-share payments instead of easement payments as follows:
 - **“Environmental Services Credits for Conservation Improvements. USDA recognizes that environmental benefits will be achieved by implementing conservation practices, measures, and activities funded through [WHIP] and that environmental credits may be gained as a result of implementing activities compatible with the purposes of a [WHIP] cost-share agreement, contract or restoration agreement. NRCS asserts no direct or indirect interest on these credits. However, NRCS retains the authority to ensure the requirements of a [WHIP] contract, cost-share agreement, or restoration plan are met consistent. Where activities required under an environmental credit agreement may affect land covered under a [WHIP] restoration cost-share agreement, or contract, an amendment to the restoration agreement or contract, or a compatible use approval may be required and participants are highly encouraged to request a compatibility assessment from NRCS prior to entering into such environmental credit agreements.”**