



# United States Department of the Interior

FISH AND WILDLIFE SERVICE  
Washington, D.C. 20240



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Gregory Johnson, Director  
Financial Assistance Programs Division  
United States Department of Agriculture  
Natural Resources Conservation Service  
Wildlife Habitat Incentives Program Comments  
P.O. Box 2890, Room 5237-S  
Washington, D.C. 20013

Dear Mr. Johnson:

The Fish and Wildlife Service (Service) has reviewed the Natural Resources Conservation Service's interim final rule amending regulations for the Wildlife Habitat Incentives Program (WHIP) and offers the enclosed comments for your consideration. The comments are submitted in response to the publication and request for public comments on the EQIP interim final rule in the *Federal Register* on January 16, 2009, (Vol. 74, No. 11, Pages 2786-2800). The interim final rule makes changes to the WHIP regulations resulting from enactment of the Food, Conservation and Energy Act of 2008 and to simplify the regulation and improve program efficiency.

We appreciate the opportunity to review and comment on the interim final rule. Please contact me at (703) 358-2011, or Dave Walker, Farm Conservation Programs Coordinator at (703) 358-2310, if you have any questions or need further information.

Sincerely,

David J. Stout  
Chief, Division of Habitat and Resource  
Conservation

Enclosure

TAKE PRIDE  
IN AMERICA 

**Fish and Wildlife Service Comments on the Interim Final Rule for the  
Wildlife Habitat Incentives Program (WHIP)**

April 17, 2009

Page 2788, Discussion of Program

In the first paragraph, third sentence, the Service recommends the addition of the term “at-risk species” as defined below in our comments on Section 636.3.

“Through WHIP, NRCS provides technical and financial assistance to participants to develop upland, wetland and aquatic wildlife habitat, as well as fish and wildlife habitat on other areas, and to develop habitat for **at-risk species, which include** threatened and endangered species.”

This change reflects the broader approach to conservation of at-risk species identified by the WHIP national priorities.

Page 2795, Section 636.3 Definitions

The Service recommends the following revision to the definition of agricultural lands:

*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, **or are capable of being produced**. Agricultural lands may include, **but are not limited to** cropped woodland, **wetlands, riparian areas**, incidental areas included in the agricultural operation, and other types of land used for, **or suitable for, agricultural** production.

Page 2795, Section 636.3 Definitions

The Service recommends the following addition to the definition of at-risk species:

*At-risk species* means any plant or animal species that is: **1) listed as endangered or threatened under the Endangered Species Act (ESA), 2) proposed for listing under the ESA, 3) a candidate for listing under the ESA, 4) likely to become a candidate for listing in the near future, 5) listed as endangered or threatened (or similar classification) under State law, 6) a State species of conservation concern, or 7) other species** determined by the State Conservationist, with advice from the State Technical Committee, to need direct intervention to halt its population decline.

The recommended change is consistent with the definition of species at-risk contained in the MOU among the Service, the NRCS and the Association of Fish and Wildlife Agencies for the conservation of species at-risk which was signed in February 2007.

Page 2795, Section 636.3 Definitions

Although the rule defines Indian land and Indian tribe, the Service recommends the addition of a definition for *trust lands* that includes Hawaiian Homelands and Pacific Insular Areas. Section 6105 of the Farm Bill, entitled Substantially Underserved Trust Areas, refers to the definition of trust lands found in 38 USC Section 3765 (Veteran's Benefits).

*Trust lands* means land that:

- (A) is held in trust by the United States for Native Americans as that term is defined in 38 U.S.C. 3765 (3);
- (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 of the Interior.

Page 2797, Section 636.4 Program requirements

The Service recommends adding “**including trust land**” after “Indian land” in paragraph 636.4(11)(b)(3) and adding “**unless held in trust**” after “public lands” at the end of 636.4 (c)(4) to accommodate Hawaiian Homelands and Pacific Island Insular Areas as lands that may be considered for enrollment in WHIP.

With regard to the categories of eligible lands in section 636.4 (b), we recommend clarification that rivers, streams and other aquatic habitats on private agricultural lands are eligible for WHIP, even in states where waterways are considered property of the State. These habitats are an integral part of the landscape and the participant’s agricultural or forestry operation, and can be suitable for habitat development, including habitat development for the benefit of at-risk species, which are identified as a national priority for WHIP.

With regard to ineligible lands in section 636.4 (c), the Service recommends that lands owned by a state that are held in trust for the beneficiaries of the State’s education system be excluded from the category of public lands ineligible for WHIP cost-share assistance.

The determinations made by NRCS in section 636.4 (c) regarding ineligible lands should be made in coordination with the Service and the appropriate State fish and wildlife agencies.

Page 2798, section 636.7(d) Cost-share payments

The Service recommends the following revision to the identification and public notice of eligible conservation projects under 636.7 (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 development and implementation of conservation activity plans including grazing, haying, forestry and crop stubble management.”

Page 2798, Section 636.7(f) Cost-share payments

This paragraph should clarify that multi-year contracts totaling more than \$50,000 are permitted as long as payments in any year do not exceed the \$50,000 per year payment limit.

Page 2798, Section 636.7(h) Cost-share payments

The interim final rule allows NRCS to adjust payment rates for conservation practices scheduled after the year of contract obligation to reflect increased costs. The Service supports this provision and recommends clarification that it applies to existing contracts, including those cost-share agreements obligated prior to publication of the interim final rule.

Page 2798, Section 636.9 (c) (2) Cost-share agreements

To avoid confusion with the term “critical habitat” as used in the ESA, the Service recommends replacing the word “critical” in paragraph 636.9(c)(2) with another term to describe the plant and animal habitat to be protected and restored under long-term WHIP contracts of 15 years or more. For example, on page 2789 of the summary, the term “...essential plant and animal habitat...” is used to describe the provision allowing use of program funds for long-term agreements.

We recommend replacing the word “critical” with “essential” and recommend that NRCS coordinate with the Service and appropriate State fish and wildlife agency in making the determination of essential habitat in 636.9(c)(2).

Page 2798, Section 636.11 Transfer of interest in a cost-share agreement

The responsibility of notifying NRCS of a loss of control of the land should be limited to the term of the agreement by adding “...during the term of the agreement.” at the end of 636.11(a).

In 636.11 (b), the term “producer” should be changed to “participant” and for consistency this change should be made throughout the WHIP interim final rule.

Page 2799, Section 636.17 Compliance with regulatory measures

This section should clarify that participants will not receive cost-share payments until all local, state and federal permits are obtained.

Page 2800, Section 636.21 Environmental services credits for conservation improvements

In addition to ensuring the requirements for WHIP improvements are met, NRCS also needs to ensure that activities associated with any credit agreements will not defeat the program’s purposes. Suggested changes to the third sentence of the paragraph are underlined:

“However, NRCS retains the authority to ensure that **program purposes are met** **and** that the requirements for WHIP funded improvements are met consistent with 636.8 and 636.9.”