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Nebraska Game and Parks Commission

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Wildlife Habitat Incentives Program (WHIP) Comments

General Comments:

The Commission appreciates the opportunity to provide comments on USDA's Wildlife Habitat Incentives Program (WHIP). 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. We look forward to working diligently with the Natural Resources Conservation Service (NRCS) to assist in delivering this important program to landowners and its benefits to the American taxpayers.

We support the current interpretation of the definition of agricultural lands being used in implementation of this rule. The current interpretation is fully inclusive of all lands which comprise part of an agricultural operation. However, to provide clarity and consistency in implementation, we've recommended modifications to the definition of eligible land in the rule. Without explicit definition in the rule, alternate interpretations at the national or state level could adversely affect landowner participation and NRCS's ability to implement WHIP.

USDA is to be commended for the continuation of the national priority to restore native fish and wildlife; as a focus on non-domesticated species is critical to meeting the program's purpose. However, new changes in the law may require more creativity from NRCS state and local offices implementing WHIP in order to accomplish the program purposes while meeting Congressional intent. More explicit limitations tied to land-ownership will make implementing wildlife practices focused on habitat/species/priority areas more difficult, especially in rivers, streams, and other aquatic systems where the watercourses are considered a public resource, even though they are surrounded by privately owned lands. WHIP needs the flexibility to produce desirable benefits and outcomes for fish and wildlife that do not place an unfair burden on participants. The ability to offer WHIP cost-share and activity payments to agricultural operators is needed, as wildlife practices are often an additional cost for producers that do not provide any cost-benefit to the landowners operation. Therefore, creative uses of cost-

share, activity and other payments would make participation in these initiatives more appealing and make it financially possible for more producers to complete wildlife practices and help fish, wildlife, and their habitats.

SECTION BY SECTION COMMENTS AND RECOMMENDATIONS:

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. WHIP is not utilized more by landowners in the past because of insufficient marketing and outreach efforts. It will be beneficial to landowners, NRCS and its conservation partners to clarify in policy that marketing and outreach components are eligible for, 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 fish and wildlife 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. We recommend 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 are not restricted to, associated** ~~cropped~~ **woodlands, marshes, wetlands, riparian areas, and in-stream habitats, 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:** NRCS continues to work with Federal and State partners to increase benefits delivered for fish, wildlife, and their habitats through their conservation programs. For consistency, we recommend using the definition jointly developed and included in the signed MOU between Association of Fish and Wildlife Agencies (AFWA), NRCS and the US Fish and Wildlife Service (FWS) to proactively conserve at-risk species and their habitats:
 - **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; State species of conservation concern; and any plant or animal species as determined by the State Conservationist, with advice from the State Technical Committee, needing direct intervention to halt its population decline.**

- **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” as well as “Indian land” in the 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 bullets from 38 USC (Veteran’s Benefits) Section 3765 Definitions

- **Indian tribe:** Because of the diversity of Indian tribes and to be as inclusive as possible across all 50 states and territories, we recommend incorporating “including Hawaiian Homelands and Pacific Insular Areas” into the definition of Indian tribe in the final rule.

- **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 current definition of land eligibility leaves gaps that needs to be clarified in the final rule to avoid creating problems 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(s) 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 wildlife species (including species of greatest conservation need), are vital to ecosystem health, and often require management to provide important 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. Landowners need an option 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 even in States where waterways are considered property of the State. A landowner who is willing to perform instream modifications, improve aquatic habitat and conduct streambank stabilization that benefits the both the participant and wildlife should be eligible for cost-share funds for such activities through WHIP. The Association 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 fish and wildlife.”**
- **(b) Eligible land includes:** We recommend 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 wildlife issues. In cases where NRCS makes ineligible land determinations, they should coordinate with the State fish and wildlife agency and the FWS to ensure at-risk species, conservation practices or important habitat components 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:
 - **Recommendation:** NRCS, after coordination with the state fish and wildlife agency and the FWS, shall not provide cost-share assistance 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 conditions that would appear to be unenforceable in a WHIP contract and will be impossible for the agency to manage effectively. A more constructive approach would be to allow State NRCS offices to offer higher cost-share rates to expediently 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, this provision should be removed.**

- **Instead, we propose NRCS should provide each State Conservationist the flexibility to offer higher cost-share rates during certain years of a contract to motivate completion of conservation practices or encourage completion of more complex conservation projects that take longer than 2 years to complete.**

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 where 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 could unintentionally and adversely affect conservation efforts in areas of higher rainfall. 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. 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)** We commend 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 written in the final rule.

636.7 Cost-share payments

- (d) We recommend NRCS modify this provision to allow input from the State Technical Committee, encompass working lands activities, and to read as follows:
 - **(d) NRCS, in consultation with the STC, will identify and provide public notice of the conservation practices eligible for payment under the program. Conservation practice payments may consider foregone income eligible for payment under the program may include development and implementation of conservation activity plans for practices such as including deferred grazing/haying, crop stubble management, and forestry**

planning/ and management if they are necessary to enhance or maintain fish and wildlife habitat.

- (f) The provision needs clarification to avoid confusion in interpretation. While this annual payment limitation will reduce the program's effectiveness and applicability for some strategic habitat initiatives and fish and wildlife conservation priorities across the country, the change in rule reflects a change in the law made by Congress.
 - 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."**
- (h) 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) NRCS should track the 25 percent designation of funds allocated for contracts for a term of at least 15 years at the National program level. 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 wildlife issues; it would be onerous and could 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. We recommend the following:
 - **(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 phrase "essential or important plant and animal habitat" should be used instead of "critical plant or animal habitat." 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:

(8) “deferment shall be eligible for payments for foregone income 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 following provision should be added to the final rule:
 - **(9) No cost share payment shall be made to a participant until all local, state, and federal permits are obtained and on file with NRCS.**

636.10 Modifications

(b) We commend 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, we recommend 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, “**producer**” **should be changed to “participant” in this section** 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 Association 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) Because NRCS does not require documentation of permits required for projects, the potential exists for NRCS to fund projects that have not been permitted by the appropriate regulatory agency. 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 subject to local, state and federal permitting requirements. We recommend adding to this section that:

... no cost-share payments should 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).

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.

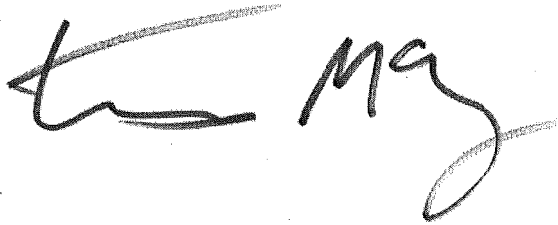
- For clarification purposes, **we recommend adding "including TSPs"** after "NRCS representative in the first sentence" so that program participants know TSPs shall have the right to enter the premises.
- **We recommend changing "agricultural operation or tract"** in the first sentence to **"a participant's 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."

Thank you for the opportunity to provide comments on these important issues.

A handwritten signature in black ink, appearing to read "Tim McCoy". The signature is stylized with a large, sweeping initial "T" and a long, trailing flourish.

Timothy McCoy, Ag Program Manager
On behalf of the Nebraska Game and Parks Commission