INSIDE

Solicitation of articles: All AALA members are invited to submit articles to the Update. Please include copies of decisions and legislation with the article. To avoid duplication of effort, please notify the Editor of your proposed article.

IN FUTURE ISSUES

New Conservation Reserve Program good faith reliance and excessive rainfall rules

The Farm Service Agency (FSA) has published final rules in the *Federal Register* amending the Conservation Reserve Program (CRP) regulations to permit the FSA Deputy Administrator to except CRP participants from being sanctioned for their breach of their CRP contract. In general, these exceptions apply in the following circumstances:

1. When the participant has violated the contract as a result of his or her good faith reliance on action or advice of an USDA authorized representative; and
2. When the participant has failed to perform the contractual obligation to plant or establish a crop as a result of excessive rainfall.

See 67 Fed. Reg. 2,131, 2,132 (Jan. 16, 2002) (to be codified at 7 C.F.R.§§ 1410.54, 1410.20(a)(2)).

The CRP is one of the four major agricultural conservation programs. Its purpose is to cost-effectively assist owners and operators in conserving and improving the environment, mainly soil, water, and wildlife resources, by taking land out of production and planting it to a long-term vegetative cover. Enrollment in the CRP requires participants to enter into a 10 to 15 year contract during which land is taken out of production in exchange for annual payments. Also, cost-share assistance is available to help enhance certain conservation practices. *See generally* 7 C.F.R. Part 1410.

Good faith reliance

Under the first of the recently published rules, "[t]he Deputy Administrator may provide equitable relief to a participant who has entered into a contract under this chapter, and who is subsequently determined to be in violation of the contract, if the participant, in attempting to comply with the terms of the contract and enrollment requirements, took actions in good faith reliance upon the action or advice of an

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Ninth Circuit dismisses suit challenging Agricultural Marketing Agreement Act producer-handler exemption

The Ninth Circuit Court of Appeals has ruled that United Dairymen of Arizona ("UDA") and Shamrock Farms, who brought their action as Arizona milk producers, lacked standing to bring a direct suit challenging the milk marketing order producer-handler exemption in the Agricultural Marketing Agreement Act (AMAA) of 1937, 7 U.S.C. §§601-626 (2001). *United Dairymen of Arizona v. Veneman*, 279 F.3d 1160 (9th Cir. 2002). The court reasoned that a producer had standing only when a handler would not have standing to bring the action. Because the court found that the challenge brought by UDA and Shamrock could have been brought by a handler, UDA and Shamrock—in their capacity as producers—lacked standing to seek judicial review. *See id.* at 1165-66. In addition, because the court also found that UDA, a cooperative, was a handler as well as a representative of its producer members and that Shamrock was related to the handler to whom it marketed its milk, they should not be permitted to evade the required AMAA administrative

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authorized USDA representative ...." 67 Fed Reg. at 2,132 (to be codified at 7 C.F.R. 1410.54 (b)(1)).

As used in this rule, "equitable relief" means that the FSA may permit the participant to do one or more of the following:

(i) Retain payments received under the contract;

(ii) Continue to receive payments under the contract;

(iii) Keep all or part of the land covered by the contract enrolled in the applicable program ...;

(iv) Re-enroll all or part of the land covered by the contract in the applicable program ...;

(v) Any other equitable relief the Deputy Administrator deems appropriate.

Id. at 2,132 (to be codified at 7 C.F.R. 1410.54 (b)(2)).

Equitable relief is available only to participants who take the actions required by the Deputy Administrator "to remedy any failure to comply with the contract". *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.54 (b)(3)).

Equitable relief is not available when both the advised participant and the USDA representative knew, or should have known, that their conduct clearly violated the CRP provisions. *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.54 (b)(3)). This new rule applies only to contracts in effect on January 1, 2000, or thereafter. *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.54 (b)(4)).

Excessive rainfall

The second new rule is an amendment to 7 C.F.R. §1410.20 that deals with the obligations of the participants in implementing the conservation plan required under a CRP contract. The new provision provides that a CRP "contract will not be terminated for failure to establish an approved vegetative or water cover on the land if as determined by the Deputy Administrator: (i)The failure to plant or establish such cover was due to excessive rainfall or flooding ...." *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.20(a)(2)(i)). This protection against contract termination is conditioned by the requirement that "[t]he land subject to the contract on which the participant could practicably plant or establish to such cover is planted or established to such cover; and [the] land the participant was unable to plant or establish such cover is planted or established to such cover after the wet conditions that prevented the planting or establishment subside." *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.20(a)(2)(ii,iii)).

The rule does not define "excessive rainfall." The amended regulations, however, add a new definition of the term "violation." The term "violation" now means "an act by the participant, either intentional or unintentional, that would cause the participant to no longer be eligible for cost-share or annual contract payments." *Id*. at 2,132 (to be codified at 7 C.F.R. 1410.2).

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Correction

The FCIC's Standard Reinsurance Agreement by Scott Fancher that appeared as an In Depth article in last month's *Agricultural Law Update* was sponsored by the National Center for Agricultural Law Research and Information (NCALRI) at the University of Arkansas School of Law, Fayetteville, Arkansas. Acknowledgement of this sponsorship was inadvertently omitted, as was the following disclaimer: "This material is based on work supported by the U.S. Department of Agriculture, under Agreement No. 59-8201-9-115. Any opinions, findings, conclusions, or recommendations expressed in this publication are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture." Any reproduction or republication of this article must be accompanied by an acknowledgment of its sponsorship and this disclaimer.

AMAA/*Cont. from p. 1*

processes for challenging milk marketing orders available to handlers. *Id.* at 1166.

The AMAA authorizes the regulation of regional raw milk prices through federal milk marketing orders. Milk marketing orders establish minimum prices that milk processors must pay producers for milk within the order region. Under the AMAA, these processors are known as "handlers." *See id.* at 1162.

The minimum prices established by milk marketing orders are based on the particular "class" for which the milk is used. Milk used for drinking is considered Class I milk, and it commands the highest price. Milk not used for fluid purposes is manufactured into Class II soft dairy products such as yogurt, cottage cheese, and ice cream and Class III products such as butter, powdered milk, and some hard cheeses. Class III milk commands the lowest price. Despite the different class prices, milk producers are guaranteed a uniform minimum price for their milk. This price is known as the "blend price." *See id*.

The blend price is based on a weighted average of all the class prices of the milk marketed within the order region. A pooling mechanism commonly known as the producer-settlement fund is used to ensure that all handlers contribute equitably to the sums that will be used to pay the minimum blend price to producers. *Id*. In general, handlers who use milk for Class I and Class II products pay into the producer-settlement fund while handlers

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Animal welfare

Numerous groups have expressed a viewpoint that some of the changes occurring in the production of animals threaten the well-being of humanity. Some European countries have placed restrictions on the use of animals for research, outlawing the production of animals for fur, and preclude egregious confinement situations. In the U.S., groups are calling for legislation eliminating the use of animals for research and for the elimination of certain confinement practices. Other issues include animal cruelty in circuses, rodeos, and other settings.

Value systems have expanded so that some people are concerned with how animal production takes place, whether we should be allowed to genetically manipulate animals, and duties owed to animals. A major issue is the suffering of the 25 million vertebrate animals currently held in U.S. laboratories for biomedical research, for testing drugs, vaccines and consumer products, and for education. Groups such as the Humane Society of the United States promote non-animal research methods to reduce and eliminate harm to animals, such as forgoing the use of mice for producing monoclonal antibodies.

Other groups have more focused agendas. The group, People for the Ethical Treatment of Animals, has been quite successful in bringing examples of asserted animal mistreatment before the public and forcing corporations to alter practices. McDonald's, Burger King, and Wendy's have ended practices following intense pressure from this animal rights group.

More serious concerns exist about genetically modifying animals. Genetic modifications for the purpose of studying a disease can have negative effects or unintended effects that cause the animals to suffer. Genetic manipulation to produce organs for transplant into humans presents a more dramatic example of animals serving as objects for human benefit.

For concentrated animal feeding operations, the question for animal rights activists is not whether producers are being cruel to their animals, but, rather, are animals suffering. Three production procedures have been proposed as indicators of excessive suffering. First, animal diets and conditions may exacerbate diseases. Second, the lack of individual attention to animals may mean that a producer is unaware of an injured animal. Third, confinement may lead to physical and psychological deprivation for animals. These conditions have caused some to argue for a new ethic to address the welfare of confined animals. In Florida, a group advocating the humane treatment of animals is seeking to amend the state constitution to ban the caging of pregnant sows.

While enacting new legislation forbidding certain practices may be forthcoming, a more likely response will be consumer movements towards "greener" crops. All natural, antibiotic-free products are now available under a label from the American Humane Association's "free-farmed" certification. Similar standards are prescribed by the British Royal Society for the Prevention of Cruelty to Animals. While antibiotics are allowed for disease treatment for individual animals, subtherapeutic antibiotics and mammalian-derived protein is prohibited. Other regulations cover items such as castration, tail docking, weaning, and housing conditions.

— Terence J. Centner, Professor, The University of Georgia

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who use milk for Class III products withdraw from the fund. *See* Kenneth W. Bailey, *Marketing and Pricing of Milk and Dairy Products in the United States* 130 (1997).

Producer-handlers are vertically integrated dairy businesses that process and market dairy products from milk produced by their own cows. Under the AMAA, producer-handlers are neither required to participate in the producer-settlement fund nor to pay the minimum prices established by the marketing order for their region. This exemption gives producer-handlers the advantage of realizing the higher prices commanded by Class I milk products without having to pay the minimum order price or to contribute to the producer-settlement fund. *See United Dairymen of Arizona*, 279 F.3d at 1162. In addition to giving producer-handlers this advantage over non-exempt handlers, the exemption also reduces the blend price paid to producers. *See id*. at 1163.

In *United Dairymen of Arizona*, plaintiff UDA was a cooperative that processed milk produced by its members. Thus, as the court observed, it was "representing its producers' interests [and] also its handler['s] interests." *Id*. at 1164. Plaintiff Shamrock was a producer, but it was related to a separate business, Shamrock Foods, that purchased its milk. Both apparently contended that they were adversely affected by the producer-handler exemption granted to Sara Farms Dairy, L.L.C. Their challenge, however, was directed at the producer-handler exemption itself. They alleged that the producer-handler exemption is invalid under the AMAA and that it violates the equal protection guarantees of the Fifth Amendment. *See id*. at 1162-63. Because the court ruled that UDA and Shamrock lacked standing to bring this action, the merits of these contentions were not addressed by the court.

UDA's and Shamrock's standing was at issue because the AMAA does not provide for an administrative mechanism whereby producers can challenge a milk marketing order. Only handlers have an express right to challenge marketing orders through administrative review. *See id.* at 1164 (citing 7 U.S.C. § 608(c)(15)(A). The final agency order resulting from that review is subject to judicial review. *See id*.

The question presented, therefore, was whether UDA, a producer who was also a handler, and Shamrock, a producer who was associated with a handler, could challenge the producer-handler exemption through a direct action. The Ninth Circuit, in affirming the district court's dismissal of the action, ruled they could not.

The Ninth Circuit drew much of its

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Conference Calendar

KSU-Southern Plains Agricultural Law Symposium.

May 9-10, 2002.

Plaza Inn, Garden City, Kansas.

Sponsored by Kansas State University.

Topics include: farm income taxation; the structural transformation of agriculture, private property rights, estate planning and others.

For more information, call Marcella Budden, 285-532-1501.

Protecting Our Farmland Workshop.

May 21-23, 2002.

Oklahoma State Regents Conference Center, Poteau, Oklahoma.

Sponsored by: The Kerr Center for Sustainable Agriculture; The American Farmland Trust; and The Trust for Public Land.

For more information, call 918-647-9123.

Notes on the USDA Wildlife Habitat Incentives Program (WHIP)

By Ada Popescu

"Fifty percent of the United States, 907 million acres, is cropland, pastureland, and rangeland owned and managed by farmers and ranchers and their families." The management of this vast amount of the nation's land affects more than the prosperity of the nation's agricultural sector. It also has an impact on wildlife populations because "land use is the principal factor affecting [wildlife] habitat."

There are an estimated 100,000 native species of wildlife in the United States. Some of these species have thrived on or near agricultural lands. Others have not fared as well. Agriculture has been identified as a contributing factor for endangering or threatening forty-two percent of the 631 plant and animal species listed as endangered or threatened in the United States in 1998. Agriculture, along with other human activities that alter natural landscapes, has also played a role in the decline in biodiversity in North America. For example, the monarch butterfly, "an indicator species reflective of the general threat to biodiversity," faces habitat losses that include those resulting from the use of pesticides on and near the milkweed plants that are essential for its nourishment and reproduction.

Just as agriculture can adversely affect wildlife, some wildlife species can harm agriculture. Cormorants, for example, have caused substantial financial losses for aquaculture operations in the South and elsewhere because of their growing population and appetite for farm-raised fish. Nevertheless, many wildlife species and agriculture can coexist, and the presence of wildlife on our nation's farms and ranches can provide economic and non-economic benefits to farmers and ranchers.

For most of its history, the United States Department of Agriculture (USDA) has not administered programs designed to improve wildlife habitat on agricultural lands. Instead of focusing on wildlife populations, the USDA conservation programs have been directed primarily at conserving soil and water and improving water quality. The oldest of these programs, the Agricultural Conservation Program (ACP), began in 1936. The ACP provided cost-share funds and technical assistance to farmers who carried out approved conservation and environmental protection practices on agricultural land and farmsteads. The Environmental Quality Incentive Program (EQIP) replaced ACP in 1996.

The ACP was followed by other conservation initiatives. In 1985, Congress authorized the Conservation Reserve Program and enacted commodity program provisions designed to conserve highly erodible lands and wetlands, respectively known as the "sodbuster" and "swampbuster" provisions. Although these programs affect wildlife habitat, their stated purposes either omit wildlife habitat protection as a goal or couple wildlife habitat protection with other desired ends. The swampbuster provisions and the subsequently created Wetland Reserve Program, for example, coupled wildlife habitat protection with water purification as program goals.

The only program under the USDA's jurisdiction that specifically and primarily addresses wildlife habitat conservation is the Wildlife Habitat Incentives Program (WHIP). This program, which is administered by the USDA's Natural Resources Conservation Service (NRCS), provides cost-sharing assistance to landowners for developing habitat for upland and wetland wildlife, threatened and endangered species, fish, and other types of wildlife.

The WHIP

The WHIP is a relatively new program. It was created in 1996 with the enactment of the Federal Agriculture Improvement and Reform Act of 1996 (FAIR Act). The FAIR Act directed the Secretary to establish the WHIP under the supervision of the NRCS. Congress also provided that the Secretary was to use WHIP to "make cost-share payments to landowners to develop upland wildlife, wetland wildlife, threatened and endangered species, fish, and other types of wildlife habitat approved by the Secretary." The authorized funding of $50 million for fiscal years 1996 through 2002 was drawn from funds that previously had been authorized for the Conservation Reserve Program.

The NRCS published final rules implementing the WHIP on September 19, 1997. These rules are now codified at 7 C.F.R. Part 636.

Following the promulgation of the final WHIP rules, WHIP funds were allocated among the states based on plans developed by the NRCS State Conservationists in consultation with their respective State Technical Committees. Special consideration was given to locally led initiatives with substantial outside funding and partnership participation. Of the available $50 million, $30 million was distributed in 1998 for 4,600 projects affecting 672,000 acres and $20 million in 1999 for 3,855 projects on 721,249 acres. WHIP projects averaged 146 and 187 acres in size in 1998 and 1999, respectively, and $4,600 in cost-share expenditures.

General WHIP requirements

The WHIP regulations generally provide that potential participants who own or control eligible land and who are willing to join the program must prepare and apply in practice a wildlife habitat development plan. The NRCS will evaluate the plan and its wildlife benefits. If the plan is viable, the NRCS will provide participants with the technical and financial assistance they need to efficiently implement the practices that will enhance wildlife habitat development on their land. In addition, if the landowner agrees, state wildlife agencies and nonprofit or private organizations may provide expertise or extra funding to help complete a project or improve its performance.

More specifically, WHIP participants must do the following:

1. Establish and comply with a Wildlife Habitat Development Plan;
2. Enter into a cost-share agreement with the NRCS;
3. Provide the NRCS with evidence of ownership or legal control over the land to be enrolled in the program for the enrollment period, unless an exception is made by the NRCS Chief;
4. Provide the NRCS with information necessary to assess the project and its future benefits; and
5. Allow NRCS representatives access to the land for periodic monitoring of the implementation of the WHDP.

Eligible land

In general, all lands can be enrolled in the WHIP except:

- Federal land;
- Land currently enrolled in a conservation program such as the Conservation Reserve Program, the Wetlands Reserve Program, or the Water Bank Program where wildlife habitat objectives have been sufficiently met;
- Land subject to an Emergency Watershed Protection Program floodplain easement; and
- Land where the NRCS determines that a conservation plan will not be successful as a result of on-site and off-site conditions or that a conservation plan will adversely affect threatened and endangered species.

WHIP funds are intended to enhance wildlife habitat on private lands. Never-

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theless, an NRCS State Conservationist, in collaboration with the State Technical Committee, can enroll other lands. Non-federal public lands can be enrolled when significant wildlife habitat gains can be achieved only by installing practices on them. For instance, an aquatic habitat restoration project could involve the enrollment of state lands if the state owned the affected stream or the lake bottom. Federal land, however, can be enrolled only when its enrollment is necessary to achieve wildlife benefits on private land. Tribal lands, even if they are federal trust lands, are eligible for enrollment in the WHIP.

Priority for enrollment

Because WHIP funds are limited, not all eligible lands can be enrolled in the WHIP. NRCS State Conservationists, in collaboration with their respective State Technical Committees, may restrict enrollments to specific geographic areas or target only certain habitats and species of wildlife.

In general, however, priorities for enrollment are established according to the following criteria:

(1) Contribution to resolving an identified habitat problem 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 wildlife habitat development activities; and

(7) Other factors determined appropriate by NRCS to meet the objectives of the program.

Some or all of these criteria will be taken into account when determining whether land will be enrolled. If these criteria are not sufficiently met, the State Conservationist, in consultation with the State Technical Committee, may deny an application. NRSC representatives are granted this power to allow them to deny cost-share funds to projects that are technically eligible but do not meet the wildlife goals of WHIP.

The Wildlife Habitat Development Plan (WHDP)

The Wildlife Habitat Development Plan (WHDP) is a central part of the cost-share agreement between the participating landowner and the NRCS. The WHDP is developed by the participant with the assistance of the NRCS or other public or private natural resource professionals. The plan must describe the landowner's wildlife habitat goals and include a list of practices to be used to meet these goals. A schedule for implementing the specified practices is also required. The participant must explain in detail how wildlife benefits will be achieved and secured during the life of the cost-share agreement. The plan can be only a part of a larger conservation plan or an independent one. The NRCS has the power to approve the modification of the initial plan if the modification is acceptable to the parties and will achieve the desired goals.

The cost-share agreement

If the WHDP is approved, the prospective participant is eligible to enter into a cost-share agreement with the NRCS. This agreement stipulates the rights and obligations of the parties.

The duration of the agreement can vary between five to ten years. The term can be less than five years if the NRCS Chief determines that "wildlife habitat is threatened as a result of a disaster and emergency measures are necessary to address the potential for dramatic declines in one or more wildlife populations."

The agreement must incorporate the approved WHDP. In addition, the agreement must contain the requirements for operating and maintaining the wildlife habitat as provided in the plan.

The initial agreement can be modified with NRCS approval as long as WHIP objectives are met and the parties agree. The agreement can also be modified to reflect a change in the ownership or operation of the land if the new owner or operator agrees to assume the responsibilities borne by the owner or operator under the agreement.

Cost-share payments

The NRCS may provide up to 75% of the costs incurred by the participant when implementing the conservation plan. This percentage can be reduced if another federal agency is providing direct assistance to the project, except if the State Conservationist determines that an increase is merited to achieve the goals of the WHIP.

Cost-share payments may be used to establish new practices or additional practices. They may also be used to maintain existing practices or replace earlier ones if the NRCS determines that they are needed to meet WHIP objectives or that the original practice failed to improve wildlife habitat for reasons beyond the participant's control.

Payments are made after the practice has been installed according to the specifications in the WHDP. The Sate Conservationist or State Technical Committee specialists will inspect the land and assess the practices. WHIP cost-share payments may be assigned.

WHIP area restrictions and agreement termination

After enrolling in the program, participants still retain control over their land. The NRCS, however, can restrict the use of certain practices or activities in the WHIP area. These restrictions can include deferring haying until after nesting season is over, limiting grazing at certain times of the year to provide brood cover, excluding livestock to allow woody planting to develop, and prohibiting burning in areas close to inhabited areas.

A cost-share agreement can be terminated by the mutual consent of the parties in three specific situations:

1. The parties are unable to comply with the terms of the agreement as a result of conditions beyond their control;

2. Parties will suffer serious hardship if they continue to comply with the contractual terms; or

3. Termination of the agreement is in the public interest, as determined by the State Conservationist.

In these situations, the State Conservationist can allow the participant to keep all cost-share payments previously received in an amount proportionate to the participant's efforts toward complying with the agreement.

Violations and sanctions

Even though program participation is voluntary, participants have to comply with the cost-share agreement once they are parties to it. Non-complying participants face sanctions meant to ensure that participants abide by the agreement.

When the NRCS discovers a violation, it will notify the participant and give the participant an opportunity to correct the violation within thirty days of the date of the notice. Additional time will be provided at the discretion of the NRCS.

The sanction for non-compliance with the notice is the refund of all or part of any assistance received by the participant, plus interest and the forfeiture of all rights for future payments. The same sanction applies if the participant misrepresents facts affecting program determinations.

WHIP successes

To date, the WHIP has been focused on three main types of habitat: upland wildlife habitat, wetland wildlife habitat, and riparian and in-stream aquatic habitat. These different habitats have required different practices.

Upland wildlife habitat, especially grasslands, has required various types of seeding and planting, fencing, livestock management, prescribed burning, and

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shrub thickets with shelterbelts. Practices on forest lands have included creating forest openings, different types of disking and mowing, woody cover control, aspen stand regeneration, and the exclusion of feral animals.

The protection of wetland habitat has included the installation of culverts or other water control structures, fencing, moist soil unit management, invasive plant control, and the creation of greentree reservoirs and shallow water areas.

Riparian and in-stream habitat protection was needed mainly in the southeastern United States and required tree plantings, seeding, fencing, in-stream structures, stream bank stabilization and protection, stream deflectors, alternative watering facilities, the creation of small pools and fish passages, installation of buffers, the removal of dams, and the establishment of in-stream structures such as logs or rocks.

These different activities are ultimately interrelated with respect to ecosystem improvement. "For instance, proposed work on a native plant communities in longleaf pine ecosystem also was recorded as applying to economically important and threatened and endangered species (e.g., northern bobwhite quail and red-cockaded wood-pecker, respectively)."

Although NRCS offices have adopted different approaches in their WHIP plans based on the unique needs of their area's wildlife habitats, some interstate cooperation has occurred. One example is Connecticut River watershed restoration project. This project used WHIP funds to restore and protect the riparian ecosystem of Connecticut River in four states: Connecticut, Massachusetts, New Hampshire, and Vermont. A unique, multistate cooperative agreement, the Connecticut River Conservation District Coalition (CRCDC), was formed as part of the WHIP operative plan. The main sources of financial assistance and technical expertise to participating landowners were the NRCS and United States Department of Interior's Silvio O. Conte Fish and Wildlife Refuge. Enthusiastic watershed landowners and private groups became involved by submitting projects in all four states for which the costs and benefits of the riparian habitat restoration would be shared.

The WHIP has provided cost-sharing for eight different ecosystems. Significant riparian forestland projects were implemented along the Ashuelot River in New Hampshire and the West River in Vermont. Significant grassland projects have been started in Amherst, Massachusetts, and Northwest Park, Connecticut. These ecosystems were identified as having high environmental potential, serving as food, cover, and nesting sites for many migratory birds and mammals and sheltering different species of native trees, shrubs, and grasses adjacent to a body of water.

In Kentucky, the WHIP was used to restore and protect grasslands and wetlands habitat for bobwhite quail, eastern cottontail rabbit, eastern kingbird, loggerhead shrike, prairie warbler, grasshopper sparrow, and many more. The program generated outstanding interest from over 750 landowners across the state. Habitat was improved on over 13,300 acres, mainly native grassland/prairie. In addition, a special partnership was established between the NRCS and the Kentucky Department of Fish and Wildlife Resources, intended to further develop WHIP plans and assist its applicants. One of the partnership's goals is to ensure that wildlife benefits will be part of planning for all USDA conservation programs in Kentucky.

In Iowa, WHIP plans were designed to support shelterbelts, riparian corridors, and grassland restoration and development. The main focus was on rebuilding habitat for the prairie chicken and on enhancing natural trout reproduction in twenty-five streams around the state. Both projects have had good results and have opened the way to other initiatives concerning wildlife protection.

WHIP funding was also used in the Souadabscook Stream Restoration Project in Maine, which involved the removal of a small, out-service-dam to restore the Atlantic salmon and trout habitat and the scenic beauty of the landscape. In Washington state, a Walla Walla River conservation project was initiated under the WHIP. After 700 hours of volunteer work, buffers were installed and the banks of the river were planted with a mix of trees and shrubs that in time will shade the river and help maintain a constant low water temperature. The result will be highly beneficial for bull trout proliferation and for the endangered steelhead migration.

Successes such as these are largely attributable to the well-defined WHIP goal of improving wildlife habitat in a manner that allows for flexibility and avoids administrative complexity. The WHIP has also benefitted from sustained cooperation and coordination between the NRSC and other governmental agencies, conservation districts, non-governmental organizations, environmental and wildlife associations and other private entities, and WHIP participants. Because participation in the WHIP is voluntary, participants are generally receptive to the advice and assistance provided by experienced specialists in biology, zoology, conservation, and environmental protection in the formulation of project plans. Also, the use of priorities in selecting projects for cost-share assistance and the option of adjusting the amount of payments based on specific needs and higher potential benefits contribute to the success of the WHIP.

If there is a shortcoming in the WHIP, it is its limited funding. Congress authorized only $50 million for the WHIP for fiscal years 1996 through 2002. These funds were spent in two years, 1998 and 1999. As a result, many landowners who wanted to participate did not have the opportunity to do so. Oklahoma, for example, was one of the five states in the country with 428 WHIP applicants. Yet, only seventy-four were funded as a consequence of lack of financing.

Many interest groups, including those advocating for the interests of farmers, have lobbied Congress for increases in WHIP funding. The National Corn Growers Association, National Association of State Departments of Agriculture, International Association of Fish and Wildlife Agencies, National Association of Conservation Districts, Wildlife Management Institute, and Ducks Unlimited have urged Congress to increase WHIP funding.

The International Association for Fish and Wildlife Agencies, for example, has urged that WHIP funding should be authorized at $100 million annually. It has pointed out that substantial financial resources were generated for the program by the close partnerships between NRCS and non-governmental organizations.

Whether Congress will respond to these requests in the new farm bill is currently uncertain. The Senate version of the 2002 farm bill authorizes WHIP funding at $225 million in fiscal year 2003; $275 million in fiscal year 2004; $325 million in fiscal year 2005; $355 million in fiscal year 2006; and $50 million in fiscal year 2007. The House bill authorizes lower funding for the program than the Senate bill, extended over a ten-year period. Specifically, it provides for funding levels of $30 million in fiscal years 2003 and 2004; $ 35 million in fiscal years 2005 and 2006; $40 million in fiscal year 2007; $45 million in fiscal years 2008 and 2009; and $50 million in fiscal years 2010 and 2011. As this article is written, the Senate and House bills are being reconciled in conference committee.

The WHIP holds considerable promise, but adequate funding will be necessary for its potential to be realized. For those who are interested in preserving biodiversity, the WHIP represents an important new policy initiative.

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this publication are those of the author and do not necessarily reflect the view of the U.S. Department of Agriculture.

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[1] United States Dep't of Agric., Natural Resources Conservation Serv., *America's Private land: A Geography of Hope* 7 (1996).

[2] *Id*. at 53.

[3] *Id*.

[4] *See id*. at 54, The Endangered Species Act, 16 U.S.C. §§ 1531-1543, seeks to preserve plants and animals by requiring the listing of threatened species. *See* 16 U.S.C. § 1531.

[5] Commission for Environmental Cooperation, *The North American Mosaic: A State of the Environment Report* 37 (2002).

[6] *Sce* David Bennett, *Agencies Differ on Cormorant Control: Official Critical of Interior Department's No-Kill Philosophy*, Delta Farm Press, Mar. 8, 2002, at 30.

[7] *See* Roger Claassen et al., *Agri-Environmental Policy at the Crossroads: Guideposts on a Changing Landscape* (USDA Econ. Resesarch Serv., AER Rep. No. 794, 2001) at 57,

[8] *See id*. at 57-58.

[9] Pub. L. No. 104-127, tit. III, § 387, 110 Stat. 888, 1020 (codified at 16 U.S.C. § 3836a).

[10] *Id.* (codified at 16 U.S.C. § 3836a(a)). The NRCS is the successor to the Soil Conservation Service (SCS). *See* Federal Crop Insurance and Department of Agricultre Reorganization Act of 1994, Pub. L. No. 103-354, tit. II, § 246, 108 Stat. 3178, 3223-25. The SCS was created in response to the Dust Bowl of the 1930s when a federal agency was needed to deal with soil erosion. Today, the NRCS is the leading conservation agency within the USDA. NRCS relies on many partners to help meets its conservation goals, from other state and federal agencies to environmental groups and professional societies. The agency is linked with all 3,000 conservation districts, almost one in every county. In this way, NRCS can acknowledge local needs and priorities, being able to find solutions and provide assistance when needed. For more information on the NRCS, see <http://www.nrcs.usda.gov>.

[11] 16 U.S.C. § 3836a(b).

[12] *See id.* § 3836(c).

[13] 62 Fed. Reg. 49,357-49,368 (Sept. 17, 1997)(final rules to be codified at 7 C.F.R. Part 636).

[14] *See* Ed Hackett, *The Wildlife Habitat Incentives Program: A Summary of Accomplishments, 1998-1999, in* L. Pete Heard et al., *A Comprehensive Review of Farm Bill Contributions to Wildlife Conservation, 1985-2000* (USDA, NRCS, Tech. Rep. WHMI-2000, Dec. 2000) at 117 [hereinafter Hackett].

[15] *See* 7 C.F.R. § 636.4 (2001).

[16] *See id.* § 636.4(b), (c).

[17] *See* 62 Fed. Reg. 49,362 (September 19, 1997)(prefatory comments to final rules to be codified at 7 C.F.R. Part 636).

[18] *See* 7 C.F.R. § 636.5(b).

[19] *Id.* § 636.5(c).

[20] *See id.* § 636.5(d).

[21] *See* 62 Fed. Reg. 49,363 (September 19, 1997)(prefatory comments to final rules to be codified at 7 C.F.R. Part 636).

[22] 7 C.F.R. § 636.7.

[23] *See id.* § 636.9(a), (c).

[24] *See id.* § 636.8(b)(2).

[25] *Id.* § 636.8(c).

[26] *Id.* § 626(b)(1), (4).

[27] *Id.* § 636.9(b), (c).

[28] *Id.* § 636.10(a), (b).

[29] *Id.* § 636.6(a).

[30] *Id*. § 636.6(c).

[31] *See id.* § 636.6(b).

[32] *See id.* § 636.14(b).

[33] USDA, NRCS, *WHIP: Questions and Answers*, available at http://www.nhq.nrcs.usda.gov/CCS/FB96OPA/WhipQ&A.html

[34] *See* 7 C.F.R. § 636.11(a).

[35] *See id.* § 636.11(b).

[36] *See id.* § 636.12(a)(1).

[37] *See id.* § 636.12(a)(2).

[38] *See id.* § 636.13.

[39] *See* Hackett, *supra* note 14, at 118.

[40] USDA, NRCS, C*onnecticut River Watershed* available at http://www.nhq.nrcs.usda.gov/PROGRAMS/whip/succ-ct.htm

[41] *Id.*

[42] USDA, NRCS, *Success Story-Kentucky*, available at http://www.nhq.nrcs.usda.gov/PROGRAMS/whip/succ-ky.html

[43] USDA, NRCS, *1999 Wildlife Habitat Incentives Program (WHIP) Accomplishments, Iowa*, available at http://www.nhq.nrcs.usda.gov/PROGRAMS/whip/whip-IA.html

[44] USDA, NRCS, *Souadabscook Stream Restoration Project*, available at http://www.nhq.nrcs.usda.gov/PROGRAMS/whip/Souadabscook.htm

[45] USDA, NRCS, *Conservation Success Stories, Fish Habitat Improved on Walla Walla River, Washington*, available at http://www.wa.nrcs.usda.gov/pas/Fish_Habitat_Improved.htm

[46] Anne Hazlett, *Conservation and The Next Farm Bill: Introduction and Status of H.R. 2646, "The Farm Security Act of 2001"* 25 (2001)(unpublished manuscript).

[47] *Id.* at 23-25.

[48] *Id*. at 24.

[49] S. 1731 (as amended), 107th Cong. § 1240M(g)(2002). *See also* Jeffrey A. Zinn, *Resource Conservation Title: Comparison of Current Law with House and Senate Farm Bills*, at 28, (January 25, 2002).

[50] H.R. 2646, 107th Cong. § 252 (2002).

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support for its ruling from *Stark v. Wickard*, 321 U.S. 288 (1944), and *Block v. Community Nutrition Inst.*, 467 U.S. 340 (1984). In *Stark*, milk producers challenged the Secretary's practice of deducting certain expenses from the producer-settlement fund before calculating the blend price that they would be paid. The Court held that the producers had standing to obtain judicial review of the Secretary's actions because the AMAA had given producers "'definite, personal rights'" and that handlers would lack standing to assert their rights because handlers had no financial interest in the fund or its use. *Id*. at 1164 (quoting *Stark*, 321 U.S. at 309). Conversely, in *Community Nutrition,* which presented the question of whether consumers of dairy products had standing to obtain judicial review of milk marketing orders, the Court held that consumers did not have standing because, among other reasons, "consumers' interests are similar to those of handlers, and, therefore, actions affecting consumers would also affect handlers who would take steps to challenge those decisions." *Id*. at 1165.

The court also found support for its ruling in its earlier decision in *Pescosolido v. Block*, 765 F.2d 827 (9th Cir. 1985). There, it interpreted *Stark* as permitting producers to bring a direct suit only when their interests were not represented by the interests of handlers. This interpretation, reasoned the court, was consistent with the holding in *Community Nutrition*. *See id.*

In light of these decisions, the court turned to the question of whether handlers would have an interest in challenging the producer-handler exemption. It determined that they would based on a letter sent by the law firm representing UDA and Shamrock to the Dairy Division Director. The letter stated, in part, that "it is apparent that handlers adversely affected by significant producer-handler competition are no longer willing to accept minimum pricing regulation under a system from which one or more of their major competitors are exempt." *Id*. at 1165. The court concluded that it was evident that the handler "element of the dairy business in this case has a significant interest in pursuing Sara Farms and their exempt status." *Id.* at 1166. The court also observed that "the non-exempt handlers here have standing because of their expressed financial interest that is being affected by the dairy division's application of the producer-handler exemption." *Id*. (citation omitted).

Noting that UDA was a handler as well as a representative of its producer-members and that Shamrock was related to another business that was a handler, the court concluded that their direct suit would have the effect of evading "the statutory requirement that they first exhaust their administrative remedies." *Id*. Given the complexity of milk marketing orders and the expertise possessed within the USDA, the court observed that "[t]his case is the perfect example of when a party should first exhaust administrative remedies before judicial review." *Id*.

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