



Memorandum

To: Tom Bennett, President, International Association of Fish and Wildlife Agencies
Steve Williams, Director, Fish and Wildlife Service

From: Terry R. Crawford, Co-chair, Joint State/Federal Task Force on Federal Aid Policy
Clint Riley, Co-chair, Joint State/Federal Task Force on Federal Aid Policy

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal Aid Policy - Loss of Control and Disposal of Real Property

The Joint State/Federal Task Force (JTF) on Federal Aid Policy submits the attached recommendation concerning "Loss of Control and Disposal of Real Property" for your review and consideration. As described in the recommendation, we suggest that it be implemented in the form of a Director's Order, with future codification within the Service Manual.

The substance of the policy recommendation is detailed within the body of the recommendation itself. It was developed by the JTF over the course of three meetings (in Las Vegas, NV on January 13-15, 2004; in Albuquerque, NM on March 31-April 2, 2004; and in Anchorage, AK on June 21-23, 2004), as well as by JTF workgroups who submitted information to the JTF at each of these meetings. As designated by each of you, the members of the JTF represent both State fish and wildlife agencies and the Service, and are listed at the end of this memorandum.

Following the JTF meeting in January, a draft recommendation was provided to all grantees of the Wildlife Restoration and Sport Fish Restoration grant programs, and to all Fish and Wildlife Service Regional Offices and relevant Service Programs, requesting comment. Comments were received from 14 grantee agencies, and from eight Fish and Wildlife Service offices. Roughly summarized, the most substantial suggestions included the following:

- A few comments recommended that the Purpose of the Order be expressed more clearly. The JTF revised Section 1 in response to these comments. Most significant, the revised Purpose explicitly includes describing whether the actions discussed in the Order constitute "federal actions." The JTF therefore intends that the Order will assist States and the Service when considering whether NEPA or similar requirements apply to the actions discussed in the Order.
- One comment requested that the Order include clarification about the definition of a "State fish and wildlife agency". Specifically, the comment wanted clarification about when and whether an official from a "State Department of Natural Resources", for example, would be

the same as someone from the State fish and wildlife agency. The JTF reviewed this comment but believes that sufficient guidance on this point exists elsewhere in current regulation and policy, and did not need to be addressed separately in this recommendation.

- A few comments questioned whether and how this Order might apply to real property purchased with license revenues, rather than Federal Assistance funds. The JTF considered this to be a necessary clarification, and added a new Section 6 to the recommended Order. This section describes existing requirements applicable when the State agency loses control or disposes of such real property, and clarifies that steps to regain management control, replace such property, or restore the license revenues, are not federal actions.
- Based on one comment's suggestion, the JTF added reference to 50 CFR 80.4(d)(2), concerning diversion of license revenues, to Section 3 describing authorities for the Order. The JTF also added to both Section 4 and to new Section 6 the clarification that replacement property cannot be funded with license revenues.
- A few comments requested further explanation of Section 4(c) (which is new (d)), which states that an action under that section does not "constitute" a federal action. The JTF simplified the language to say the action "is not" a federal action, and believes that the revisions to the Purpose of the Order should also help clarify this section.
- One comment requested several additions to Section 4, including: differentiating between temporary and permanent loss of control; differentiating between voluntary and involuntary loss of control; defining the time frame acceptable for restoring control; and defining eligible replacement property. The JTF did not make changes concerning the majority of these suggestions. Loss of control of real property requires the State agency to take steps to come into compliance, regardless of whether the loss was permanent, or voluntary. Existing regulations already specify that replacement property must be acquired within three years. Eligible replacement property would be for the purpose of resolving a compliance issue and avoiding diversion, and therefore the case-by-case judgment regarding whether the replacement property appropriately accomplishes the purpose of the original property should be discussed in other policy statements concerning diversion.
- In different ways, a few comments stated that the Service must approve a State agency's actions to come into compliance by regaining management control or by acquiring replacement property, and therefore these actions must be considered federal actions. These commenters believed that stating otherwise means the Order would be in conflict with 50 CFR 80.14. One commenter supported this assertion by noting that the process of replacing property should be collaborative between the State and the Service, and that requiring the State agency to submit documentation that the replacement property has the same value serves no purpose unless the Service takes formal action to approve it. After reviewing these comments and further discussion with legal counsel, the JTF disagrees with this analysis. State replacement of real property to avoid diversion does not involve new expenditure of federal funds, and providing technical counsel to assist a state agency achieve compliance does not constitute action by the Service. Most important, a finding by the Service that a State agency is in diversion, or a finding that it is no longer in diversion, is an action to

enforce State compliance with law and regulations, and does not constitute a federal action requiring NEPA analysis or similar requirements. Based on the JTF's review, this is true regardless of whether the diversion in question involves real property.

- One comment questioned whether requiring the State to control real property precludes subgrantees from owning property purchased through Federal Assistance. The JTF, with the assistance of legal counsel, believes that this is not the case under existing laws and regulations, which as a general rule apply to both grantees and subgrantees.
- One comment noted that the approval of replacement property requires an amendment to the grant agreement, which approving the amended grant would constitute a federal action. The JTF agrees that if the Service must approve a grant amendment, this would constitute a federal action, and added this point to Section 4. However, the JTF also notes that a grant for purchase of property would likely be closed when loss of control of the property is discovered. Consequently, the JTF believes it would be rare for replacement of property, for the purpose of regaining compliance with Federal Assistance, to involve a grant amendment.
- One comment noted that Section 5 regarding disposal of property should refer to "real" property, and made other editorial suggestions. The JTF agreed that this should specify real property, rather than just property, and therefore made this and other minor edits for clarification. However, concerning other of these editorial suggestions, the JTF did not agree that they appropriately clarified the Section, and did not include the changes.

The actual comments received could be provided to you at your request.

The recommendation presented to you at this time reflects the JTF's consideration of all of these comments, and our consensus opinion after this review. If you have any questions about this recommendation, or the process used by the JTF to arrive at this recommendation, please contact either of us, or any member of the JTF.

Members of the Joint State/Federal Task Force on Federal Aid Policy (in alphabetical order):

Gerald Barnhart, Director, New York Division of Fish, Wildlife and Marine Resources
Lisa Evans, Federal Funds Manager, New Mexico Department of Game and Fish
John Frampton, Assistant Director, Development & National Affairs, South Carolina DNR
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Dale Hall, Regional Director, Albuquerque NM
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Kris LaMontagne, Chief, Division of Federal Aid, Washington Office
Tom Niebauer, Federal Policy Advisor, Wisconsin DNR
Gary Reinitz, Branch Chief, Grant Operations and Policy, Washington Office
Glen Salmon, Director, Division of Fish and Wildlife, Indiana DNR
Paul Schmidt, Assistant Director, Migratory Birds and State Programs

Attachment