



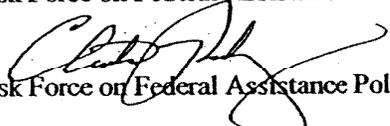
Memorandum

DEC 11 2003

To: Thomas Bennett, President  
International Association of Fish and Wildlife Agencies

Steven Williams, Director  
U.S. Fish and Wildlife Service

From: Terry Crawford, Co-Chair   
Joint State/Federal Task Force on Federal Assistance Policy

Clint Riley, Co-Chair   
Joint State/Federal Task Force on Federal Assistance Policy

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal Assistance Policy –  
Allowable Commercial Activities and Related Facilities on Federal Assistance Lands

The Joint State/Federal Task Force on Federal Assistance Policy (JTF) submits the attached recommendation concerning "Allowable Commercial Activities and Related Facilities on Federal Assistance Lands" for your review and consideration. We suggest that the guidance be implemented in the form of a Director's Order, with future codification within the U.S. Fish and Wildlife 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 Atlanta, GA, on March 11-12, 2003; at NCTC on May 13-15, 2003; and in Missoula, MT, on August 5-7, 2003), 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 the memorandum.

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

The comments expressing the most serious reservations were focused on Section 5 of the draft recommendation. Some comments asserted that the draft recommendation did not appropriately address the federal responsibility to oversee the use of federal funds. Others related comments stated that the draft recommendation would not help States protect the integrity of assets, because the

recommendation would leave States to "go it alone." Several of these commenters interpreted the draft recommendation as allowing States to monitor themselves, removing any federal authority or responsibility. Of these commenters, some suggested that a provision be added equivalent to Section 7 of Director's Order No. 152, which addresses allowable recreational activities on Federal Assistance lands. After review, the JTF agreed that this provision was both appropriate and necessary, and added it as new Section 10. The JTF also reviewed the language of Section 5, to ensure that it describes the State responsibility, without implying State authority to disregard federal laws and regulations.

- A number of commenters also voiced serious concern with the standard of "interference" as expressed in Section 5 of the draft recommendation. Commenters suggested alternative standards for allowable commercial activities, including activities that are "compatible," and activities that "contribute" to the purpose of the area. One comment argued that the standard violates 50 CFR 80.14, which states that federal funds shall not be used for the purpose of producing income. This commenter feared that the proposed standard virtually advocated commercial activities. The JTF discussed and reviewed these comments, and reviewed regulatory requirements with State and federal legal counsel. The resulting belief and recommendation of the JTF is that existing law and regulation prohibits activities that interfere with the fulfillment of grant objectives (as more completely stated in the recommendation), but do not require that activities contribute to these objectives. The JTF also believes it is inappropriate to apply a standard of "compatibility," precisely because the standard may be interpreted as different than the existing legal standard in regulation. By contrast, the JTF agrees that existing regulation prohibits federal funds from being used for the purpose of producing income, and believes that Section 6 of the recommendation recognizes this distinction by noting that commercial costs are not eligible as program costs (see the recommendation for the complete statement).
- One comment interpreted the draft recommendation as requiring States to determine for each activity whether it would interfere, and the commenter feared this could undermine a State's ability to prohibit an activity. The JTF believes the recommendation establishes a different requirement, because while the policy would prohibit certain activities, it does not require a State to allow any given activity. Consequently, a State may establish a higher standard of its own, as long as it does not allow activities that would interfere with the grant's objectives. In fact, one commenter suggested that a State may decide to require any commercial applicant to demonstrate that the proposed activity would benefit the grant project. The JTF believes this is not required by regulation, but would be permissible under the State's own authority.
- One commenter pointed out that once facilities are allowed, they have a tendency to grow, without retaining an effective ability to terminate them in the future. The same comment asserted that construction for uses other than fish and wildlife management would violate existing regulation. After review, the JTF notes that while these points may have some practical implications, they do not change the underlying legal requirements. For example, it seems unlikely that a commercial structure could be constructed on land managed for an approved fish and wildlife purpose without interfering with that purpose. Nonetheless, if shown to be true, and no federal funds are used for the construction, it would be allowable under relevant regulations.
- One comment suggested edits to Section 5 to clarify that the activity must not interfere with approved purposes, and to better emphasize the importance of hunting and fishing within those purposes. After review, the JTF made revisions to address both of these points.
- One comment suggested that relevant titles be added to the cited authorities. After review, the JTF made these revisions.

A few comments suggested that additions be provided to the examples in Section 4, including adding provisions to include non-profit activities that may not produce income. After review, the JTF did make some revisions to clarify this section. In discussion, the JTF noted that non-profit organizations may also produce income. However, the JTF did not attempt to address scenarios that do not produce income of any kind, as such examples would be covered by Director's Order No. 152.

A few comments suggested edits to Section 6, including one comment that it appeared to conflict with Section 8. The JTF reviewed these comments to ensure that no actual conflict exists, and made certain revisions.

One commenter asserted that the Section 7 creates a loophole by stating that income not received by the State is not subject to Federal oversight. By contrast, other commenters believed this section of the draft recommendation created new financial tracking requirements, or that additional information was needed. After review, the JTF made no substantial changes to this section, other than to add reference to the recommended Director's Order concerning program income. The section restates existing regulatory requirements, and cites to the relevant regulations and policy guidance.

One commenter expressed a number of reservations about Section 8 in the draft recommendation, asserting that substantially more information should be required in grant documents beyond the activities actually being funded by the grant. After review, the JTF continues to recommend that, generally speaking, only grant-funded activities be included in the grant documents, but the JTF replaced the draft Section 8 language with the similar section from Director's Order No. 152.

The comment on Section 9 of the draft recommendation suggested that only significant capital improvements be included within the scope of the recommendation. Other commenters made editorial suggestions. After review, the JTF made these editorial revisions, but did not limit the scope to significant capital improvements. The JTF does not believe any legal authority exists for this distinction.

Other more general suggestions included: clarify that "State fish and wildlife agency" includes whatever agency has authority for wildlife, fish, or public water; add a section to encourage a cooperative approach, and encourage States to consult with the Service for a mutual determination of allowability; and address commercial guides. After review, the JTF notes that the phrase "State fish and wildlife agency" is previously defined for this purpose in regulation. The JTF endorses the recommendation that States and the Service work cooperatively, but does not feel this statement is appropriate as a section in a Director's Order. Finally, the JTF believes the recommendation clearly applies to any commercial activity, and no explicit mention is needed for commercial guides, and the relevant standard would be the same.

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 Assistance Policy (in alphabetical order):

Gerald Barnhart, Director, New York Division of Fish, Wildlife and Marine Resources  
John Frampton, Director, South Carolina Department of Natural Resources  
Don Friberg, Chief, Division of Federal Assistance, FWS Region 1

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Dale Hall, Regional Director, FWS Region 2

Kelly Hepler, Director, Sport Fish Division, Alaska Department of Fish and Game

Bobbi Keeler, Federal Aid Coordinator, Montana Department of Fish, Wildlife, and Parks

Mitch King, Deputy Regional Director, FWS Region 4

Kris LaMontagne, Chief, Division of Federal Assistance, FWS Washington Office

Tom Niebauer, Federal Policy Advisor, Wisconsin Department of Natural Resources

Gary Reinitz, Branch Chief, Grant Operations and Policy, FWS Washington Office

Glen Salmon, Director, Division of Fish and Wildlife, Indiana DNR (current JTF member, joined after relevant discussions)

Paul Schmidt, Assistant Director, Migratory Birds and State Programs, FWS

David Waller, Director, Georgia Wildlife Resources Division (JTF during relevant discussions)

Attachment