



In Reply Refer To:
FWS/AMBS/FA

MAR 24 2003

Memorandum

To: Brent Manning, President, International Association of Fish and Wildlife Agencies
Steve Williams, Director, Fish and Wildlife Service

From: Terry Crawforth, 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- Budget Changes

The Joint State/Federal Task Force (JTF) on Federal Aid Policy submits the attached recommendation concerning "budget changes" 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 Denver, CO on November 13-14, 2002, in Las Vegas, NV on January 21-22, 2003, and in Atlanta, GA on March 11-12, 2003), as well as 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 grantees of the Wildlife Restoration and Sport Fish Restoration grant programs, and to all Fish and Wildlife Service Regional Offices and Service Programs, requesting comments. Comments were received from 19 grantee agencies, and from seven Fish and Wildlife Service offices. No commenter indicated disagreement with the recommendation as whole. However, eleven suggested changes to the recommendation as provided to them in draft form. Roughly summarized, the most substantial suggestions included the following:

- A few commenters expressed concern about the level of flexibility that would be provided to make budget changes, if this flexibility applied to large grant amounts. After review, the JTF did not believe it appropriate to set an arbitrary cap of the applicable grant size, and therefore no specific change was made.

- Several commenters suggested that the Service's flexibility to waive prior written approval requirements should be the exception rather than the rule, or at least specify some standard regarding approval of this waiver (No. 5 of the recommendation). After review, the JTF made changes to reflect this suggestion.
- Several commenters suggested that the recommendation specify that approval be in writing. After review, the JTF made changes to reflect this suggestion.
- One commenter requested that the recommendation also address the appropriate level of accounting that would be required. After review, the JTF noted that a separate recommendation is under consideration to address this issue, and therefore no specific changes were made.
- Several commenters requested clarification concerning the scope of the recommendation, including terms used (such as "project") or exclusion of types of grants (such as construction grants). After review, the JTF made several changes to reflect these suggestions, including specification of certain items not intended to be included within this recommendation. In addition, the JTF has identified general use of the term "project" as an item for additional discussion as it relates to several features of Federal Aid Policy.

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:

Gerald Barnhart, Director, New York Division of Fish, Wildlife and Marine Resources
 John Frampton, Assistant Director, Development & National Affairs, South Carolina DNR
 Don Friberg, Chief, Division of Federal Aid, Region 1
 Dale Hall, Regional Director, Albuquerque NM
 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, Region 4
 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
 Paul Schmidt, Assistant Director, Migratory Birds and State Programs
 David Waller, Director, Georgia Wildlife Resources Division

Attachment

Joint State/Federal Task Force on Federal Aid Policy
Recommendation on Budget Changes
24 March 2003

Background:

Several issues have arisen regarding changes to approved grant budgets and the authority within 43 CFR Part 12 to make changes within budgets. The specific question that solicited this response was the interpretation and application of the so-called "ten percent" rule. However it was immediately determined that the real issue in question was budget changes in general under the Federal Aid in Sport Fish and Wildlife Restoration Programs. The FWS' Federal Aid Washington Office (WO) had previously identified this as an issue needing clarification and had sought a solicitor's office opinion.

Analysis:

43 CFR § 12.70 addresses changes to approved grant budgets by permitting grantees to revise budgets to meet unanticipated requirements. The WO's position is supported in a solicitor's office opinion (attached). This opinion outlines three methods for making budget changes that would otherwise require written permission of the awarding agency when cumulative transfers of budget items exceed 10 percent of the total budget in grants when the Federal share exceeds \$100,000. These three methods are: 1) specific language in the grant agreement, 2) prior written approval of the awarding agency, or 3) waiver of the requirement.

The US Fish and Wildlife Service Manual delegates the Director's authority for the conduct of Service grant programs, including budget changes, to the regional directors or their designee.

Recommendation:

General policy:

- 1) All non-construction grant agreements when the Federal share exceeds \$100,000 should contain a provision that specifically addresses the grantee's ability to make transfers among direct cost categories or, if applicable, among separately budgeted programs, projects, functions or activities ("direct cost categories") at any level within an approved grant.
- 2) Such grant provisions should allow the grantee to make such transfers as circumstances dictate so long as all funds are expended to achieve approved grant objectives. A special grant condition may read:

This grant agreement is not subject to the prior approval requirements of 43 CFR,

§ 12.70 (c)(1)(ii), the "10% Rule."

However, such a grant provision does not waive the requirement that a grantee obtain prior written approval if transfers in funds revise the scope or objectives of a grant agreement.

If not covered by the general policy:

- 3) If a grant does not contain specific language concerning transfers among direct cost categories then a grantee will be required to obtain the prior written permission of the FWS before it makes a transfer of more than ten percent between direct cost categories in grants when the Federal share exceeds \$100,000, pursuant to 43 CFR, 12.70(c)(1)(ii). Such permission should be granted if, in the judgment of the FWS, the transfer would have been allowed as a provision in the original grant document.

Retroactive Provisions:

- 4) Where grants were approved prior to the adoption of this policy, and the grantee did not get written permission to make transfers among direct cost categories, a waiver, in writing, should be granted if, in the judgment of the FWS, the transfer would have been allowed as a provision of the original grant agreement.
- 5) Although all future grant agreements should specifically address the flexibility of grantees to make transfers among direct cost categories, absent such language, and the failure of a grantee to obtain prior written approval to make such a transfer, the FWS retains the authority to "waive," in writing, the prior written approval requirement and retroactively approve such transfers. However, this authority is discretionary, and will be considered on a case-by-case basis.

Other Budget Change Issues:

- 6) Any revision to a grant agreement which would result in the need for additional funding requires the prior written approval of the FWS [43 C.F.R. 12.70(c)(1)(i)].
- 7) The transfer of funds allotted for training allowances also requires the prior written approval of the FWS unless specifically addressed in the grant agreement [43 C.F.R. 12.70(c)(1)(ii)].
- 8) Construction grants are not addressed within this recommendation. The budget changes for construction grants are addressed in [43 C.F.R. 12.70 (c) (2) and (3)].

Method of Issuing New policy:
Director's Order



United States Department of the Interior

OFFICE OF THE SOLICITOR

Washington, D.C. 20240

September 10, 2002

Memorandum

To: Tom Melius
Assistant Director
Migratory Birds and State Programs
U.S. Fish and Wildlife Service

From: Larry Mellinger 
Attorney-Advisor
Parks and Wildlife

Subject: The "Ten Percent" Rule

This responds to the request from the Director, U.S. Fish and Wildlife Service, that we review the provisions of 43 C.F.R. Subpart C, "Uniform Administrative Requirements for Grants and Cooperative Agreements to State and Local Governments," and determine what flexibility the FWS has to "waive" the so-called "Ten Percent" rule.

The Ten Percent rule is a provision in the federal grant regulations, at 43 CFR 12.70(c)(1)(ii), which generally requires the prior written approval of an awarding agency to allow States to transfer budgeted items if: 1) the cumulative amount of all transfers exceeds ten percent of the total approved budget, and, 2) the federal share of the overall budget is more than \$100,000. The specific language of 43 CFR 12.70(c)(1)(ii), unless excepted by one of the three methods discussed below, prohibits State grantees from making:

...cumulative transfers among direct cost categories, or, if applicable, among separately budgeted programs, projects, functions, or activities which exceed or are expected to exceed ten percent of the current total approved budget, whenever the awarding agency's share exceeds \$100,000.

We note that States making cumulative transfers of more than ten percent of budgeted items in approved budgets without the prior written approval of the awarding agency has raised red flags among auditors trying to square this provision of the federal grant regulations with such shifts in budgeted items. However, the specific language of 43 CFR 12.70 cites three different methods by which the awarding agency can allow a State to transfer budgeted items within a grant, while still comporting with the regulations. Under the terms of this provision, a State may transfer

more than 10 percent of items within a grant if one of the following three conditions is met: 1) there is specific language to such effect stated in the grant document itself; 2) the State obtains the prior written approval of the FWS; or, 3) the FWS waives the requirement.

The language of the regulation that deals specifically with budget changes in nonconstruction projects, 43 CFR 12.70(c), begins with a preface to the Ten Percent rule language, cited above, by providing that "(E)xcept as stated in other regulations or an award document..." This caveat clearly implies that the award document itself can deviate from the prior written approval requirement of the Ten Percent rule. The agency, in this case the FWS, or more specifically the regional director or his designee, is given the flexibility of determining at the inception of a grant, whether or not the Ten Percent rule should apply.

If the grant agreement itself does not address the Ten Percent rule, a State, during the grant period, may still seek the approval of the FWS to transfer budgeted items beyond the ten percent threshold set out in the general rule. Again, citing from 43 CFR 12.70(c), the caveat stated just before listing the three budget changes addressed in this provision, provides that, "grantees or subgrantees shall obtain the prior approval of the awarding agency whenever any of the following changes is anticipated..." Obviously, if the grant agreement itself allows the State to vary from the Ten Percent rule, it is not required to seek further approval to transfer budgeted items in excess of ten percent. But, if the grant agreement does not allow for such shifting, the State can seek written approval at the time it appears such a shift is desirable in administering the grant.

Finally, there is a third method, provided within the language of 43 CFR 12.70, in which a State can be relieved of following the directive of the Ten Percent rule. The FWS can grant the State a "waiver." In the "(G)eneral" language found in 43 CFR 12.70(a), the provision states that, "unless waived by the awarding agency, certain types of post-award changes in budgets and projects shall require the prior written approval of the awarding agency." This "waiver" language is again inserted just before the Ten Percent rule provision in 43 CFR 12.70(c)(1)(ii), where it states, "(U)nless waived by the awarding agency, cumulative transfers..." This "waiver" which the awarding agency may grant the State to transfer budgeted items in excess of ten percent, is not qualified as to the time or place it may be granted, as it may be outside of the grant agreement or the prior approval that can be obtained during the grant period. While a State is in no way entitled to a "waiver," the regulatory language is such that the agency could waive this requirement very broadly, in specific instances, prior to entering a grant agreement, or even after the grant period itself has been completed.

The primary criteria in accounting for the funds expended in a State Wildlife grant should be whether the project meets the "substantiality in character and design," requirements set out in 50 CFR 80.13. The ability of the awarding agency, in this case the FWS, and specifically the regional director or his designee, to utilize the provisions of the Ten Percent rule to allow greater than ten percent cumulative budget changes, either within a grant agreement itself, by the

granting of prior written approval during the grant period, or by means of a waiver, is intended to ensure that in cooperating with States to achieve program objectives, the agency can allow as much flexibility as possible. Exercising any of these options to exempt a State from the Ten Percent rule is an administrative function of carrying out the FWS's Federal Aid program. Authority to utilize any of these options provided within the regulatory regime may be exercised by any FWS official with the authority to approve the grant which is the subject of the budget changes. This authority would be governed by FWS policy regarding the administration of grants.

Please let me know if you have any further questions regarding this matter.