



Date:

Memorandum

To: Terry Crawforth, President, International Association of Fish
and Wildlife Agencies
Matthew J. Hogan, Acting Director, U. S. Fish and Wildlife Service

From: Glen Salmon, Cochair, Joint State/Federal Task Force on Federal Assistance
Policy *Glen Salmon*
Mitch King, Cochair, Joint State/Federal Task Force on Federal
Assistance Policy *Mitch King*

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal
Assistance Policy – Pre-Agreement Costs

The Joint State/Federal Task Force on Federal Assistance Policy (JTF) submits the attached policy recommendation concerning “Pre-Agreement Costs” for your review and consideration. We suggest that this policy recommendation be released as a chapter in the U.S. Fish and Wildlife Service Manual.

The substance of the policy recommendation is detailed within the body of the draft policy itself. It was developed by the JTF over the course of four meetings (in Las Vegas, NY, on January 13-15, 2004, in Albuquerque, NM, on March 31--April 2, 2004, in Anchorage, AK, on June 21- 23, 2004, and in Minneapolis, MN, on October 25-26, 2004) as well as a JTF workgroup who submitted information to the JTF at these meetings. As designated by the JTF’s charter, 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 June 2004, a draft policy 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. Roughly summarized, the most substantial comments received are listed below in italics followed by the action taken by the JTF in response to the comments

- *It was suggested that the purpose of the draft policy needed to be strengthened.* In response, the JTF made a minor change designed to clarify that the draft policy provides guidance on the approval of eligible pre-agreement costs.
- *Careful review by responders identified a couple of small changes to the authorities for the draft policy.*

- *Considerable comment was provided on the definition of pre-agreement costs as provided in the initial draft policy. Most of the comments noted that the definition in the draft was more flexible than previous definitions included in the Service Manual (522 FW 1.1 B(2)) and suggested that the definition provided in the draft policy be rewritten to more accurately reflect the Service Manual. Comments were also provided regarding the timing of pre-agreement costs — noting that the proposed definition included no time constraints on how far back a State might reach to seek reimbursement for costs associated with a proposal. The JTF discussed this comment at length and, while some minor modifications were made to the definition for clarification, the JTF decided against significantly modifying the definition to simply reflect the definition included in the current Service Manual. It was the collective opinion of the JTF that the current definition provided in the Service Manual was overly restrictive and went beyond the bounds provided by current regulations. The JTF addressed the issue of “timing” of pre-agreement costs in a major rewrite of Section 5.*
- *Comments provided on Section 5 centered on three basic themes. First, concern was expressed regarding the timing of pre-agreement costs. As written, the responders were concerned that there was no time limit on how far back a State could go for reimbursement of pre-agreement costs. In fact, as the draft policy was originally written, a project that is complete at the time of submission of the grant proposal could be considered. Second, several responders were concerned that the current language in this section could be interpreted to require too much specificity in the Grant Agreement for pre-agreement costs. Third, there was concern that the proposed language in this section would create situations where on-the-ground actions included in a Grant Agreement may be completed prior to fully complying with the requirements of NEPA, ESA and NHPA. The JTF discussed all of these concerns in detail and made significant changes to Section 5 and added a new Section 6 to the draft policy.*
- *On the issue of timing of pre-agreement costs — The JTF recognized that, as written, the draft policy made it possible for a State to reach back beyond reasonableness to include costs from many years prior to the Grant Agreement. In fact, a State could actually complete a project prior to a Grant Agreement and then look to the Program for reimbursement. However, the JTF can find no basis for any specific time frame upon which to limit pre-agreement costs. Instead, the JTF chose to lean heavily towards approving pre-agreement costs that were considered “necessary and reasonable for accomplishing the overall grant objectives and would have been approved had they occurred within the grant period.” In addition, the JTF also modified Section 5 to include a statement of general policy of the Service that “grants are approved to fund eligible projects prospectively for activities commencing after the effective date of an approved grant.” Finally, the JTF added a new section (Section 6) that speaks directly to the question of funding an entire project retrospectively as pre-agreement costs by answering “no” and refers to the general policy statement included in Section 5.*
- *The second issue raised regarding Section 5 related to the perception by responders that the draft policy would require a detailed accounting for all pre-agreement costs be included in a Grant Agreement for consideration for reimbursement. The JTF agreed that this was an incorrect perception and made modifications to the language to take out any suggestion that such specificity would be required. Nevertheless, the applicant must present enough detail in the project proposal (for subsequent incorporation into the Grant Agreement) to demonstrate that the pre-agreement costs are reasonable, allocable to the award, and necessary for accomplishing the grant objectives.*
- *The final issue raised with Section 5 dealt with the perception that funding significant undertakings through pre-agreement costs might preclude an adequate review of the*

Federal Action under NEPA, ESA, and/or NHPA. The JTF discussed this issue at length and agreed that the proposed language in this draft policy would not adversely impact the Service's ability to comply fully with the various applicable environmental laws. This position is based on the fact that the Federal Action is the act of funding the action and that the draft policy clearly states that any action that a State takes regarding pre-agreement costs, it takes without assurance of funding. Should the Service decide that any action included in the proposed Grant Agreement (including actions already taken and included as pre-agreement costs and those proposed to be taken) would violate any of the applicable environmental laws, then the Service has the authority (and obligation) to deny Federal funding for that action. The JTF has proposed additional language to the advisory statement in Section 5 that strengthens its position on this issue.

At its meeting on October 25-26, 2004, the JTF decided to recommend an amendment of its charter that would allow it to review operational policies and administrative problems, and recommend solutions, for the State Wildlife Grants Program (SWG), and the Landowner Incentive Program (LIP). The President of IAFWA and the Service Director approved the amendment on December 8 and 10, 2004, respectively.

At its meeting on January 11-13, 2005, in Kansas City, KS, the JTF received an analysis of the applicability to LIP and SWG of the previous JTF policy recommendations for the Wildlife and Sport Fish Restoration Programs. This analysis concluded that, if the draft policy on pre-agreement costs were modified to include appropriate references to LIP and SWG, and if the establishing authorities for LIP and SWG were cited, the draft policy could be applied to LIP and SWG as written. The JTF accepted this conclusion.

The actual comments received and the LIP and SWG analysis 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 the LIP and SWG analysis, 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):

Tom Barnes, Chief, Grant Operations & Policy Branch, Div. of Fed. Assistance, USFWS
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, Director, South Carolina Department of Natural Resources
Dale Hall, Regional Director, USFWS Region 2
Kelly Hepler — Director, Sport Fish Division, Alaska Department of Fish and Game
Mitch King, Assistant Director — Wildlife and Sport Fish Restoration, USFWS
Kris LaMontagne, Chief, Division of Federal Assistance, USFWS
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