

Handwritten signature/initials



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 *Terry R. Crawford*
Joint State/Federal Task Force on Federal Assistance Policy

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

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal Assistance Policy - Program Income from Federal Assistance Grants

The Joint State/Federal Task Force on Federal Assistance Policy (JTF) submits the attached recommendation concerning "Program Income from Federal Assistance Grants" 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 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 ten grantee agencies, and from seven Service offices. Roughly summarized, the most substantial suggestions included the following:

- The most substantial comments received addressed income received after the close of a grant period. A number of commenters strongly suggested that this income should be treated as program income, rather than the draft recommendation to treat this income as license revenue. While the commenters explicitly taking this position were a minority of total comments, they did include both States and Service offices, and the commenters made several policy arguments in support of this position. The

JTF review of this issue included substantial discussion of this point before and after comments were received, and review by State and federal legal counsel. It is the considered position of the JTF that existing law and regulation does not require income received after a grant period closes to be accounted for as program income, and therefore to make a policy recommendation along such lines would overstep federal authority. Therefore, the JTF recommends that such income be treated as license revenue, but that policy be established to clarify that a State may request the income be treated as if it were program income, by including a provision in the grant agreement.

A substantial number of commenters also expressed concern about the definition of program income in the draft recommendation. In addition to general questions about the accuracy of the proposed definition, some comments suggested that it was inappropriate to restrict the definition to "income received" by the grantee or subgrantee. After review, and noting that the provided definition is a direct quote from the controlling federal regulation, the JTF made no substantive change to this section. The JTF believes it is both important and appropriate to explicitly clarify that the regulation includes only income actually received.

One comment suggested that the recommendation should solely quote 50 CFR 80.14(c), concerning whether activities that generate program income are allowable. The JTF believes that considerable confusion has existed due to perceived inconsistencies between 50 CFR 80.14(c) and 43 CFR 12.65(a), and that simply quoting one or the other of these regulations would fail to address this confusion. Consequently, the language in Section 5 of the recommendation was created after much discussion and after consultation with both State and federal legal counsel, and it intended to provide guidance for interpreting each of these regulations.

Some commenters suggested that Section 6 of the draft recommendation was confusing and added little to the recommendation as a whole. After review, the JTF agreed that the section was not necessary to the purpose of the recommendation, and therefore removed this section.

Several commenters expressed concern about the impact of the draft recommendation on subgrantees, and especially the potential that draft Section 8 (new Section 9) would impose inappropriate financial reporting from subgrantees after the grant period closes. After review, the JTF believes that subgrantees are subject to the same requirements concerning program income, as a matter of law. However, after a grant period ends, the JTF believes that the subgrantee relationship terminates. Consequently, unless ongoing reporting and oversight is required by some other ongoing relationship with the subgrantee, the JTF does not believe there is basis for this concern. Nonetheless, the JTF has identified that relationship between a grantee and a subgrantee, in general, to be a potential topic for future JTF discussions and possible development of policy clarification.

One commenter noted the important distinction between program income, and income generated from the sale of property. The JTF agrees, and reviewed the draft recommendation to ensure that it specifically addresses program income.

Some additional comments addressed draft Section 8 (new Section 9), with questions about the definition of "grant period," application of matching funds that came from an outside source, and other edits. After review, the JTF revised the recommendation where it felt it was necessary to clarify these points.

Some commenters suggested that grantees be provided the option to use either deductive or additive methods, when reporting program income. One commenter, however, suggested that the deductive method should remain the preferred method, and that cost sharing or match should never be an

approved method. After review of these comments and further discussion and review of the applicable regulations, the JTF revised the recommendation to allow either deductive or additive methods be used, and allow cost sharing or match only when the Service deems appropriate based on appropriate considerations, as described in the recommendation. The JTF notes that the regulations provide for considerable flexibility, and that this is very much a statement of policy.

- One commenter expressed concern that by allowing these various methods of application of program income, the recommendation would allow the funds to be used in totally separate programs. The JTF did not intend this result, and reviewed the language to ensure it was not stated in the recommendation.

- Some commenters raised the question of the time period when program income may be applied. For example, one commenter noted that some Service Regions allow excess program income to be "carried over" to future grant agreements. After review, the JTF agreed that this issue should be addressed, and new Section 8 establishes the basis by which such excess program income may be used in a subsequent grant, based on the JTF's review of controlling law and regulations.

- A number of commenters addressed the examples in Exhibits 1 and 2. One commenter questioned whether the Exhibits were necessary. Most, however, strongly supported the need for the examples, and primarily suggested that the draft examples be clarified, and that additional, more specific examples be added. After review, the JTF made considerable revisions and additions to the examples, focusing especially on Exhibit 1. The JTF also notes that, as stated both in the recommendation itself and in the introduction to the Exhibits, they are intended to be dynamic lists to help provide guidance.

- One commenter questioned why this recommendation was limited to Wildlife and Sport Fish Restoration Programs, and suggested an additional authority for Section 3. After review, the JTF notes that it considers its mandate to be specifically related to these Programs, although the Director may choose to apply policy more broadly. The JTF reviewed the appropriate authorities again based on the comment, and believes it is appropriate to cite only law and regulation.

- A number of general edits were suggested, for example in draft Section 7. The JTF reviewed and incorporate these edits where appropriate.

- A few commenters expressed frustration in the limited time made available to comment. The JTF noted this frustration, and continues to explore methods to allow for comment in the most effective manner possible. However, the JTF believes the comments received were substantial, relevant, and reflected the broad range of viewpoints concerning this issue.

- Finally, a minority of commenters expressed strong reservation concerning the draft recommendation, believing that it constitutes an inappropriate erosion of federal oversight of State programs. The JTF notes this concern, but believes the policies expressed in the recommendation are consistent with law and regulation, and in many cases are necessary to ensure that the law and regulations are implemented appropriately.

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

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