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Memorandum

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

FROM: Terry 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- Allowable Recreational Activities and Related Facilities on Federal Aid Lands

Terry
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The Joint State/Federal Task Force (JTF) on Federal Aid Policy submits the attached recommendation concerning "allowable recreational activities and related facilities on Federal Aid lands" for your review and consideration. We recommend that it be implemented in the form of a Director's Order of the Director of the U.S. Fish and Wildlife Service, with future modification within the Service Manual.

The substance of the policy recommendation is detailed within the body of the draft Director's Order. 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 Fish and Wildlife Service, and are listed at the end of this memorandum.

Following the Joint Task Force meeting in January, a draft Director's Order was developed in the form of a "Director's Order." This 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 Service Programs, requesting comment. Comments were received from 20 grantee agencies, and from seven Fish and Wildlife Service offices. Four commenters indicated disagreement with the recommendation, or the need for the recommendation. An additional six commenters indicated they had substantial questions about the draft recommendation. Eleven commenters indicated clear agreement with the draft recommendation, although some of these commenters suggested editorial changes to the recommendation as provided to them in draft form. Roughly summarized, the most substantive of the concerns, questions, and suggestions included the following:

A few commenters expressed a desire that this policy recommendation also more clearly address what type of recreational uses may be eligible for Federal Aid reimbursement. After review, the Joint Task Force revised Section 5 of the draft recommendation to more clearly state that the rule for allowing a recreational use is not identical to the standard for eligibility for Federal Aid reimbursement. However, the Joint Task Force determined that, if a policy clarification is needed on this separate point, it should be provided in a distinct policy recommendation.

A number of commenters expressed strong reservations concerning the role of the Service as described in Section 6 of the draft recommendation. The most common concern was that the draft recommendation inappropriately removed the Service from its required responsibility to ensure that Federal Aid funds are appropriately used, and could lead to undue pressure on a grantee agency to allow inappropriate recreational uses or facilities without any opportunity for review or check by the Service. After review, the Joint Task Force revised the recommendation to more clearly state that, while the grantee agency has first responsibility to determine allowable activities or facilities, the Service maintains the right to review or inspect for compliance, as stated in federal regulation.

A number of commenters expressed concern with the reference to non-fish and wildlife dependent activities in Section 4 of the draft recommendation. Frequently, these commenters were concerned that the draft language effectively put non-fish and wildlife dependent activities on equal footing with traditional fish and wildlife-dependent activities such as hunting or fishing. Consequently, some expressed concern that hunting and fishing may be disallowed unless and until they are proven to be compatible. Many commenters expressed a closely-related concern that the draft language would put the burden on the grantee to prove "interference" when considering the allowability of a recreational activity, which would create a practical challenge to distinguish between traditional fish and wildlife-dependent activities and non-fish and wildlife dependent activities. It was suggested that the draft language appeared to be written with a "permissive" assumption concerning non-wildlife dependent recreation activities, while the actual law used a more "restrictive" tone. After review, the Joint Task Force revised the language of Section 4 to more closely track the language in law, that an activity may not be allowed unless it will not interfere with the appropriate purposes (see the recommendation for specific language). The Joint Task Force believes this language allows a grantee appropriate discretion to determine what recreational activities or facilities it would allow, within the standard that it may not allow activities or facilities that would interfere with the appropriate purposes. In addition, the Joint Task Force added language explicitly discussing the fact that, as a general rule, fish and wildlife-dependent activities (including hunting and fishing) would be expected to be within the appropriate purposes, and therefore much less likely to interfere with these purposes than non-fish and wildlife dependent activities. (Once again, see the recommendation for actual language.)

One commenter expressed concern that the draft language in Section 8 implies authority beyond the one-year applicability of a Director's Order. After review, the Joint Task

Force revised this language so that it more clearly states the authority during the year, rather than implying that the authority itself is in perpetuity without further codification.

- One commenter wished to use a phrase other than "State fish and wildlife agency." After review, the Joint Task Force determined that this is an appropriate term for the Director's Order, because it is defined in regulation.
- One commenter wished to restrict the policy as expressed in Section 8 to only "major" projects funded through Federal Aid. After review, the Joint Task Force determined that this would be an inappropriate and arbitrary distinction, and therefore no change was made.
- A few commenters expressed concern that Section 7 of the JTF's draft recommendation would not require sufficient documentation of all allowed activities and facilities to ensure compliance with other applicable laws such as NEPA or the ESA. After review, the Joint Task Force determined that the appropriate scope of this recommendation, and of the requirement for these grant documents, should be compliance with Wildlife Restoration and Sport Fish Restoration Act requirements. However, the Joint Task Force recognized that effective compliance with other laws may require disclosure of other activities, especially activities that develop after a grant has been approved, and therefore intends to consider whether separate policy recommendations would be appropriate specific to these issues.
- A few commenters questioned the use of the term "useful life" in Section 8 concerning improvements, suggesting that as applied, the term removes the Service from its responsibilities to ensure appropriate use of Federal Aid funds. After review, the Joint Task Force revised the language of Section 8 to more closely track the relevant language in regulation. However, the Joint Task Force also noted that the term "useful life" exists elsewhere in federal regulation, and intends to further examine appropriate use and definition of the term.
- One commenter expressed reservation about the application of the policy to construction of facilities, rather than restricting it to recreational activities. After review, the Joint Task Force determined that the relevant law and regulations do not distinguish between construction and non-construction activities, as they apply to the policy addressed in the recommendation.

The actual comments received could be provided to you at your request. We wish to expressly acknowledge that those commenters with the strongest reservations were concerned that the draft recommendation established standards outside the bounds of existing federal regulation – or, at best, failed to establish useful standards at all. With assistance from both state and federal legal counsel, however, the Joint Task Force believes that this recommendation is fully within existing regulation, and in fact is necessary to clarify application of existing regulation to ensure that they are clearly understood and are implemented consistently.

The recommendation presented to you at this time reflects the Joint Task Force's consideration

of these comments, and our consensus opinion after this review. If you have any questions about this recommendation, or the process used by the Joint Task Force to arrive at this recommendation, please contact either of us, or any member of the Joint Task Force.

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

Ernest Barnhart, Director, New York Division of Fish, Wildlife and Marine Resources
John Frampton, Assistant Director, Development & National Affairs, South Carolina DNR
John Friberg, Chief, Division of Federal Aid, Region 1
Dale Hall, Regional Director, Albuquerque NM
Melly Hepler, Director, Sport Fish Division, Alaska Department of Fish and Game
Robbi Keeler, Federal Aid Coordinator, Montana Department of Fish, Wildlife and Parks
Mitch King, Deputy Regional Director, Region 4
Chris 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