Joint Federal State Task Force on Federal Assistance Policy
Twelfth Meeting - June 21 through 23, 2005
Meeting Report

The Joint Federal/State Task Force on Federal Assistance Policy (JTF) met in Lake Placid, New York on June 21, 22 and 23, 2005. This report summarizes the outcomes and action items resulting from that meeting.

Attendance:

Glen Salmon	Co-Chair - Director, Division of F&W, Indiana DNR
Mitch King	Co-Chair – Assistant Director, WSF Restoration, USFWS

State Representatives

Tom Niebauer	Federal Policy Advisor, Wisconsin DNR
Gerald Barnhart	Director, New York Division of FW&M Resources
John Frampton	Director, South Carolina DNR
Keith Sexson	Assistant Secretary, Kansas Department of W&P
Lisa Evans	Federal Funds Manager, New Mexico Department of G&F
Kelly Hepler	Director, Sport Fish Division, Alaska Department of F&G

Fish and Wildlife Service Representatives

Dale Hall	Regional Director – Region 2
Kris LaMontagne	Chief, Division of FA, Washington
Chris McKay	Assistant Regional Director – Region 1
John Organ	Regional Grants Manager – Region 5
Tom Barnes	Policy Branch Chief, FA, Washington

Additional Attendees

Larry Mellinger	Office of the Solicitor, DOI (ex-officio)
Jimmy Christensen	Chief, General Counsel Section, Wisconsin DNR (ex-officio)
Carol Bambery	Special Counsel, IAFWA (ex-officio)
Kelly Reed	Special Assistant, IAFWA, (JTF Recorder)

This summary of discussions is provided in the following outline:

I. Review Kansas City Meeting Action Items
II. Transitioning Director's Orders and Guidance Memos into Manual Chapters
III. Cost Accounting & Pre-Agreement Costs Director's Orders – Status
IV. Audit Review Period
V. Using Federal Assistance funds to Maintain Lands Purchased with Land and Water Conservation Act Funds
VI. Director's Order Application to Other Programs
VII. Review SWG / LIP application to existing Director's Orders and Guidance Memos

VIII. NEPA / ESA / NHPA Compliance Issues
IX. Future Meeting Schedule

I. Review Kansas City Meeting Action Items

The Task Force reviewed all of the action items from the Kansas City Meeting. Most action items have been completed. Two minor items required further action (see below). Items of significance are covered as specific agenda items later in this report.

Including the 25% minimum match language developed by the JTF into future grant agreements. - The FWS Washington Office has coordinated the language provided by the JTF with the Regional Chiefs and expects satisfactory language to be drafted by August. JTF members will get an opportunity for review of the language before it is finalized.

Using actuary life tables for calculating the longevity of lifetime licenses. – It was reported that most states that have lifetime licenses use actuary tables. The FWS is waiting to hear how the few that don't use actuary tables calculate longevity. The JTF agreed that no further action is required on this issue.

II. Transitioning Director's Orders and Guidance Memos into Handbook Chapters

In an effort to get the DOs into the Manual quicker and eliminate the need for annual renewals to keep the DOs in force, the JTF agreed to take the existing DOs as written and turn them into "stand alone" manual chapters rather than wait for a more comprehensive rewrite of the Manual. To minimize any confusion that might result from potential conflicting guidance between DO generated Manual Chapters and older chapters, the FWS will include a disclaimer that these DO generated chapters supercede conflicting positions in other areas of the Manual. In addition, the FWS will take every opportunity to educate Regional and State Federal Assistance staff on the need to fully understand the DO generated manual chapters.

Another reservation that the JTF had regarding this new proposal was that a more comprehensive rewrite of the Service Manual would drag on longer than it already has. The JTF will revisit this issue at the next meeting and consider asking the Service to establish a Joint Working Group of State and Service Federal Assistance staff to pursue this comprehensive rewrite of the manual with some clear deadlines.

III. Cost Accounting & Pre-Agreement Costs Director's Orders – Status

The Service is very close to having the final signatures on both of these documents and that we are moving ahead with the strategy discussed above to move these directly into stand-alone manual chapters rather than first becoming DOs. The Stewardship Investment reporting

requirements (associated with the Cost Accounting DO) will be addressed with a letter from the Director modifying earlier guidance and instructing the Regional FA staff to assure that the information required by the Departmental Stewardship Investment information need be incorporated into the Grant Agreement and the SF-269.

IV. Audit Review Period

The JTF revisited the recommendation to the Director on this issue drafted at the Kansas City meeting due to concerns identified by FWS staff. Attachment A is the final draft. The Service will finalize the draft memo for signature by the co-chairs and release.

V. Using Federal Assistance funds to Maintain Lands Purchased with Land and Water Conservation Act Funds

The FWS met with the NPS on the issue of using Federal funds to operate and maintain properties purchased with LAWCON funds. As a result of that meeting, the FWS determined that a total prohibition of using all Federal funds (i.e., Service Federal Assistance funds) for operation and maintenance efforts on lands purchased with NPS LAWCON funds was never NPS's intention. Consequently, the Service's interpretation that was incorporated into 522 FW 7 of the Service Manual was in error. The Service drafted a Director's Order to temporarily correct this error that is awaiting final signature.

The JTF discussed how this new DO will impact current audit findings and CAPS. Since the DO acknowledges an error in a past interpretation, the DO will be retroactive. The Service will provide guidance to Regional FA Chiefs on this point. The Service has already contacted the OIG and this should not be a problem in ongoing and future audits.

Attachment B is a copy of the draft DO

VI. Director's Order Application to Other Programs

The JTF discussed the issue of which specific grant programs are covered by the JTF-recommended Director's Orders. The eight Director's Orders approved to date state: "This Order applies to all Service personnel who administer grants funded through the Sport Fish and Wildlife Restoration Programs." After discussion, the consensus of the JTF was that the DO's approved to date apply to WR, SFR, CVA, BIG, Hunter Education and Safety (Sec. 10) Programs, but not to the Multistate Program.

VII. Review SWG / LIP application to existing Director's Orders and Guidance Memos

The JTF reviewed draft rewrites of the Director's Orders on Allowable Recreational Activities (DO-152); Allowable Commercial Activities (DO-167); and, the responses received from the States and FWS Regional Offices on the proposed DO applying SWG and LIP to six DOs and one Director's Guidance. Following is a summary of each of those discussions:

Draft DO on the application of the six previously approved DOs and one Director's Guidance to SWG and LIP:

The significant comments received resulted in the JTF revisiting the applicability of SWG and LIP to each of the six DOs and one Director's Guidance. The JTF decided that this draft DO was not applicable to DO-168 (Program Income from Federal Assistance Grants); DO-175 (Useful Life of Capital Improvements funded by Federal Assistance Grants); and, DO-182 (Loss of Control and Disposal of Real Property).

The JTF determined that this draft DO (with some minor modification) was applicable to the three remaining DOs (DO-156 (Budget Changes in Federal Assistance Grants); DO-178 (Establishment and Use of Land Value as Match); DO-179 (Determining Approval and Effective Dates for Federal Assistance Grants)); and the Director's Guidance Memorandum on ESA. Attachment E is the proposed Director's Order that the JTF will forward to the Director of the FWS and the President of the IAFWA for consideration.

The JTF determined that the issues related to the application of DO-182 (Loss of Control and Disposal of Real Property); DO-175 (Useful Life of Capital Improvements Funded by Federal Assistance); and, DO-168 (Program Income from Federal Assistance Grants) could be addressed with Director's Guidance Memorandum rather than a series of new DOs. The JTF is of the opinion that discussions related to the determination of "useful life" and actions taken in response to a "loss of control" for LIP and SWG projects had to do more with how to assure that the State was getting a level of commitment commensurate with the level of expenditure and what actions were appropriate should a third party default on a commitment. Therefore, Attachment F is a proposed Director's Guidance Memorandum, which includes sections on "Enforcement of Third Party Commitments" and "Program Income." The JTF will forward this guidance memorandum to the Director of the FWS and the President of the IAFWA for consideration.

Re-Draft of DO-152 (Allowable Recreational Activities) incorporating SWG and LIP:

The JTF reviewed a re-draft of this DO that incorporated SWG and LIP and with minor modification, approved this draft DO (Attachment C) for release through Group Systems for State and FWS Regional review and comment. The JTF will address comments received at the next JTF meeting. The JTF discussed why this rewrite excluded related tribal programs. While it was understood that these DOs were developed without Tribal participation, the JTF recommends that the FWS apply the concepts of this DO to the tribal programs.

Re-Draft of DO-167 (Allowable Commercial Activities) incorporating SWG and LIP:

The JTF provided additional comment on a re-draft of this DO and with minor modifications, agreed on a final draft (Attachment D), which will be released through Group Systems for State and FWS Regional review and comment. The JTF will address comments received at the next JTF meeting.

VIII. NEPA / ESA / NHPA Compliance Issues

In follow-up to the Kansas City meeting, the JTF reviewed and discussed a White Paper on "compliance." As a result of that discussion, the JTF drafted a memo (Attachment G) to send to the Director of the FWS explaining the concerns that have surfaced relative to this subject and asking that the AD for Wildlife and Sport Fish Restoration be directed to coordinate with other appropriate members of the Directorate to clarify the problem and identify solutions.

IX. Future Meeting Schedule

The JTF identified December 6-9 for the next meeting, with the 6th and 9th as travel days. The meeting will be in New Orleans with nearby refuge tours arranged. The Service will work with the SE Regional Office to iron out the details.

Attachments

A. Revised memo on Audit Review Period

B. Draft LAWCON DO

C. Re-Draft of DO-152 – Allowable Recreational Activities

D. Re-Draft of DO-167 – Allowable Commercial Activities

E. New Director's Order – Application of SWG & LIP to Three Existing Director's Orders and the Director's Guidance Memorandum on ESA

F. New Director's Guidance Memorandum – Enforcement of Third Party Commitments / Program Income

G. JTF Memorandum to the Director on Compliance

Attachment A. Revised Memo on Audit Review Period

REVISED #2 MEMO

Date:

Memorandum

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

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

Subject: Policy Recommendation of the Joint State/Federal Task Force on Federal Assistance Policy – Two-Year Audit Period Corrective Action Plan/Resolutions

The Joint State/Federal Task Force on Federal Assistance Policy (JTF) submits the following recommendation concerning "Two-Year Audit Period Corrective Action Plan (CAP)/ Resolutions" for your review and consideration. We suggest that the guidance be implemented in the form of a Director's policy memorandum, with future inclusion within the U.S. Fish and Wildlife Service (USFWS) Manual.

The subject came to the JTF via a solicitation by the JTF to the States and the USFWS Regions requesting program issues that should be considered by the JTF. The JTF reviewed these issues and collected and ranked them relative to importance. One of these issues was "Limit Federal Assistance Audit Time Frames."

The issue identified is that, while there is clear audit process detailed in the Manual, there is not any written direction provided to the Regional Director on CAP development

and the relevant associated time frames. This has led to inconsistent resolutions and application of time periods, and confusion among the State agencies and the Service. Generally, the concern is that the direction detailed in the audit chapters has not been interpreted or translated smoothly into the audit resolutions developed in the CAP.

Specifically, there have been instances in the past, in which the Service recommended that the States provide restitution of funds beyond the five-year audit period. The JTF's opinion is that there is a shared responsibility between the State and the Service to insure stewardship of the funds and the integrity of the program is maintained. For the purpose of resolution with a state, prior audits should have identified and reported to the Service any findings. In the JTF's opinion, the only justification to reach back prior to the current five-year audit period to expand a finding (and restitution) would be a finding of fraud as detailed in the audit chapter.

It is the goal of the JTF to have the State fish and wildlife agency be an effective and efficient steward of restoration programs. To that end, the JTF respectfully offers the following text for inclusion in Director's policy memo and in the Manual:

> Except in the case of fraud, the financial effect of a corrective action plan shall not reach back beyond the scope of the audit and in no event beyond the date of current five-year audit period.
>
> Remedial actions that involve the exceptions from paragraph 417 FW 2.6 in the Planning Audits chapter shall be handled on a case-by-case basis with the approval of the Service Director.

Attachment B. Draft LAWCON DO

DIRECTOR'S ORDER NO.

Subject: Use of Federal Assistance Funds for Operation and Maintenance of Land and Water Conservation Fund Projects

Sec. 1 What is the purpose of this Order? This Order amends 522 FW 7 to remove restrictions on using Federal Assistance funds to operate or maintain properties or facilities purchased under the Land and Water Conservation Fund (LWCF).

Sec. 2 What is the LWCF? The Land and Water Conservation Fund Act of 1965 (16 U.S.C. 4601-4604) established a fund in the U.S. Treasury to subsidize State and Federal acquisition of lands and waters for recreational and conservation purposes. The LWCF derives revenues from the sale of surplus Federal real property, motorboat fuel taxes, and oil and gas exploration and extraction on the Outer Continental Shelf. The Act stipulates that operation and maintenance of projects funded by the Act must be financed "at State expense" [16 U.S.C. 4601(f) (1)].

Sec. 3 What is Service policy on what funds States can be use for operation and maintenance of LWCF funded projects? States cannot use LWCF funds for operation and maintenance of properties or facilities purchased or constructed under an LWCF project. However, States may use other Federal or State funds that the State manages.

Sec. 4 How should I amend 522 FW 7? Pending publication of a revised 522 FW 7, make the following changes:

a. Delete last sentence of paragraph 7.4C, which reads: *Refer to paragraph 7.5 for guidance relating to facilities purchased or constructed under the Land and Water Conservation Fund Act.*

b. Delete paragraph 7.5B.

Sec. 5 Why is the Service removing this restriction on use of Federal Assistance funds? In an April 21, 2005, meeting, representatives of the Office of the Solicitor (Department of the Interior) determined that we were incorrect in our interpretation that the Land and Water Conservation Act prohibits use of Federal Assistance funds for operation and maintenance of facilities funded under the Act.

Sec. 6 What is the effective date of the Order? This Order is effective immediately. It will expire on June 30, 2006, unless amended, superseded, or revoked. We will revise 522 FW 7 to include the contents of this Order.

DIRECTOR

Date

Attachment C. Re-Draft of DO-152 – Allowable Recreational Activities

DIRECTOR'S ORDER NO: 152 REVISED

Subject: Allowable Recreational Activities and Related Facilities on Federal Assistance Lands

Sec. 1 What is the purpose of this Order? This Order provides guidance on recreational activities conducted and related facilities constructed on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

Sec. 2 To whom does this Order Apply? This Order applies to all Service personnel who administer grant funds through the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

Sec. 3 To what lands does this guidance apply? These guidelines apply to the following, unless otherwise mutually agreed to by the State fish and wildlife agency and the Service and specified in the grant agreement:

a. Lands acquired with Federal Assistance funds, regardless of when the lands were acquired.

b. Lands that have been developed or improved with Federal Assistance funds, for the useful life of the development or improvement.

c. Lands upon which any Federal Assistance-funded management activities were conducted during the defined grant periods.

Sec. 4 What are the authorities for taking this action?

a. 16 U.S.C. 777
b. 16 U.S.C. 669
c. 43 CFR 12.71(b)
d. 43 CFR 12.83
e. 50 CFR 80.5
f. 50 CFR 80.14(b)
g. 50 CFR 80.18(c)
h. 50 CFR 80.21
i. Wildlife Conservation and Restoration Program Authorizing Legislation
j. State Wildlife Grants Program Authorizing Legislation
k. Landowner Incentive Program Authorizing Legislation

Sec. 5 What recreational activities and related facilities are allowed on lands acquired, developed, or managed with Federal Assistance funds? The State fish and wildlife agency determines what recreational activities and related facilities are allowed on Federal Assistance supported lands, within the bounds of the following guidance.

a. The State fish and wildlife agency is prohibited from allowing recreational activities and related facilities that would interfere with the purpose for which the land was acquired or developed, or is managed. This means that the State fish and wildlife agency may not allow an activity or facility that will interfere with the fulfillment of the grant objectives for restoration, conservation, management, and/or enhancement of fish, wild birds, wild mammals, or species of greatest conservation need.

b. As required by law, grants to acquire, develop, or manage lands must have a purpose consistent with the Wildlife Restoration and Sport Fish Restoration Acts, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), or the Landowner Incentive Program (non-Tribal). Fish or wildlife dependent activities (e.g., hunting, trapping, fishing, birding, wildlife photography, or viewing platforms) would frequently be associated with the purpose for which the land was acquired, developed, or managed, and, therefore, such activities would generally be allowed, because they would not interfere with such purpose. Recreational activities and related facilities that are not fish or wildlife dependent (e.g. bicycling, swimming, rock climbing, kennels, stables, horseback riding) may be allowed if it is shown they will not interfere with the purpose for which the land was acquired or developed, or is managed.

Sec. 6 Are costs attributable to recreational activities on lands acquired, developed, or managed with Federal Assistance funds eligible for Federal Assistance funding? The standard for an "allowable" recreational activity or related facility is separate and distinct from the standard to determine whether or not the associated costs are eligible for Federal Assistance funding. A State fish and wildlife agency may only be awarded a grant if the grant is consistent with the purposes of the Wildlife Restoration or Sport Fish Restoration Acts, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), or the Landowner Incentive Program (non-Tribal); and the agency may only recover costs attributable to recreational activities if the activity or facility is (1) allowable as defined in Section 5 and (2) specified in the grant agreement.

Sec. 7 What is the Service's authority to review compliance with this guidance? The State fish and wildlife agency has responsibility for the accountability and control of all assets, and has first responsibility to determine if a recreational activity or related facility interferes with the purpose for which the land was acquired or developed, or is managed [43 CFR 12.71 or 50 CFR 80.18]. However, the Service has the right to review or inspect at any time to ensure compliance with Section 5 [50 CFR 80.21 or 43 CFR 12.83].

Sec. 8 Must recreational activities and related facilities on lands acquired, developed, or managed with Federal Assistance funds be included in the grant documents? A description of recreational activities and related facilities on lands acquired, developed, or managed with Federal Assistance funds does not need to be included in grant documents as long as: (1) the decision as to what recreational activities and related facilities will be allowed remains with the State fish and wildlife agency; (2) the activities and related facilities would not interfere with the purpose for which the lands were acquired or developed, or are managed; and (3) the cost of the activities and related facilities will not be paid for with Federal Assistance funds.

Sec. 9 What is the effective date of this Order? This Order is effective immediately. We will include the contents of this Order in Part 522 of the Fish and Wildlife Service Manual. This Order will expire on _____, unless amended, superseded, or revoked.

Attachment D. Re-Draft of DO-167 – Allowable Commercial Activities

DIRECTOR'S ORDER NO: 167 REVISED

SUBJECT: Allowable Commercial Activities and Related Facilities on Federal Assistance Lands

Sec. 1 What is the purpose of this Order? This Order provides guidance on commercial activities conducted and related facilities constructed on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

Sec. 2 To whom does this Order Apply? This Order applies to all Service personnel who administer grant funds through the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

Sec. 3 To what lands does this guidance apply? These guidelines apply to the following, unless otherwise mutually agreed to by the State fish and wildlife agency and the Service and specified in the grant agreement:

a. Lands acquired with Federal Assistance funds, regardless of when the lands were acquired.

b. Lands that have been developed or improved with Federal Assistance funds, for the useful life of the development or improvement.

c. Lands upon which any Federal Assistance-funded management activities were conducted during the defined grant periods.

Sec. 4 What are the authorities for taking this action?

a. 16 U.S.C. 777
b. 16 U.S.C. 669
c. 43 CFR 12.65(a)
d. 43 CFR 12.71(b)
e. 50 CFR 80.14(b)(2) and (c)
f. 50 CFR 80.18(c)
g. 50 CFR 80.21
h. Wildlife Conservation and Restoration Program Authorizing Legislation
i. State Wildlife Grants Program Authorizing Legislation
j. Landowner Incentive Program Authorizing Legislation

Sec. 5 What commercial activities are covered by this Order? This Order applies to any activity or service that produces income to any entity or individual that is conducted on lands or facilities acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

Examples include boat rentals, launching fees, camping fees, concessionaires, fees for guiding services, forestry and agricultural activities, snowmobile fees, professional photography, site access fees, horseback trail rides, special associated event fees and visitor center fees.

Sec. 6 Who determines what commercial activities and related facilities are allowed on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal) and the Landowner Incentive Program (non-Tribal)? Subject to guidance in this Order, the State fish and wildlife agency determines what commercial activities and related facilities are allowed on lands supported by Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal).

a. For commercial activities and related facilities on lands supported under the Wildlife and Sport Fish Restoration Programs, the State agency may not allow a commercial activity or facility that will interfere with the fulfillment of the restoration, conservation, management, and enhancement grant objectives for sport fish, wild birds, or wild mammals on the area, and the provision for public use of and benefits from these resources.
b. For commercial activities and related facilities on lands supported under the Wildlife Conservation and Restoration Program, State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal), the State agency may not allow a commercial activity or facility that will interfere with the fulfillment of the grant objectives for the benefit of Federally listed, proposed or candidate species, other species determined to be at-risk, and species of greatest conservation need.

Therefore, commercial activities and related facilities that would interfere with the approved purpose for which the land was acquired, developed, or is managed are prohibited. At the request of the State fish and wildlife agency, the Service will confer on proposed commercial activities or construction of related facilities.

Sec. 7 What is the Service's authority to review compliance with this guidance? The State fish and wildlife agency has responsibility for the accountability and control of

all assets, and has first responsibility to determine if a commercial activity or related facility interferes with the purpose for which the land was acquired or developed, or is managed (50 CFR 80.18). However, the Service has the right to review or inspect at any time to ensure compliance with Section 6 (50 CFR 80.21).

Sec. 8 Are State fish and wildlife agency costs attributable to commercial activities and related facilities on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal), and the Landowner Incentive Program (non-Tribal) eligible for Federal Assistance funding? No. Costs associated with commercial activities on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal) and the Landowner Incentive Program (non-Tribal) are not eligible Federal Assistance Program costs, unless the commercial activity supports a grant's primary purpose. Note: States may use contracts or other third-party agreements to fulfill grant objectives.

Sec. 9 Must commercial activities and related facilities on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal) and the Landowner Incentive Program (non-Tribal) be included in the grant agreement? A description of commercial activities and related facilities on lands acquired, developed, or managed with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the State Wildlife Grants Program (non-Tribal) and the Landowner Incentive Program (non-Tribal) does not need to be included in the grant agreement as long as:

a. The decision as to what commercial activities and related facilities will be allowed remains with the State fish and wildlife agency.

b. The activities and related facilities would not interfere with the purpose for which the lands were acquired or developed, or are managed.

c. The cost of the activities and related facilities will not be paid for with Federal Assistance funds under the Wildlife and Sport Fish Restoration Programs, the Wildlife Conservation and Restoration Program, the State Wildlife Grants Program (non-Tribal) and the Landowner Incentive Program (non-Tribal).

Sec. 10 What is the effective date of this Order? This order is effective immediately. We will include the contents of this Order in Part 522 of the Fish and Wildlife Service Manual. This Order will expire on _____, unless amended, superseded, or revoked.

Attachment E. New Director's Order – Application of SWG & LIP to Three Existing Director's Orders and the Director's Guidance Memorandum on ESA

DIRECTOR'S ORDER NO: XXXX

Subject: Application of Previously Approved Director's Orders to State Wildlife Grant (SWG) and Landowner Incentive Programs (LIP)

Sec. 1 What is the purpose of this Order? This Order extends the application of previous Director's Orders on Wildlife and Sport Fish Restoration Programs to the State Wildlife Grant and Landowner Incentive Programs.

Sec. 2 To whom does this Order apply? This Order applies to all Service personnel who administer (concur or approve) grants funded through the State Wildlife Grant and Landowner Incentive Programs.

Sec. 3 What are the Authorities for taking this action?

Specific legal authorities identified in the Director's Orders and Guidance listed below in Section 4, when combined with the following, are sufficient to support this Order.

a. 43 CFR 12.43

b. 43 CFR 12.60.

c. 43 CFR 12.83.

d. 43 CFR 12.91.

e. Wildlife Conservation and Restoration Program Authorizing Legislation

f. State Wildlife Grants Program Authorizing Legislation

g. Landowner Incentive Program Authorizing Legislation

Sec. 4 To which previously approved Director's Orders and Director's Guidance does this Director's Order apply?

a. Director's Order #156 - Budget Changes in Federal Assistance Grants

b. Director's Order #178 - Establishment and Use of Land Value as Match

c. Director's Order #179 - Determining Approval and Effective Dates for Federal Assistance Grants

d. Director's Guidance dated September 2, 2004- Guidance for Conducting Endangered Species Act Section 7 Consultations on Federal Assistance Grants to States (Section 7 Guidance)

Sec. 5 How should the previously approved Director's Orders and Director's Guidance memos be interpreted to apply to Wildlife Conservation and Restoration Program, State Wildlife Grant, and Landowner Incentive Programs? While the existing Director's Orders and Guidance (see Section 4) refer explicitly to Wildlife and Sport Fish Restoration, the guidance and procedures provided in those documents shall apply to the Wildlife Conservation and Restoration Program, the State Wildlife Grant Program, and Landowner Incentive Program, with the following exceptions:

a. Statements that specify legal authorities and examples applicable solely to Wildlife and Sport Fish Restoration Programs are not incorporated by this Order.

b. Statements in the Section 7 Guidance based on the purpose or scope of Wildlife and Sport Fish Restoration grants, such as part of Section V.I., Example 2, or Example 6, shall be applicable to SWG and LIP based on the purpose or scope of a SWG or LIP grant.

Sec. 6 What is the effective date of this Order? This Order is effective immediately. We will include the contents of this Order in the Fish and Wildlife Service Manual. This Order will expire on _____, 2006, unless Amended, superseded, or revoked.

DIRECTOR

Date:

Attachment F. New Director's Guidance Memorandum – Enforcement of Third Party Commitments / Program Income

In Reply Refer To:
XXX

To: Service Directorate

From: Director

Subject: Grant Agreement Requirements and Program Income Guidance for Third Party Commitments Under the State Wildlife Grants Program and the Landowner Incentive Program

The Joint Task Force on Federal Assistance Policy has examined the State Wildlife Grant (SWG) and Landowner Incentive (LIP) Programs in an effort to recommend guidance on several issues. It is important to remember two significant differences between the Sport Fish (SFR) and Wildlife (WR) Federal Assistance Programs and the SWG/LIP Programs. First, the WR/SFR Programs have authorizing legislation and regulations that were promulgated to guide the implementation of grant management and accomplishment. The SWG/LIP Programs are one-year authorizations made through the appropriations process. Therefore, regulations have not been developed due to the temporary nature of the funding.

Second, LIP, and to some extent SWG, are targeted to third party partners who often voluntarily provide the basis (the land) for development of fish and wildlife benefits for species and habitats of significant conservation concern. These third parties provide matching contributions to accomplish natural resource objectives.

Because of these significant differences, we are providing specific guidance with regard to enforcement of third party commitments and the generation of income under the LIP and SWG programs.

Enforcement of Third Party Commitments

Questions pertaining to enforcement and the clause "used for the originally authorized [grant] purposes as long as needed " (43 CFR 12.83) must be interpreted for LIP and SWG in a different light than WR/SFR and the associated rules that are designed to assure sport fish and wildlife benefits to the public for consumptive uses.

Enforcement tools available for ensuring compliance with the terms of the grant are available in 43 CFR 12.83 for fee title or easement acquisition but, for basic habitat improvements, there is little guidance available in Federal Regulations. It is expected that the majority of grants that involve the question of "as long as needed for that [grant]

purpose" for structures under SWG/LIP will be below the threshold identified in D.O. xxx of $100,000 and will, therefore, require negotiations with the third party to define a reasonable commitment. Determination of the length of the commitment, e.g. "as long as needed for that [grant] purpose" should focus on the natural resource benefits desired rather than a "useful life" analysis, e.g., engineering and design specifications routinely used for structures of greater size and complexity.

The Service shall use a common sense approach to the questions of Enforcement and Useful Life. The guiding principles should be clearly articulated as a focus on natural resource benefits, a reasonable return based on the amount of investment and reasonable efforts by the grantee to ensure compliance. Clear and consistent communication between Federal and State Coordinators will go far in limiting confusion and inconsistencies across Regions. In the end, there should be deference given to the states regarding outcomes and the time required to achieve those outcomes. Efforts to monitor compliance and, when necessary pursue enforcement should also be pragmatic and collaborative.

Q1. What should the grant agreement between the State and Service include regarding third party commitments under the State Wildlife Grants Program and the Landowner Incentive Program?

A1. At a minimum, the grant agreement between the State and the Service should require the State to enter into a binding legal agreement with the third party for a term of commitment that is reasonable and proportionate to the level of investment and the conservation objectives of the agreement.

Q2. Must the Service approve or review each binding legal agreement between the State and a third party?

A2. No. Copies of each binding legal agreement must be available for review by the Service upon request. The exception is fee title or easement acquisition, which must comply with 43 CFR and 49 CFR.

Q3. What should the grant agreement between the State and Service include regarding the third party's non-performance under the terms of the binding legal agreement?

A3. The State must commit to use reasonable remedies available to it, and to make a good faith effort to recover the State and the Federal investment if the terms of the agreement are violated.

Q4. In addition to the documents required under 43 CFR 12, what records should the State maintain regarding third party commitments under the State Wildlife Grants Program and the Landowner Incentive Program?

A4. The State must maintain an inventory and copies of all the legal binding agreements between the State and the third party consistent with State and Federal requirements.

Program Income

Because of the nature of the LIP and SWG programs, we recognize that income generated by third party partners on private lands under these program agreements will often not fit within the regulatory definition of program income (43 CFR 12.65). The questions and answers below are designed to give direction on how to treat income associated with grant agreements under LIP and SWG.

Q1. When a State generates income under a LIP or SWG grant, what rules and guidance pertain?

A1. When a State generates income under a LIP or SWG grant, 43 CFR Part 12.65 and D.O. 168 shall be applicable except for Section 9.

Q2. What options does a State have for accomplishing third party work under LIP and SWG?

A2. The State has the option of accomplishing third party work through sub-grantees or vendors, which should be clearly stated in the Grant Agreement.

Q3. Should income generated by third party vendors be treated as program income?

A3. No. Income generated by third party vendors is not considered program income under 43 CFR Part 12.65.

Q4. Is all income generated by third party subgrantees considered program income?

A4. No. Third party subgrantees may generate income, but it is only considered program income under 43 CFR 12.65 if it is "directly generated" by a grant-supported activity or earned "only as a result of" the grant agreement during the grant period. Therefore, income generated that is incidental to grant objectives should not be considered program income.

For example, if the purpose of the grant is to create a desired habitat, then the sale of timber, hay, or other commodities is a by-product. Therefore, the revenue generated is

incidental to accomplishing the objectives of the grant agreement and should not be considered program income.

Q5. If it is obvious that certain activities will generate income that should not be treated as program income, should it be noted in the Grant Agreement?

A5. Yes. However, failure to note such income in the Grant Agreement does not mean that it must be treated as program income.

Attachment G. JTF Memorandum to the Director on Compliance

To: Matthew J. Hogan, Acting Director of the U.S. Fish and Wildlife Service

From: Glen Salmon, Co-Chair, Joint State/Federal Task Force on Federal Assistance Policy
Mitch King, Co-Chair, Joint State/Federal Task Force on Federal Assistance Policy

Subject: Compliance Issues in the Division of Federal Assistance

State Fish and Wildlife agencies and the USFWS Division of Federal Assistance have a shared responsibility for the administration of the Wildlife and Sport Fish Restoration programs and other federal assistance programs within the US Fish and Wildlife Service (Service). One component of this relationship involves compliance with federal statutes and regulations, particularly those associated with the Endangered Species Act (ESA), National Environmental Policy Act (NEPA), and the National Historic Preservation Act (NHPA).

Federal Assistance staff in both the States and Service have raised several issues regarding compliance. These issues have been brought to the Joint State/Federal Task Force on Federal Assistance Policy (JTF) for review and action.

These issues include the following:

1. Service Regions appear to have different processes for compliance. For example, some Regions delegate substantial authority to the Division of Federal Assistance for ESA and NEPA compliance while others place control in Ecological Services and Habitat Conservation. Where substantial authority is not granted to the Division of Federal Assistance, grant approval tends to require extraordinary time and effort for compliance.

2. State Fish and Wildlife Agencies have technical knowledge and experience regarding federal assistance projects and as a result do most of the staff work for Federal compliance. However, in some Service Regions, States are not called upon to participate in or contribute to compliance decision making on the Federal level. Moreover, States have not been consistently involved in programmatic issues, such as the application of categorical exclusions.

3. In some cases, states avoid using Federal assistance funds on projects that trigger ESA, NHPA or NEPA compliance. This is because either the

federal compliance process is burdensome or Service does not recognize or rely on State expertise and procedures to aid in federal compliance.

4. In some cases the threat of litigation extends the compliance process, requiring compilation of an excessive administrative record to support a decision.

Given these issues, the JTF respectfully recommends that the Assistant Director for Wildlife and Sport Fish Restoration work with other members of the Directorate to review the administration of compliance programs associated in the Division of Federal Assistance with the following considerations:

- Assign coordination for ESA, NEPA, and NHPA compliance to the Division of Federal Assistance for grant programs under their administration.

- Identify and communicate "Best Practices" for complying with ESA, NEPA, and NHPA to the Regional Federal Assistance Managers.

- To the extent feasible, share responsibility and authority with state fish and wildlife agencies for compliance.

- Working collaboratively with the States and based on years of monitoring project outcomes, develop additional categorical exclusions under NEPA.

The JTF recognizes that compliance with ESA, NEPA, NHPA, and other established compliance regulations is of paramount importance to the natural resources of this country. The long-standing partnership between the Service and States provides a unique opportunity to insure effective compliance in an efficient manner.