United States Department of the Interior

FISH AND WILDLIFE SERVICE
Washington, D.C. 20240

In Reply Refer To:
FWS/AWSR/FA/023034

DEC 12 2005

Memorandum

To: Service Directorate

From: Director H. Dale Hall

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 Federal/State 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 Restoration (SFR) and Wildlife Restoration (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 12.71) 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 Director's Order 175 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, part 12 and 49 CFR, part 24.

Q3. What should the grant agreement between the State and Service include regarding the third party's nonperformance 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, part 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 12.65 and Director's Order 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 subgrantees 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 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.