



Gulf of Mexico Fishery Management Council

Managing Fishery Resources in the U.S. Federal Waters of the Gulf of Mexico

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Mr. Adam Issenberg
Assistant General Counsel for Fisheries
NOAA Office of the General Counsel
1315 East West Highway
Silver Spring, MD 20910-3282

Dear Mr. Issenberg:

At the last Council Coordination Committee (CCC) held January 2012 in DC, you indicated you would be willing to examine some important legal and procedural issues with which the Regional Fishery Management Councils (RFMC) have had little or no resolution. To give a broader perspective of the situation, I contacted the other Council EDs and have put together some representative issues that confront us. To be sure, there are many more, but addressing these would go far in facilitating the Councils' ability to conduct their business.

Unemployment claims – The Councils need assignment of specific Federal liaison personnel who can directly assist in resolving unemployment claims.

Although DOC/NOAA contracts with a third party (UC Express/TALX) to handle unemployment claims, each claim requires numerous phone conversations with states because states do not accept the Council's explanation of our status as a Federal instrumentality. In one instance, a state cited that a Council was in violation by not paying state unemployment taxes. At one point, an account was set up by the state in the Council's name along with notice of quarterly filings. For every unemployment claim, all the necessary legal opinions must be forwarded to the state. Moreover, each claim involves a host of conference calls and these calls are usually to request the assistance of DOC General Counsel. Some unemployment claims take several months to finalize.

Worker's compensation – The Councils need assignment of specific Federal liaison personnel who can directly assist in worker's compensation claims.

DOC/NOAA contracts with a third party (CCSI) to handle its worker's compensation claims. CCSI is not familiar with the Councils and has not been responsive. In one instance, it took over 18 months to pay a claim of approximately \$300. The staff time involved was hundreds of hours.

Legal representation – The Councils need assistance in obtaining legal representation from the Department of Commerce/Justice.

The Councils have been advised that they are covered under the Federal Tort Claims Act (FTCA), and that staff are eligible for legal representation by the Federal Government. However, the current situation is such that approval for representation must take place before legal assistance can be proffered. In many instances the necessity to respond (30 days, 60 days, etc.) is sooner than the approval can be granted. This puts the individual being served in an untenable position. It is essential to have pre-approval of representation in the event of a law suit or other legal action that requires a rapid response.

In addition, there are potential problems for staff members involved in lawsuits that are prolonged (e.g., after individuals have left the employ of the Council). DOC/DOJ should advise the Councils in writing that staff will continue to have legal representation in the event a case remains active after employment with the Council has ended

Ability to provide liability insurance within Council budgets – Staff must be able to purchase liability insurance in the instance where DOJ is unable to offer representation in a timely manner.

This would be important in instances where a staff member may be required to pay a settlement for suits for which a staff member is found financially responsible. Additionally, given the applicability of the FTCA, insurance companies are reluctant to allow the Councils to purchase professional liability insurance.

FOIA requests – When a FOIA request is made through NOAA or the Fisheries Service, Council staff is often asked to provide personnel/financial assistance to satisfy these requests.

Councils spend a great deal of time searching for records in response to FOIA requests. Some requests can be time consuming for staff; however, Councils must respond by the deadlines even though our personnel resources are more limited in comparison to Federal agencies. Moreover, Councils cannot charge requesters for staff time to search for records. Additionally, there is a strong possibility that a large request or multiple requests in a short period of time could necessitate a Council to hire an additional administrative employee to fulfill these requests. This would necessitate that Councils budget in anticipation of excessive FOIA requests.

Procurement – The Councils need assignment of specific Federal liaison personnel who can directly assist in purchasing supplies and services from GSA vendors.

There has been some difficulty determining the correct vendor contact and/or vendor department. Sometimes Councils are directed to the vendor's commercial accounts department, other times to its Federal accounts department. There have been times that, in order to place orders with GSA vendors, vendors have requested a copy of the Magnuson Act, only to subsequently question how it applies to Councils in that it is unclear to vendors how the Magnuson Act allows Councils to purchase under the GSA contract.

In another example for the need of specific Federal assistance is with regard to journal access. The cost for journal subscriptions is extremely expensive as well as the cost of access to journals via library search services. If Councils could obtain licenses under a NOAA/NMFS contract and pay NOAA for the licenses that would allow Councils access to journals already under Federal

purchase, it would save thousands. Councils have been told that because we do not have NOAA IP addresses, Councils cannot obtain access to journals under NOAA's contract which are at a reduced price. Councils continually receive contradictory information from various NOAA personnel regarding procurement and access issues that involve Federal services.

Staff harassment by Council members – Staff must have a formal pathway to resolve instances where Council members harass staff (libel, slander, etc.).

Staff have, on occasion, been subject to false accusations or had false statements (oral and written) made about them in public by Council members.

Obtaining additional legal guidance – Often circumstances dictate that legal counsel provided by NOAA is insufficient. Councils would appreciate knowing limits of when it is permissible to obtain outside legal counsel.

By way of example, for more than a decade Councils have asked NOAA GC for a definition (or determination of) what it means to be an 'executive agency' of the DOC, with regard to ongoing FACA and other issues. NOAA GC has not responded to this repeated request. This could be interpreted as "legal advice unavailable from NOAA GC" and should allow Councils to obtain advice outside NOAA GC.

Again, this list of issues is not exhaustive but representative of the legal and procedural situations that confront Councils. My colleagues and I would appreciate any advice or guidance that would help us resolve or better address these issues.

I look forward to hearing from you, either prior to or during the next CCC meeting in May.

Sincerely,



Stephen A. Bortone, Ph.D.
Executive Director

c: Regional Fishery Management Councils, William Chappell