



UNITED STATES DEPARTMENT OF COMM  
Office of the General Counsel  
Washington, D.C. 20230

October 11, 2000

MEMORANDUM FOR: Margaret Hayes  
Assistant General Counsel for Fisheries

FROM: Stacia D. Le Blanc *Michael A. Connor Fox*  
Chief, Federal Assistance Law Division

SUBJECT: Fishery Management Council SOPPs

You requested that we review the Fishery Management Council's (FMC) Statements of Organization, Practices and Procedures (SOPPs) for legal sufficiency. The Employment Labor Law Division, General Law Division, and the Ethics Division in the Office of the Assistant General Counsel for Administration, in addition to my office, have reviewed the SOPPs for legal sufficiency, and our recommendations are set forth below. Where handwritten comments on the copies of the SOPPs we received addressed issues, we did not deem it necessary to repeat those comments.

This memorandum will be in two sections. The first section will contain suggested language for provisions that should be in all SOPPs. The second section will address provisions particular to individual Council SOPPs with which we have a legal objection. Comments are keyed to the numbering system used in the SOPPs. The objectionable part of the cited provision will be referenced or quoted, followed by the legal objection.

**I. Provisions Applicable to All SOPPs**

**A. Equal Employment Opportunity Statement**

The Council is an Equal Employment Opportunity Employer. All employment actions will be free from discrimination based on race, religion, color, national origin, sex, age, disability, sexual orientation,<sup>1</sup> status as a parent<sup>2</sup> and reprisal.

Except for complaints alleging sexual orientation and status as a parent, complaints by employees alleging that they have been discriminated against on the bases listed above, should be processed in accordance with 29 C.F.R. § 1614. Employees must contact an EEO Counselor at NOAA's Office of Civil Rights within 45 days

<sup>1</sup> Many of the SOPPs did contain an Equal Employment Opportunity statement, however, these statements listed as protected bases "physical handicap" and sexual preference. These terms should be changed to "disability" and "sexual orientation."

<sup>2</sup> Executive Order 13152 dated May 2, 2000, prohibits employment discrimination based on an individual's status as a parent.

of the date of the alleged discrimination.<sup>3</sup> Employees alleging discrimination on the basis of sexual orientation will have their complaints processed in accordance with DAO 215-11. Employees must contact an EEO Counselor at NOAA's Office of Civil Rights within 45 days of the date of the alleged discrimination.

**B. Fair Labor Standards Act Statement**

Overtime payments shall be made in accordance with the provisions of the Fair Labor Standards Act (FLSA) 29 U.S.C. § 201 et. seq.

**C. Harassment Statement.**

The Council has a zero-tolerance policy for harassment on the basis of race, religion, color, national origin, sex, age, sexual orientation, disability and reprisal. Any employee who believes he or she has been harassed should report the harassment to a supervisor or manager. The supervisor or manager should then follow the steps set forth in Department Administrative Order, DAO 202-955. Any complaints of harassment on the basis of sexual orientation should be handled in accordance with DAO 215-11. The provisions of these DAOs are entirely separate from the EEO complaint process, and must be followed whether or not an employee has filed an EEO complaint.

**D. Reasonable Accommodation For Disabilities**

Requests for disability-related accommodations should be processed in accordance with Department Administrative Order, DAO 215-10.

**E. References to Governing Regulations at 50 C.F.R. § 600 et seq.**

Some of the provisions in the SOPPs make reference to the provisions at 50 C.F.R. § 600 et. seq. As these regulations are currently being revised, the SOPPs should be updated to reflect the accurate regulatory citation once the regulations have become final.

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<sup>3</sup> According to a Legal Opinion dated March 14, 1995, from the U.S. Department of Justice, Office of Legal Counsel, the Fisheries Management Councils "... are covered by the anti-discrimination provisions of Title VII of the Civil Rights Act of 1964 insofar as they apply to employment in the federal government. . . ." As such, their discrimination complaints are processed in accordance with 29 C.F.R. § 1614.

**F. Salary and Compensation Provisions**

All salary and compensation provisions, including provisions concerning unused sick leave should be consistent with the newly revised regulations at 50 C.F.R. § 600 et. seq.

**II. Review of Provisions in Individual SOPPs**

**A. New England FMC**

1. a. Provision

7.B. Employment Policies and Practices

This section references outdated CFR provisions.

b. Discussion

Recommend citing to the current regulations at 50 CFR Section 600.120.

2. a. Provision

8. Standards of Conduct

This section references outdated CFR provisions.

b. Discussion

Recommend citing to the current regulations at 50 CFR Section 600.225.

3. a. Provision

16. Administrative Management System

The introductory paragraph, in addition to sections B. Procurement Procedures, and Section C. Property Management System, reference OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by

2. a. Provision

The introductory paragraph of the subsection on Procurements in the Financial Management section on page 9, last sentence states that "The Council will contract for services to be provided by other government agencies, educational institutions, and profit and nonprofit organizations in accordance with the OMB Circulars, terms and conditions of the grant, the special award conditions, and the Council's procurement procedures"

b. Discussion

The paragraph should specifically mention 15 CFR Part 14 because the Councils procurements under its award are governed by this provision.

3. a. Provision

The subsection on the Property Management System in the Financial Management section on page 9 does not mention 15 CFR Part 14.

b. Discussion

This section should specifically mention 15 CFR Part 14 because the management of property obtain under a financial assistance award is governed by this provision.

4. a. Provision/Discussion

The subsection on page 11 discussing Privacy Act Records needs to state that all records subject to the Privacy Act will be collected, maintained, used and disseminated in accordance with the provisions of the Privacy Act. They will be kept securely, with disclosure limited to those permitted access pursuant to the Privacy Act. Any questions about Privacy Act issues should be referred to the NOAA FOIA/Privacy Act officer.

5. a. Provision/Discussion

The subsection on page 11 discussing the Freedom of Information Act needs to explain that the NOAA FOIA/Privacy Act officer logs in requests; also, a response (not merely an acknowledgment) to a FOIA request must be made in twenty (not ten) working days. Also, note that all responsive documents must be reviewed for disclosure on a page-by-page basis and that originals must be retained in the originating office, while copies ~~(including redacted and unredacted copies) of FOIA documents~~ must be maintained by the FOIA office. ~~In accordance~~

*in accordance with DOC policy.*

handled under FOIA, whether or not they reference the FOIA. The time limit for responding to a FOIA request is 20 working days. Appeals are to the DOC Assistant General Counsel for Administration, not to the General Counsel. Appeals should include copies of the initial request and the letter of denial; however the Council does not send these documents to the Assistant General Counsel for Administration unless there is an appeal and the Counsel's office requests those documents. The "exceptions" referred to by the Council are the FOIA exemptions. Responsive documents must be disclosed unless there is an applicable FOIA exemption. A foreseeable harm statement must be drafted in all instances in which documents are withheld.

D. Pacific FMC

1. a. Provision

The introductory paragraph of the subsection on Cooperative Agreements in the Financial Management section on page 9, last sentence states that "In addition to administrative funds, the Council may obtain programmatic funding by entering into cooperative agreements with federal and state agencies and private institutions on matters of mutual interest which further the objectives of the Magnuson-Stevens Act.

b. Discussion

The Councils do not have the legal authority to enter into cooperative agreements. Additionally, the term "cooperative agreement" has a specific legal definition. Under the Federal Grant and Cooperative Agreement Act (FGCA), a cooperative agreement is a legal instrument reflecting the relationship between the U.S. Government and a recipient when the principal purpose is to transfer something of value to the recipient to carry out a public purpose of support or stimulation authorized by law, and substantial involvement by the Government is expected. So, by definition, a Council can't enter into a cooperative agreement with a state or private institution. Replace section a. with the following:

a. Receipt of funds. The Council may not independently enter into agreements, including grants, contracts, or cooperative agreements, whereby they will receive funds for services rendered. All such agreements must be approved and entered into by NOAA on behalf of the Council. Additionally, the Council is not authorized to accept gifts or contributions directly. All such donations must be directed to the NOAA Administrator in accordance with applicable Department of Commerce procedures.

