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1h

January 21, 2020

Thomas A. Nies, Executive Director
New England Fishery Management Council
50 Water Street, Mill 2
Newburyport, MA 01950

Dear Tom,

This letter responds to your correspondence of July 8, 2019, to Gene Martin, in which you asked several questions that were raised during the June 2019 New England Fishery Management Council (Council) meeting. I have consulted with both the Department of Commerce's Office of General Counsel (DOC/GC) and NOAA program offices to provide the guidance below. We have addressed some of your questions in a previous letter to the Mid-Atlantic Council, and I have included it along with this response for your convenience. DOC/GC noted that without a change in facts, their advice on these matters will remain the same. Additionally, DOC/GC raised concerns about the Council's reviewing a NOAA program that is grounded in law within a solid legal framework and that has operated efficiently and successfully.

Your first question focuses on whether the RSA program could operate on a contractual basis as opposed to one rooted in Federal financial assistance. The DOC/GC has long advised that the RSA Program must operate using a grant funding mechanism as opposed to a contract award. This legal determination derives from application of the requirements of the Federal Grant and Cooperative Agreement Act of 1977 (Pub. L. 95-224, February 3, 1978). This law prescribes criteria for selecting appropriate legal instruments in order to carry out the functions of the Federal government. In the instant case, NOAA's primary purpose with respect to this program is not to acquire services from the applicants for its direct benefit or use. If this were the case, a contractual arrangement would be appropriate. Rather, the agency is providing financial assistance in the form of pounds of fish or days-at-sea, reserved by the Council, to be sold or used to offset the cost of conducting fisheries research priorities established by and for the use of the Council, NOAA, and the public. Given this arrangement, the Act mandates use of a Federal financial assistance funding mechanism to accomplish the goals of the program. Any modification to the current organizational structure of the program in order to have NOAA use contracts as a funding mechanism would fundamentally alter the Council's ability to establish critical priorities for the program and, most importantly, to secure the information and research data that the Council needs in order to make fully-informed fishery management decisions.

Your second question addresses the possible use of a "broad cooperative agreement" for the RSA program. In concept, a cooperative agreement could be a tool used to attain some of the



objectives outlined in recommendation 4.3. However, based on communications with NMFS staff, questions remain as to whether a "broad cooperative agreement" would be the most effective approach to meeting these objectives. Two of the final report's recommendations (4.4 and 4.5) go beyond the scope of a cooperative agreement and would seem to involve using a cooperative institute.

Establishment and use of a NOAA Cooperative Institute (CI) infrastructure in the context of the RSA program would necessitate a multi-layered, complicated, and resource intensive overlay. The establishment of the requisite CI would be impossible without, at minimum, NMFS line office support and up-front funding, as well as Research Council, NOAA Executive Council, and Under Secretarial support. In comparison, the established RSA program is a streamlined mechanism that is already provided for in law.

As I understand your last question, you ask what future legal considerations should be taken into account as the program matures. In particular, a member of the RSA Review Panel raised concerns of potential Anti-Deficiency Act (ADA) violations, premised on the program's ability to generate funding for its research through the sale of harvested fish. There can be no violative funding augmentation where Congress expressly authorizes an agency to fund activities in a specific manner. Here, NOAA is authorized to fund a researcher through an award of Federal financial assistance that, in lieu of granting money, instead permits him/her to retain for sale harvested fish. Given this arrangement, there is no augmentation of funds and therefore no potential violation of the ADA.

I hope these responses to your questions are helpful and will encourage further conversations with NMFS staff involved with operating NOAA's RSA program. If you have further questions, please do not hesitate to contact me.

Sincerely,



Mitch MacDonald
Attorney-Advisor, NOAA

Attachment





U.S. DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
OFFICE OF GENERAL COUNSEL
55 Great Republic Drive
Gloucester, Massachusetts 01930

January 12, 2012

Christopher M. Moore, Ph.D.
Executive Director
Mid-Atlantic Fishery Management Council
800 North State Street, Suite 201
Dover, Delaware 19901-3910

Dear Chris,

This letter responds to your correspondence of October 18, 2011, to me in which you asked for legal advice regarding whether the Mid-Atlantic Fishery Management Council (Council) could assume responsibility for the administration of the Research Set Aside (RSA) Program either directly or through a contractual agreement with a third party. Specifically, you asked: (1) could the RSA Program operate using contracts, instead of grants, with those whose research proposals are accepted in order to conduct research on board fishing vessels and to make compensation trips to harvest RSA amounts of fish; (2) can the Council enter into contractual agreements with outside entities to fund scientific research under the RSA Program; (3) can the Council enter into a contractual agreement with a third party to sell RSA species of fish at auction to generate revenues to fund scientific research; and (4) can revenues generated from the auction of RSA species of fish be deposited in a fund established by the Council.

I have consulted with the Department of Commerce's Office of General (DOC/GC) with respect to a number of these questions. DOC/GC advised that there is no basis upon which to revise its original advice that, as presently configured, the RSA Program should operate using a grant funding mechanism as opposed to a contract award. NOAA's primary purpose with respect to this program is not to acquire services from the applicants for its direct benefit or use. Rather, the agency is providing financial assistance (in this case, amounts of fish that can be sold to offset the cost of conducting research) to the researchers to accomplish a public objective focused on fisheries research. This determination is dispositive and supports the use of federal assistance to fund these projects.

Your remaining questions really turn on a determination as to whether the Council has the legal authority to take over administration of the RSA Program. It matters not whether the Council does this directly or under contract with a third party. The functions of a fishery management council are set forth in section 302(h) of the Magnuson-Stevens Fishery Conservation and Management Act (Act). None of these functions contemplate that the Council can take over administration of the RSA Program. This would put the Council in the role of conducting a scientific research program, which is more properly the province of an organization like the Northeast Fisheries Science Center. Such activity would be well beyond the Council function in section 302(h)(7) that empowers the Council to develop research priorities, as it currently does for the RSA Program. These research priorities cannot be implemented through a research



program administered by the Council but must be submitted to the agency for its "consideration in developing research priorities and budgets for the region of the Council." Similarly, the "basket" provision in section 302(h)(8) does not support the administration of the RSA Program by the Council. It allows the Council to conduct "other activities" which are required by, or provided for in, the Act or which are necessary and appropriate for to the functions enumerated in section 302(h). These other activities are circumscribed by sections 302 and 303 of the Act which outlines the authorities and functions of the Council. Further, if you look at section 404 of the Act respecting fisheries research, it is the Secretary who is charged with initiating the research program "in cooperation with the Councils." The cooperation of the Councils is limited by section 302(h)(7) to making recommendations on research priorities. The "other activities required by, or provided for, in the Act" language runs more to the administration of those activities mentioned in section 302(f). There is no authority vested in the Council in sections 302, 303, or 404 of the Act to run a research program such as the RSA Program.

While your remaining questions need not be answered in light of the limitations on the Council's functions noted above, they deserve some comment. The only auction authority contained in the Act appears at section 303a(d) which deals with auctioning off allocations under a limited access privilege program to collect royalties. Given that Congress limited the auction authority to this activity, the canons of statutory construction do not support an additional Congressional intent to allow the Council to auction off RSA species of fish. As above, it matters not that the auction is conducted by a third party under contract with the Council. Further, monies generated as the result of the auction might be considered program income which must be applied to the administration of the Council's grant or returned to the agency. Finally, a fund to receive the monies from the auction can only be established if there is express statutory authority to do so. There is no such authority in the Act.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



Joel G. MacDonald
Northeast Section Chief