



#1c

New England Fishery Management Council

50 WATER STREET | NEWBURYPORT, MASSACHUSETTS 01950 | PHONE 978 465 0492 | FAX 978 465 3116
John F. Quinn, J.D., Ph.D., *Chairman* | Thomas A. Nies, *Executive Director*

MEMORANDUM

DATE: April 1, 2021
TO: Council
FROM: Tom Nies, Executive Director
SUBJECT: **Scientific and Statistical Committee (SSC) Conflict of Interest/Recusal Guidance**

1. Official guidance on SSC conflicts of interest (COI) and recusal requirements is limited. This has led to confusion. The Executive Committee recommends the Council incorporate guidance into our Operations Handbook to avoid these issues in the future. This memorandum explains the issue and includes suggested text for the Operations Handbook.

Background

2. The Magnuson-Stevens Act (MSA) provides guidance on conflict of interest and financial disclosure requirements for Councils and SSC members. Council members are considered to be federal employees that are subject to the ethics criminal provisions at 18 U.S.C. § 208.¹ This section prohibits employees from participating personally and substantially in matters affecting their financial interests. The MSA, however, provides an exception for Council members if financial interests are disclosed. The MSA also requires SSC members to disclose financial interest information, but does not provide for considering this disclosure for recusal. Unlike Council members, SSC members are not subject to a statutory recusal requirements as a result of their appointment.

3. There are also regulations that establish standards of conduct for Council members and others. One of the rules applies to SSC members because they can be considered “members of a Council advisory group.” This rule prohibits the ““use, for other than official purposes, of information obtained through or in connection with his or her Council employment that has not been made available to the general public.” 50 C.F.R. § 600.225(b)(6). It would be rare for this situation to occur, since all information provided to the SSC is also provided to the public.

¹ Council members and employees are also subject to other criminal provisions such as prohibiting bribery and lobbying restrictions, but I’m focusing only on recusal and disclosure requirements.

4. SSC members should also adhere to the National Standard Guidelines (which do not have the force or effect of law). NS2 requires the use of the best scientific information available. The NS2 guidance ([NSG2](#)) includes peer review conflict of interest provisions applicable to all SSC members, including non-federal employees. Generally, to participate in a peer review, the employees need to be free of financial conflicts of interest or conflicts with scientific information, subject matter, or work product under review, or any aspect of the statement of work for the peer review. Reviewers should not review their own work. 50 C.F.R. § 600.315(b)(2)(ii). Note that there is extensive guidance on how peer reviews will be conducted, and it is clear that SSC discussions use the results from peer reviews: an SSC discussion is not, in and of itself, considered a peer review.

5. SSC members who are federal employees are subject to these rules, but are also subject to all of NOAA's ethical standards of conduct and NOAA's Scientific Integrity Policy. The Scientific Integrity Policy broadly defines conflicts of interest as any financial or non-financial interest which conflicts with the actions or judgments of an individual when conducting scientific activities because it could impair the individual's objectivity; create an unfair competitive advantage for any person or organization; or could create the appearance of either of the foregoing. Federal employees with questions on these issues can seek guidance from their general counsel.

6. As summarized, the general guidance available does not address several situations that are routinely encountered. We consulted with NOAA GC, and they advised us that a Council may provide additional guidance. A few Councils have done so – most notably the North Pacific Fishery Management Council. The Council is considering guidance on three specific issues. These are further explained below.

- a) Issue 1: Participation by an SSC member in developing an SSC recommendation based on work prepared by a subordinate. To date, this situation was only encountered by federal employees, and only when the SSC develops ABC recommendations based on a stock assessment prepared by a subordinate.
 - b) Issue 2: Participation by an SSC member in developing an ABC recommendation that will affect an individual or organization that the SSC member has a formal relationship with (contractor, employee, employer, paid or unpaid board member, etc.).
 - c) Issue 3: Submission of a contract proposal by an SSC member that addresses a specific research topic identified by the SSC.
7. Issue 1: Senior Population Dynamics scientists from the NEFSC are frequently appointed to the SSC. In the past, they have usually recused themselves from most ABC discussions because they supervised or advised the scientists who prepared the assessment used as the basis for the discussion. Generally, in these situations they limit discussion to technical clarifications. As a result, the SSC loses much of the benefit of the expertise that these scientists have. The basis for this recusal decision appears to be a combination of NSG2 and NOAA's Scientific Integrity Policy. The ABC decision, however, is not a peer review, and arguably the relationship with subordinates does not automatically impair the judgment or objectiveness of comments on an ABC determination.

8. Issue 2: By their very nature, ABCs have financial impacts on fishermen. SSC members are sometimes contracted by fishing interests to do scientific work, or to serve on a corporate board. Participating in an ABC discussion under these circumstances could give the appearance of a conflict of interest. While ABC recommendations are the most obvious example of this potential problem, it is possible this could arise with other SSC recommendations.

9. Issue 3: The SSC frequently identifies research needs. While some are general in nature and are part of the Council's annual review of research priorities, at other times the SSC identifies very specific research projects. At times, the Council will seek a contractor to address the issue, and SSC members are sometimes asked to help the Council prepare the request for proposals. SSC members are often well-qualified to perform the work, and occasionally submit proposals. The Council has awarded contracts to SSC members in the past.

10. Proposed Council guidance to address these issues is on the next page.

Proposed Operations Handbook Changes to Address SSC Conflict of Interest Issues

Conflict of Interest: SSC members are expected to maintain high standards of conduct. SSC decisions are expected to be objective and must avoid conflicts of interest. The following guidance will help SSC members address frequently encountered situations. Should SSC members have questions about a specific issue, the Executive Director will facilitate consultation with NOAA GC. SSC members who are federal employees may also consult with the appropriate ethics officer.

- 1) Each SSC member is required to complete a financial interest disclosure form on an annual basis and when there is relevant change. These are made available to the public on the Council web page. If an SSC member has a current, recurring, or persistent financial conflict of interest (as defined in the NOAA Scientific Integrity Policy, [NAO 202-735D-2](#)) with an SSC agenda item, the member must identify the conflict and recuse him or herself from participating in SSC discussions on that subject. Recusals must be documented in the SSC report.
- 2) In cases where the SSC, or an SSC sub-panel, is conducting a peer review, SSC members shall follow the guidance on peer reviews as described in the National Standard 2 guidelines as well as other regulations or legal requirements that may be applicable (for example, in the case of federal employees).
- 3) If an SSC member is an author or coauthor of a report considered by the SSC, that individual should recuse him or herself from discussion about SSC recommendations on this agenda item. However, that SSC member may provide clarifications about the report to the SSC as necessary. If, on the other hand, the SSC reviews a report prepared by individuals under the line of supervision of an SSC member, then that SSC member should recuse him or herself from leading the SSC discussion of that agenda item. He or she may otherwise participate fully in the SSC discussion and development of recommendations based on the report after disclosing affiliation with the authors. The Council believes that in the latter instance, the benefit of participation by SSC members outweighs the possible appearance of a conflict of interest. Any recusals must be documented in the SSC report.
- 4) SSC members, or their employers, are eligible to compete for Council contracts. If the SSC is asked for assistance in drafting the request for proposals, SSC members who may compete for that contract should not provide advice to avoid the appearance of a conflict. SSC members should not assist the Council with the review of their own proposals or competing proposals.