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Ms. Josie Quintrell
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RE: Regional Associations under the ICOOS Act of 2009 (MASGP 09-008-07)

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Dear Ms. Quintrell,

Below is the summary of research regarding the questions you posed to the National Sea Grant Law Center concerning tort liability issues associated with the Integrated Coastal and Ocean Observation System Act of 2009 (ICOOS Act). This information is intended as advisory research only and does not constitute legal representation of NOAA or the Regional Associations (RAs) by the Law Center. It represents our interpretation of the relevant laws and cases and does not necessarily reflect the views of the National Sea Grant Office, NOAA, or any other agency or entity.

Following a short overview of the ICOOS Act and an outline of the duties required of RAs under this Act, this memo addresses the potential liability of a RA, as established by the ICOOS Act, if an individual uses data to make a decision and is injured in some way. Furthermore, this memo addresses additional questions presented by the National Federation of Regional Associations for Coastal and Ocean Observing (NFRA), including: 1) How does the ICOOS Act affect Regional Information Coordination Entities (RICEs) and RAs and how are RAs defined and established under the Act; 2) What authority does NOAA have in defining or altering requirements for RA contracting and certification; 3) Whether federal employees can participate on an RA's Board of Directors; 4) What liability coverage is afforded to employees of an RA; and 5) What kind of actions should an RA take to minimize risks, even with these protections (e.g., website disclaimers, best practices, etc) in place?

ICOOS Act of 2009 – Background

On March 30, 2009, President Barack Obama signed the ICOOS Act into law. Enacted as a component of the Omnibus Public Land Management Act, H.R. 146, the ICOOS Act advances a larger effort designed to conserve public lands and promote water-related research. Beyond providing information concerning marine resources, the national ICOOS will measure and predict weather and climate change, support marine commerce, and bolster energy projects in coastal regions.

NOAA will serve as the lead federal agency for the ICOOS in coordination with the National Ocean Research Leadership Council (Council) and the Interagency Ocean Observing Committee (Committee). The ICOOS Act directs the Council, whose membership consists of the heads of fifteen federal agencies involved in conducting or funding ocean research or developing ocean research policy, to serve as the policy and coordination body for all aspects of ICOOS.

The Council is responsible for establishing the Committee; approving budgets developed by the Committee; ensuring coordination of ICOOS with other domestic and international observing activities; and encouraging coordinated research and technology development. The Committee is responsible for preparing annual and long-term plans for the ICOOS; creating comprehensive budgets; establishing required observation data variables to be gathered by ICOOS components and identifying priorities for ICOOS observations; and establishing protocols and standards for data processing, management, and communication. The Act also provides authority for the certification or contracting of RICEs; the responsibilities of which are outlined below.

RA/RICE Responsibilities Under the ICOOS Act

According to the ICOOS Act, RICEs will coordinate state, federal, local, and private interests at a regional level and have the responsibility of engaging the private and public sectors in designing, operating, and improving regional coastal and ocean observing systems in order to ensure data and information meet the needs of user groups from the respective regions.¹

The ICOOS Act also requires RICEs to:

- Demonstrate an organizational structure capable of gathering required System observation data, supporting and integrating all aspects of coastal and ocean observing and information programs within a region and that reflects the needs of state and local governments, commercial interests, and other users and beneficiaries of the System and other requirements specified under the ICOOS Act and the System Plan;
- Identify gaps in observation coverage needs for capital improvements of Federal assets and non-Federal assets of the System, or other recommendations to assist in the development of the annual and long-term plans and transmit such information to the Committee;
- Develop and operate under a strategic operational plan that will ensure the efficient and effective administration of programs and assets to support daily data observations for integration into the System, pursuant to the standards approved by the Council;

¹ Integrated Coastal and Ocean Observation System Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 at § 12303(6)(A).

- Work cooperatively with governmental and non-governmental entities at all levels to identify and provide information products of the System for multiple users within the service area of the RICEs; and
- Comply with all financial oversight requirements established by the Administrator, including requirements relating to audits.²

RA Tort Liability Under ICOOS Act

As discussed in our 2005 memorandum³, any lawsuit filed to recover for injuries sustained by the use of raw data supplied by buoys, models, or other instruments would likely be decided under tort law, specifically the law of negligence. Normally, the federal government and its entities enjoy sovereign immunity and may not be sued without their consent. Congress, however, through the Federal Tort Claims Act (FTCA) has waived immunity for tort claims based on negligence law.

The FTCA⁴, however, contains several exemptions that expressly preclude recovery on certain negligence claims. The most relevant of these exemptions to RA activities is the “discretionary function or duty” exception.⁵ The FTCA excludes negligence claims *based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a federal agency or government employee*, regardless of whether that discretion has been abused. Further discussion on the applicability of the “discretionary function” doctrine to RA activities is contained in Question 4 below.

Questions Raised by NFRA

1) *Are the RAs now automatically considered a federal agency because we are “incorporated into the system by contract, lease, grant or cooperative agreement”? Does NOAA need to “do something” to activate this clause or does it apply to the RAs automatically?*

The Act defines the term regional information coordination entity (RICE) as “an organizational body that is certified or established by contract or memorandum” by NOAA.⁶ The term includes RAs.⁷ For purposes of the ICOOS Act, an RA is not automatically considered a federal agency, but must be either certified or established by contract or agreement by the NOAA Administrator. That said, the Act specifically states that the passage of the ICOOS Act does not invalidate any existing certifications, contracts, or agreements between RICEs and other parts of the ICOOS system.⁸

² *Id.* §12304(c)(4).

³ Memorandum, National Sea Grant Law Center, *IOOS Tort Liability Issues* (June 5, 2005), available at <http://www.olemiss.edu/orgs/SGLC/National/Tort%20Memo.pdf>.

⁴ 28 U.S.C. §§ 1346(b), 2671-2680.

⁵ *Id.* § 2680(a).

⁶ Integrated Coastal and Ocean Observation System Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 at § 12303(6)(A).

⁷ *Id.* §12303(6)(B).

⁸ *Id.* §12304(f).

The ICOOS Act states that, “[t]o be certified or established..., a regional information coordination entity shall be certified or established by contract or agreement by the Administrator, and shall agree to meet the certification standards and compliance procedure guidelines issued by the Administrator and information needs of user groups in the region while adhering to national standards.”⁹ Therefore, before an RA/RICE can be considered “certified” by NOAA, it must meet these two requirements. The RA/RICE must actually be certified or established by contract or agreement and the RA/RICE must agree to meet the certification standards, compliance procedure guidelines, and, through the adherence to national standards, meet the needs of user groups in the region.

An existing RA, which has been established by contract or agreement by the NOAA Administrator, would appear from the plain language of the Act to have meet the first requirement. However, it would need to meet the second requirement as well. Since an RA cannot agree to adhere to standards that NOAA has not yet developed, NOAA would need to develop certification standards and compliance standards before an RA could become officially certified for the purposes of the ICOOS Act.

2) Can NOAA restrict this definition in some way?

The ICOOS Act gives authority to three separate entities for the establishment of guidelines for certifying RAs/RICEs and for managing non-Federal assets. These entities are NOAA, the Council, and the Committee.

Section 12304(c)(3) of the ICOOS Act establishes NOAA as the lead federal agency. Under this section NOAA “shall” promulgate program guidelines to certify and integrate non-Federal assets, including RICEs, into the System. Under § 12304(c)(2)(E), the Committee develops contract certification standards and compliance procedures for all non-Federal assets, including RICEs. The Committee also establishes eligibility criteria for integration into the ICOOS System and ensures compliance with any standards or protocols established by the Council.¹⁰ NOAA is also given authority to “enter into and oversee contracts, leases, grants or cooperative agreements with non-Federal assets, including regional information coordination entities, to support the purposes of [the ICOOS Act] on such terms as the Administrator deems appropriate.”¹¹

Section 12304(b)(1)(B) states that a network of RICEs are to be included in the national ICOOS to fulfill regional observation priorities, but NOAA is given authority to certify those entities. Therefore, NOAA, the Committee, and the Council are given authority to restrict or broaden the role RAs hold in the ICOOS system through the establishment of certification standards, program guidelines, and compliance guidelines.

3) Is the section of the ICOOS Act indicating that Federal employees may “participate in the functions of the regional information coordination entities” meant to imply that they can also serve as a member of the board of directors, especially if the board is managing funds that might go to a federal agency to carry out RICE activities?

⁹ *Id.* §12304(c)(4)(A).

¹⁰ *Id.* §12304(c)(2)(E).

¹¹ *Id.* §12304(c)(3)(D).

The ICOOS Act specifically states that “employees of Federal agencies may participate in the functions of the RICES.”¹² The ICOOS Act, however, does not speak to *how* a Federal agency employee may participate in the functions of a RICE. Nothing in the ICOOS Act expressly prohibits a Federal agency employee from serving on an RA’s Board of Directors, but it is important to note that federal employees are barred by other federal laws from participating in certain activities. As discussed in our 2005 memo¹³ on federal representation on the boards of the RAs, the Office of Legal Counsel (OLC) within the Department of Justice ruled in 1996 that 18 U.S.C. § 208 prohibits a federal employee from serving in his/her official capacity as a board member of an outside organization.¹⁴ Nothing in the ICOOS Act affects § 208, although presumably NOAA can speak to this issue when it promulgates RICE program guidelines during the certification process or when it establishes a RICE through a contract, grant or cooperative agreement.

4) What liability coverage is extended to the RA, its employees, etc?

To answer this question properly we must examine two separate elements, which are: (1) who is an employee for the purposes of this Act and (2) what actions are included or protected under the FTCA?

Who is an employee for the purposes of this Act?

The Act states that any “employee of a non-Federal asset or regional information coordination entity, while operating within the scope of his or her employment in carrying out the purposes of [the ICOOS Act], is deemed to be an employee of the Federal Government with respect to tort liability.”¹⁵ Since an employee of a non-Federal asset or RICE is deemed by the Act to be a Federal employee, the FTCA would govern the RICE’s liability for tort actions based on negligence law.

It is not as clear whether independent contractors, contracted by an RA to help fulfill the missions of the RA, are included under this definition of Federal employee. The plain language of the FTCA and case law suggests that independent contractors working for an RA/RICE are not covered under the FTCA and are not considered employees for purposes of the ICOOS Act.

Under the doctrine of substitution,¹⁶ the FTCA limits sovereign immunity by making the federal government liable to the same extent as a private person for certain torts of federal government employees acting within the scope of their employment.¹⁷ The FTCA defines “employee of the government” to include “officers or employees of any federal agency, members of the military or

¹² *Id.* §12304(c)(4)(B).

¹³ Memorandum, National Sea Grant Law Center, *Federal Representation on the Boards of the Regional Associations (RAs)* (Aug. 11, 2005), available at <http://www.olemiss.edu/orgs/SGLC/National/Ethics%20Memo.pdf>.

¹⁴ The federal government, as a general principle, will not subsidize lobbying and Executive branch employees may not lobby Congress on behalf of their agency. With respect to lobbying by federal executive agencies, this principle is manifested in 18 U.S.C. § 1913.

¹⁵ Integrated Coastal and Ocean Observation System Act of 2009, Pub. L. No. 111-11, 123 Stat. 991 at §12304(e).

¹⁶ Understood in this instance as when an employee acts toward a third party through the federal government, thus making the government liable for that employee’s action.

¹⁷ 28 U.S.C. §§ 1346(b), 2671.

naval forces of the United States, . . . and persons acting on behalf of a federal agency in an official capacity. . . .”¹⁸ The FTCA waiver of sovereign immunity, however, does not extend to independent contractors.¹⁹

Whether a person is a government employee or an independent contractor is a question of federal law.²⁰ The FTCA’s definition of “federal agencies” includes entities that are “acting as instrumentalities and agencies of the United States.”²¹ This issue is critical because, in contrast to independent contractors, the FTCA’s waiver of sovereign immunity extends to the negligent acts of employees of “federal agencies” or employees established by law, as in the employees of RICEs under the ICOOS Act.

Applying principles of agency law, the courts recognize that the term “federal agency” is synonymous with “servant or agent” of the government.²² Courts have concluded that contractors are not servants because the government lacks the authority “to control the detailed physical performance of the contract.”²³ Therefore, the federal government is not held liable for the conduct of the contractors’ employees.

What actions are included or protected under the FTCA?

To determine what actions are covered, a two-pronged analysis must be undertaken. First, the ICOOS Act states that “any employee of such a non-Federal asset or regional information coordination entity, while operating within the scope of his or her employment in carrying out the purposes of this subtitle, with respect to tort liability, is deemed to be an employee of the Federal Government.” The important aspect of this definition is the phrase “while operating within the scope of . . . employment.” The ICOOS Act restricts this definition of “scope of employment” to include only those operations that carry out the purposes of the ICOOS Act. Therefore, to be covered by liability protections (1) an employee must be acting within the scope of his or her employment to be protected under the FTCA and (2) even if acting within the scope of his or her employment, the employee must be carrying out the purposes of the ICOOS Act.²⁴ In addition, one must determine if the action was a discretionary function. If the action was discretionary, it would be exempt from tort liability under the FTCA.

Procedurally, the United States may substitute itself for the federal employee as the defendant in a suit brought under the FTCA against a federal employee. For example, if a fisherman is injured by using data from a marine buoy, he may file a lawsuit in state court against the employee(s) who collected and disseminated that data.²⁵ Once the lawsuit is filed, the United States will determine whether that employee was acting within the scope of his or her employment, and if

¹⁸ *Id.* § 2671.

¹⁹ *Id.*; see *United States v. Orleans*, 425 U.S. 807 (1976).

²⁰ *Logue v. United States*, 412 U.S. 521 (1973).²⁰

²¹ 28 U.S.C. § 2671.

²² See *Logue*, 412 U.S. at 527-28 (citing Restatement (Second) of Agency § 2 (1958)); *Orleans*, 425 U.S. at 814-15.

²³ *Logue*, 412 U.S. at 527, 528; see *Orleans*, 425 U.S. at 814; accord Restatement (Second) of Agency § 2.

²⁴ It seems unlikely that an employee of a RA/RICE would be employed to carry out something other than the purposes of the Act, but the distinction is a prudent one to make.

²⁵ State law, rather than federal law, governs the substance of negligence actions. The FTCA allows the federal government to be brought into court; once it is there, the court applies the negligence law of the state in which the negligent act or omission took place.

so, may substitute itself as defendant in the case, and under the FTCA may remove the case to federal district court.

Under the Westfall Act²⁶, “the United States may be substituted in a civil action for money damages brought against a federal employee who is alleged to have committed a common law tort while acting within the scope of his or her employment.”²⁷ The U.S. Attorney General must first certify that the federal employee in question was acting within the scope of their employment before the U.S. may be substituted in a civil action. The Westfall Act states that the “certification of the Attorney General shall conclusively establish scope of office or employment for purposes of removal [from State to Federal court].”²⁸ The Supreme Court has held, though, that the Attorney General’s scope-of-employment certification is subject to judicial review for purposes of substitution.²⁹ The Sixth Circuit held that “whether an employee was acting within the scope of his employment is a question of law, not fact, made in accordance with the law of the state where the conduct occurred.”³⁰

The Sixth Circuit also held that “the Attorney General’s certification provides prima facie evidence that the employee was acting within the scope of employment.”³¹ Thus, to contest the propriety of substitution, the plaintiff must produce evidence that demonstrates that the employee was not acting in the scope of employment. If the plaintiff produces such evidence, the government must then produce evidentiary support for its certification.

As stated before, the “discretionary function or duty” exception contained in 28 U.S.C. § 2680(a) excludes from the FTCA’s application any claim based on the exercise or performance, or the failure to exercise or perform, a discretionary function or duty on the part of a federal agency or government employee, regardless of whether the discretion is abused. The exception and its applicability are explained in detail in the 2005 IOOS tort liability memo, but a quick refresher is outlined below.

Under the Federal Tort Claims Act,³² claims based upon a discretionary function are precluded, whether or not the federal agency discretion involved has been abused.³³ Whether a claim arises out of discretionary function bringing it within the exception of § 2680(a) must be resolved under federal law³⁴ and the U.S. Supreme Court has stated that whether a discretionary function is involved is a matter to be decided under subsection (a) of 28 U.S.C. § 2680, rather than under state rules relating to political, judicial, quasi-judicial, and ministerial functions.³⁵

²⁶ 28 U.S.C. § 2679.

²⁷ *RMI Titanium Co. v. Westinghouse Elec. Corp.*, 78 F.3d 1125, 1142 (6th Cir. 1996).

²⁸ 28 U.S.C. § 2679(d)(2).

²⁹ See *Gutierrez de Martinez v. Lamagno*, 515 U.S. 417, 434 (1995); see also *Arbour v. Jenkins*, 903 F.2d 416, 421 (6th Cir. 1990).

³⁰ *Singleton v. United States*, 277 F.3d 864, 870 (6th Cir. 2002); see also *RMI Titanium Co. v. Westinghouse Electric Corp.*, 78 F.3d 1125, 1143 (6th Cir. 1996).

³¹ *RMI*, 78 F.3d at 1143.

³² 28 U.S.C. § 1346(b) and §§ 2671-2680.

³³ Abuse of discretion connotes both negligence and wrongful acts in the exercise of discretion, for “discretion could not be abused without negligence or a wrongful act.” See *Dalehite v. United States*, 346 U.S. 15 (1953).

³⁴ See *United States v. De Camp*, 478 F.2d 1188 (9th Cir. 1973).

³⁵ See *United States v. Muniz*, 374 U.S. 150 (1963)

The congressional purpose in adding the “discretionary function” exception of 28 U.S.C. § 2680(a) to its general waiver of United States immunity from suit for tort injury caused by its agencies or employees was to avoid recovery against the government for regulatory activities of government agents whose actions might be deemed tortious. Even when a particular enabling statute does not expressly grant the government agency authority to exercise discretion in taking an action, the overall statutory purpose can immunize the government from liability for the planning and execution of government policies. The U.S. Supreme Court stated, with respect to the scope of the statute, in *Dalehite v United States*³⁶ that “where there is room for policy judgment and decision, there is discretion.”

To be protected by the discretionary function exception, the government employee’s act must involve an element of judgment or choice and the conduct must be based on consideration of public policy.³⁷ The Supreme Court has stated that an element of judgment or choice is not present if a “federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow.”³⁸ For example, if a fisherman relies on weather data from a buoy, but an RA has recently decided not to maintain that buoy, and the fisherman subsequently ends up in a storm and receives damage to his/her person, he/she may try to sue for injury. The FTCA “discretionary function” exception would protect an RA from liability, presuming that the decision to stop maintaining the buoy was a choice based on consideration of public policy, and was not a prescribed course of action in regulation, statute, or policy.

The ICOOS Act does contain some language that would seem non-discretionary. For example, the Act requires that the ICOOS System ensure the timely and sustained dissemination of data and ensure the continuity of the data and the integration of the data into the System. But, while at a first glance this seems like a mandate, the agency retains the discretion to determine what “timely” dissemination of the data is, or how the “integration” of the data will occur. Nothing in the ICOOS Act proscribes an RA, NOAA, the Council, or the Committee to ensure that data is correct or accurate, or ensure that users use data in the appropriate way. Please note that while federal employees and federal agencies are shielded from liability under this exception, ultimate liability will depend on the facts of the specific situation.

5) *What kind of actions should RA take to minimize risks, even with these protections (e.g., website disclaimers, best practices, etc)?*

It is advisable that some sort of disclaimer be retained on any data product produced with non-Federal assets though a RICE or RA. Those disclaimers can simply point the public to the language in the ICOOS Act that provides the RA with the protections provided by the federal government to its employees. This may help to alleviate some confusion in the public about the new classification of RAs under the ICOOS Act and provide clarity about the liability the RA has assumed for purposes of the FTCA. What exactly these disclaimers entail or whether the risk of liability is minimized through best management practices will have to be determined by NOAA and NOAA General Counsel.

Conclusion

³⁶ See *Dalehite v. United States*, 346 U.S. 15 (1953).

³⁷ See *U.S. v. Gaubert*, 499 U.S. 315, 322-23 (1991).

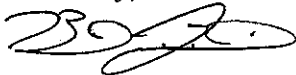
³⁸ *Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).

RICEs and RAs involved in the implementation of ICOOS should not be overly concerned about liability emanating from data products or forecasts. RA employees are employees of the Federal government for purposes of the ICOOS Act and are thus afforded the protection of the "discretionary function" exception under the FTCA as long as they are acting within the scope of their employment. Please note that while federal employees and federal agencies are shielded from liability under this exception, ultimate liability will depend on the facts of the specific situation.

In order to function as an RA in the ICOOS system, the Administrator must certify a RA. Certification involves being actually certified or established by contract or agreement, and the RA must agree to all certification standards, program guidelines, and compliance procedure guidelines. NOAA, the Council, and the Committee are all authorized with developing these certification standards and the decision on whether to certify an RA lies within their discretion.

I hope the above information serves to provide you answers on your liability concerns. The Law Center would be happy to conduct any follow-up research if the RAs have any additional questions. Thank you for bringing your questions to the Law Center and we look forward to working with you in the future.

Sincerely,



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