

consumer fraud and speculative applications. Pending resolution of these issues, and out of caution, the Commission required new applications filed for the Shared Paging Channels to continue to be processed under the interim licensing rules. The Commission, however, again relaxed the interim licensing rules by eliminating the 40-mile requirement and allowing incumbents to file for new sites on the Shared Paging Channels at any location. The Commission also affirmed its decision to allow new applicants to file applications for private, internal-use systems. While the interim licensing rules as developed in Commission decisions apply to all of the Shared Paging Channels, the *Second R&O* specifically revised § 90.494(g) of the Commission's rules to reflect the interim licensing rules for purposes of the five 929 MHz shared paging channels.

In the *Third R&O*, the Commission considered the many comments filed on the issue of application fraud. In response, it determined that adding language to FCC Form 601 warning applicants that failure of a licensee to meet construction or coverage requirements would result in termination of the license would be generally helpful to applicants in all services and might also help deter fraud. The Commission directed the Bureau to remove the interim licensing rules for the Shared Paging Channels, including § 90.494(g) of its rules, once the warning language was added to FCC Form 601.

II. Lifting the Freeze on Applications for Licenses on the Shared Paging Channels

As of November 9, 2001, the following warning language has been added near the signature block on the FCC Form 601 application in Universal Licensing System (ULS), as well as the FCC Form 601 available through Fax-on-Demand and the Bureau's website: "Upon grant of this license application, the licensee may be subject to certain construction or coverage requirements. Failure to meet the construction or coverage requirements will result in termination of the license. Consult appropriate FCC regulations to determine the construction or coverage requirements that apply to the type of license requested in this application."

The Bureau has initiated the process for printing new paper copies of FCC Form 601 that contain the warning language, but those copies will not be available to the public for several weeks. As already noted, where paper copies of FCC Form 601 may be used or are needed, updated applications containing the warning language can be

obtained from Fax-on-Demand (202-418-2830) or are currently available for downloading from <http://www.fcc.gov/wtb/csinfo/orderfrm.html>. The Bureau also notes that applications for new licenses on Shared Paging Channels must be filed through certified land mobile frequency coordinators. The Bureau has provided the updated version of FCC Form 601 to each coordinator and has encouraged them to point out the new warning language to applicants for the Shared Paging Channels.

Having added the warning language to FCC Form 601, the Bureau eliminates the interim licensing rules that have applied to lower band shared paging channels and the five 929 MHz shared paging channels. Accordingly, pursuant to the *Third R&O*, the Bureau removes the interim licensing rules developed through Commission decisions as well as § 90.494(g) of the Commission's rules as applied to the Shared Paging Channels. Any qualified entity may file an application for a license on the Shared Paging Channels for new sites at any location. Applications for new sites filed on these Shared Paging Channels continue to require frequency coordination prior to filing the applications with the Commission.

Procedural Matters and Ordering Clauses

Pursuant to §§ 4(i), 303(r), and 332 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 303(r), 332, and the *Third R&O*, the Commission's interim licensing rules as applied to the Shared Paging Channels are eliminated and § 90.494(g) of the Commission's rules, 47 CFR 90.494(g), is removed as set forth in the *Order*.

This action is taken pursuant to the *Third R&O* and the authority delegated in § 0.331 of the Commission's rules, 47 CFR 0.331.

The provisions of this *Order* and the Commission's rules, as amended in the *Order*, shall become effective November 19, 2001 in accordance with § 1.103 of the Commission's rules, 47 CFR 1.103.

List of Subjects in 47 CFR Part 90

Paging, Radio.

Federal Communications Commission.

Katherine M. Harris,

Deputy Chief, Commercial Wireless Division,
Wireless Telecommunications Bureau.

Rule Changes

For the reasons set forth in the preamble, part 90 of Chapter I of title 47 of the Code of Federal Regulations is amended as follows:

PART 90—PRIVATE LAND MOBILE RADIO SERVICES

1. The authority citation for part 90 continues to read as follows:

Authority: Section 4(i), 11, 303(g), 303(r), and 332(c)(7) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 161, 303(g), 303(r), 332(c)(7).

§ 90.494 [Amended]

2. Section 90.494 is amended by removing paragraph (g).

[FR Doc. 01-28883 Filed 11-16-01; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 600

[Docket No. 010427105-1260-02; I.D. 011001F]

RIN 0648-AJ82

Magnuson-Stevens Act Provisions; Update of Regulations Governing Council Operations

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Final rule.

SUMMARY: NMFS issues a final rule updating regulations governing the operation of Regional Fishery Management Councils (Councils) under the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). This final rule makes amendments by codifying recent administrative and policy changes and by making editorial changes for readability, clarity, and uniformity. The intent of this final rule is to update Council regulations to reflect current policies and procedures.

DATES: Effective December 19, 2001.

FOR FURTHER INFORMATION CONTACT: Richard Surdi, F/SF5, NMFS, 301-713-2337. This Federal Register document is also accessible via the Internet at the Office of the Federal Register Web site at http://www.access.gpo.gov/su--docs/aces/aces_140.tml.

SUPPLEMENTARY INFORMATION:

Background

Currently, regulations pertaining to general provisions of the Magnuson-Stevens Act related to Council operations are contained in title 50 of the Code of Federal Regulations (CFR). NMFS is updating part 600 (Regional

Fishery Management Councils, subpart B, and Council Membership, subpart C) to codify important provisions of the recently withdrawn Council Operations and Administration Handbook (Handbook), which was a reference guide that compiled various requirements of the Magnuson-Stevens Act and other applicable law, as well as policy guidance. Some of the guidance contained in the Handbook consisted of regulations that were removed from title 50 of the CFR at the time the Handbook was developed. NMFS is reinstating some of those former regulations because they are not contained elsewhere and they are necessary for the Councils to function. Other proposed additions and revisions were not contained in the Handbook, and were not previously in regulation.

On May 25, 2001, NMFS published a proposed rule at 66 FR 28876 to update the regulations governing Council operations; comments were requested through June 25, 2001. The preamble of the proposed rule contained detailed descriptions of the proposed regulations, which are not repeated here. The following section contains the response to the only comment received during the comment period.

Comment and Response

Comment. One commenter objected to the language in the proposed rule that would allow a person who is not a state employee to serve as a designee of a principal state official on a Regional Fishery Management Council.

Currently, the principal state official's designee is required to be an employee of the state. This commenter argued that a state employee will best represent the state's and the public's interests in fishery management issues. A non-state employee, on the other hand, may represent narrower interests. Therefore, this commenter proposed maintaining the previous CFR language that addressed this issue.

Response. NMFS maintains the change contained in the proposed rule. NMFS believes that the new language provides additional flexibility that will not compromise the representation of state and public interests in matters taken up by the Councils. This added flexibility was specifically requested by some of the Councils, in part because some states have very small offices and in the past have been limited to a small pool of candidates. Based on prior dealings with states, NMFS believes that the states will exercise this discretion in a responsible manner. It is not in a state's best interest to select someone with very narrow interests or experience, and it is not likely to do so.

Essentially, this change will enable state governments to select their designees from a larger pool of candidates, better ensuring that the states' interests will be effectively represented.

Classification

NMFS has determined that this final rule is consistent with the Magnuson-Stevens Act. This final rule has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule will not have a significant economic impact on a substantial number of small entities as that term is defined in the Regulatory Flexibility Act, 5 U.S.C 601 *et seq.* The factual basis for this certification was published with the proposed rule. No comments were received regarding the economic impact of this final rule. As a result, no final regulatory flexibility analysis was prepared.

NMFS has analyzed this final rule in accordance with the criteria of the National Environmental Policy Act (NEPA). This rule does not constitute a major Federal action significantly affecting the quality of the human environment because it provides only an update to agency procedure or practice (i.e., procedures and guidelines for the administration of Councils). NMFS has determined that issuance of this policy qualifies for a categorical exclusion as defined by NOAA 216-6 Administrative Order, Environmental Review Procedures.

This final rule contains no collection-of-information requirements subject to the Paperwork Reduction Act.

List of Subjects in 50 CFR Part 600

Fisheries, Fishing.

Dated: November 9, 2001.

Rebecca Lent,
Deputy Assistant Administrator for
Regulatory Programs, National Marine
Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 600 subparts B and C are amended as follows:

PART 600—MAGNUSON-STEVENS ACT PROVISIONS

1. The authority citation for part 600 continues to read:

Authority: 5 U.S.C. 561 and 16 U.S.C. 1801 *et seq.*

2. Section 600.120 of subpart B is revised to read as follows:

§ 600.120 Employment practices.

(a) Council staff positions must be filled solely on the basis of merit, fitness for duty, competence, and qualifications. Employment actions must be free from discrimination based on race, religion, color, national origin, sex, age, disability, reprisal, sexual orientation, status as a parent, or on any additional bases protected by applicable Federal, state, or local law.

(b) The annual pay rates for Council staff positions shall be consistent with the pay rates established for General Schedule Federal employees as set forth in 5 U.S.C. 5332, and the Alternative Personnel Management System for the U.S. Department of Commerce (62 FR 67434). The Councils have the discretion to adjust pay rates and pay increases based on cost of living (COLA) differentials in their geographic locations. COLA adjustments in pay rates and pay increases may be provided for staff members whose post of duty is located in Alaska, Hawaii, Guam, the U.S. Virgin Islands, the Northern Mariana Islands, and Puerto Rico.

(1) No pay adjustment based on geographic location shall exceed the COLA and locality pay adjustments available to Federal employees in the same geographic area.

(2) [Reserved]

(c) Salary increases funded in lieu of life and medical/dental policies are not permitted.

(d) Unused sick leave may be accumulated without limit, or up to a maximum number of days and contribution per day, as specified by the Council in its SOPP. Distributions of accumulated funds for unused sick leave may be made to the employee upon his or her retirement, or to his or her estate upon his or her death, as established by the Council in its SOPP.

(e) Each Council may pay for unused annual leave upon separation, retirement, or death of an employee.

(f) One or more accounts shall be maintained to pay for unused sick or annual leave as authorized under paragraphs (d) and (e) of this section, and will be funded from the Council's annual operating allowances. Councils have the option to deposit funds into these account(s) at the end of the budget period if unobligated balances remain. Interest earned on these account(s) will be maintained in the account(s), along with the principal, for the purpose of payment of unused annual and sick leave only. These account(s), including interest, may be carried over from year to year. Budgeting for accrued leave will be identified in the "Other" object class categories section of the SF-424A.

(g) A Council must notify the NOAA Office of General Counsel before seeking outside legal advice, which may be for technical assistance not available from NOAA. If the Council is seeking legal services in connection with an employment practices question, the Council must first notify the Department of Commerce's Office of the Assistant General Counsel for Administration, Employment and Labor Law Division. A Council may not contract for the provision of legal services on a continuing basis.

3. Section 600.125 of subpart B is revised to read as follows:

§ 600.125 Budgeting, funding, and accounting.

(a) Each Council's grant activities are governed by OMB Circular A-110 (Uniform Administrative Requirements for Grants and Agreements with Institutions of Higher Education, Hospitals, and other Non-Profit Organizations), OMB Circular A-122 (Cost Principles for Non-Profit Organizations), 15 CFR Part 29b (Audit Requirements for Institutions of Higher Education and other Nonprofit Organizations), and the terms and conditions of the cooperative agreement. (See 5 CFR 1310.3 for availability of OMB Circulars.)

(b) Councils 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 Councils.

(c) Councils are not authorized to accept gifts or contributions directly. All such donations must be directed to the NMFS Regional Administrator in accordance with applicable Department of Commerce regulations.

4. Section 600.135 is added to subpart B to read as follows:

§ 600.135 Meeting procedures.

(a) Public notice of regular meetings of the Council, scientific statistical committee or advisory panels, including the agenda, must be published in the *Federal Register* on a timely basis, and appropriate news media notice must be given. The published agenda of any regular meeting may not be modified to include additional matters for Council action without public notice, or such notice must be given at least 14 days prior to the meeting date, unless such modification is to address an emergency under section 305 (c) of the Magnuson-Stevens Act, in which case public notice shall be given immediately. Drafts of all regular public meeting notices must be transmitted to the NMFS Headquarters

Office at least 23 calendar days before the first day of the regular meeting. Councils must ensure that all public meetings are accessible to persons with disabilities, and that the public can make timely requests for language interpreters or other auxiliary aids at public meetings.

(b) Drafts of emergency public notices must be transmitted to the NMFS Washington Office; recommended at least 5 working days prior to the first day of the emergency meeting. Although notices of, and agendas for, emergency meetings are not required to be published in the *Federal Register*, notices of emergency meetings must be promptly announced through the appropriate news media.

(c) After notifying local newspapers in the major fishing ports within its region, having included in the notification the time and place of the meeting and the reason for closing any meeting or portion thereof:

(1) A Council, SSC, AP, or FIAC shall close any meeting, or portion thereof, that concerns information bearing on a national security classification.

(2) A Council, SSC, AP, or FIAC may close any meeting, or portion thereof, that concerns matters or information pertaining to national security, employment matters, or briefings on litigation in which the Council is interested.

(3) A Council, SSC, AP, or FIAC may close any meeting, or portion thereof, that concerns internal administrative matters other than employment. Examples of other internal administrative matters include candidates for appointment to AP, SSC, and other subsidiary bodies and public decorum or medical conditions of members of a Council or its subsidiary bodies. In deciding whether to close a portion of a meeting to discuss internal administrative matters, a Council or subsidiary body should consider not only the privacy interests of individuals whose conduct or qualifications may be discussed, but also the interest of the public in being informed of Council operations and actions.

(d) Without the notice required by paragraph (c) of this section, a Council, SSC, AP, or FIAC may briefly close a portion of a meeting to discuss employment or other internal administrative matters. The closed portion of a meeting that is closed without notice may not exceed 2 hours.

(e) Before closing a meeting or portion thereof, a Council or subsidiary body should consult with the NOAA General Counsel Office to ensure that the matters to be discussed fall within the exceptions to the requirement to hold

public meetings described in paragraph (c) of this section.

(f) Actions that affect the public, although based on discussions in closed meetings, must be taken in public. For example, appointments to an AP must be made in the public part of the meeting; however, a decision to take disciplinary action against a Council employee need not be announced to the public.

(g) A majority of the voting members of any Council constitute a quorum for Council meetings, but one or more such members designated by the Council may hold hearings.

(h) Decisions of any Council are by majority vote of the voting members present and voting (except for a vote to propose removal of a Council member, see 50 CFR 600.230). Voting by proxy is permitted only pursuant to 50 CFR 600.205 (b). An abstention does not affect the unanimity of a vote.

(i) Voting members of the Council who disagree with the majority on any issue to be submitted to the Secretary, including principal state officials raising federalism issues, may submit a written statement of their reasons for dissent. If any Council member elects to file such a statement, it should be submitted to the Secretary at the same time the majority report is submitted.

5. Section 600.150 is added to subpart B to read as follows:

§ 600.150 Disposition of records.

(a) Council records must be handled in accordance with NOAA records management office procedures. All records and documents created or received by Council employees while in active duty status belong to the Federal Government. When employees leave the Council, they may not take the original or file copies of records with them.

(b) [Reserved]

6. Section 600.155 is added to subpart B to read as follows:

§ 600.155 Freedom of Information Act (FOIA) requests.

(a) FOIA requests received by a Council should be coordinated promptly with the appropriate NMFS Regional Office. The Region will forward the request to the NMFS FOIA Official to secure a FOIA number and log into the FOIA system. The Region will also obtain clearance from the NOAA General Counsel's Office concerning initial determination for denial of requested information.

(b) FOIA requests will be controlled and documented in the Region. The requests should be forwarded to the NMFS FOIA Officer who will prepare the Form CD-244, "FOIA Request and

Action Record", with the official FOIA number and due date. In the event the Region determines that the requested information is exempt from disclosure, in full or in part, under the FOIA, the denial letter prepared for the Assistant Administrator's signature, along with the "Foreseeable Harm" Memo and list of documents to be withheld, must be cleared through the NMFS FOIA Officer. Upon completion, a copy of the signed CD-244 and cover letter transmitting the information should be provided to the NMFS FOIA Officer and the NOAA FOIA Officer.

7. Section 600.205 of subpart C is revised to read as follows:

§ 600.205 Principal state officials and their designees.

(a) Only a full-time state employee of the state agency responsible for marine and/or anadromous fisheries shall be appointed by a constituent state Governor as the principal state official

for purposes of section 302(b) of the Magnuson-Stevens Act.

(b) A principal state official may name his/her designee(s) to act on his/her behalf at Council meetings. Individuals designated to serve as designees of a principal state official on a Council, pursuant to section 302(b)(1)(A) of the Magnuson-Stevens Act, must be a resident of the state and be knowledgeable and experienced, by reason of his or her occupational or other experience, scientific expertise, or training, in the fishery resources of the geographic area of concern to the Council.

(c) New or revised appointments by state Governors of principal state officials and new or revised designations by principal state officials of their designees(s) must be delivered in writing to the appropriate NMFS Regional Administrator and the Council chair at least 48 hours before the

individual may vote on any issue before the Council. A designee may not name another designee. Written appointment of the principal state official must indicate his or her employment status, how the official is employed by the state fisheries agency, and whether the official's full salary is paid by the state. Written designation(s) by the principal state official must indicate how the designee is knowledgeable and experienced in fishery resources of the geographic area of concern to the Council, the County in which the designee resides, and whether the designee's salary is paid by the state.

§ 600.245 [Amended]

8. In § 600.245 of subpart C, paragraph (a) is removed, and paragraphs (b), (c), and (d) are redesignated as paragraphs (a), (b), and (c), respectively.

[FR Doc. 01-28880 Filed 11-16-01; 8:45 am]

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UNITED STATES DEPARTMENT OF COMMERCE
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 For*
 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,¹ status as a parent² 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

¹ 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."

² 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.³ 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.

³ 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

promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

4. a. Provision

16F. Foreign Travel

Any foreign travel other than across the border to either Canada or Mexico will be with the authorization of NMFS Assistant Administrator for Fisheries and the Grants Officer.

b. Discussion

OMB Circular A-122, Cost Principles for Non Profit Organizations, states that direct charges for foreign travel are allowable only when the travel has received prior approval of the awarding agency. Foreign travel is defined as any travel outside of Canada and the United States, its territories and possessions. OMB Circular A-122, Attachment B, § 55.e. Therefore, to allow travel to Mexico without prior approval is contrary to the cost principles governing the awards made to the Councils. Recommend this section of the SOPPs be edited to exclude "Mexico" as a place travel is allowed without prior authorization.

5. a. Provision/Discussion

D. Conflicts and Recusal. Rewrite the second sentence to read: "The method chosen by Congress to deal with conflicts of interest is full public disclosure of interests in a fishery harvesting, processing, or marketing activity." Additionally, change the CFR cite in the forth sentence to read: "50 CFR 600.235."

B. Caribbean FMC

1. a. Provision:

12.13.6 Salary and Wage Administration:

A cost of living allowance (COLA) will be applied to the base salaries of Council members and staff in accordance with Federal rates established for Puerto Rico and the U.S. Virgin Islands. Salaries will be adjusted as changes occur to the General Schedule pay rates (Presidential increase) approved for federal employees.

b. Discussion

This provisions should cite to the newly revised regulations regarding salaries at 50 C.F.R. § 600 et. seq.

2. a. Provision

12.1.3.10.2 c. Sick Leave

Sick leave may be used for . . . death in the immediate family as defined in the Federal Personnel Manual.

b. Discussion

The Federal Personnel Manual no longer exists. This reference should be deleted.

3. a. Provision

12.5 Financial Management, Budget, Procurement, and Property Management Procedures

The introductory paragraph to this section references OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

4. a. Provision

Appendix III, Property Management

This Appendix references OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

6

5. a. Provision

Section 12.1.5.1. Standards of Conduct. The subsection regarding 18 U.S.C. §§ 203 and 205 needs adjusting.

b. Discussion

Change this section to read as follows: "18 U.S.C. 203, 205 - prohibits officials from contacting any Federal agency or Federal court on behalf of others concerning a particular matter involving specific parties with the intent to influence Government action if they participated personally and substantially in the matter as a Council member. Furthermore, officials may not receive compensation for the representational activities of others regarding such matters."

6. a. Provision

Section 12.1.5.1. Standards of Conduct. The subsection regarding 18 U.S.C. § 207 needs adjusting.

b. Discussion

Change this section to read as follows: "18 U.S.C. 207 - prohibits a former official permanently from representing others before a Federal agency or Federal court concerning a particular matter involving specific parties in which the official participated personally and substantially as a Federal official or for two years concerning a matter which was under the person's official responsibility during their last year of Government service."

7. a. Provision

Section 12.1.5.1. Standards of Conduct. The subsection regarding 18 U.S.C. § 208 needs adjusting.

b. Discussion

Replace the word "manner" with "matter", so this section reads "which prohibits official acts in a matter . . ."

C. Mid-Atlantic FMC

1. a. Provision

III.D.4. Disability. Action may be initiated by the employee, the employees legal representative or the supervisor, but in all cases, must be supported by medical evidence acceptable to the Executive Director, the Council and their insurance carrier.

b. Discussion

The purpose of this provision is unclear. If it is referring to an employee seeking accommodation for a disability, the procedures set forth in DAO 215-10 -- Reasonable Accommodation For Disabilities in Employment should be followed.

2. a. Provision

III.D.5. Reprimand or Suspension Without Pay. . . . An employee may be suspended without pay for reasons of misconduct, negligence, inefficiency, insubordination, disloyalty, unauthorized absence, or other justifiable reason. . . .

b. Discussion

"Disloyalty" as a grounds for discipline is too vague and arbitrary, and would be difficult to support if the disciplinary action were challenged. This term should be omitted. A possible alternative term might be conduct unbecoming a Fishery Management Council employee.

3. a. Provision

7. Dismissal. The Executive Director may dismiss employees for reasons of misconduct, negligence, inefficiency, insubordination, disloyalty, unauthorized absence, or other justifiable reason. . . .

b. Discussion

"Disloyalty" as a grounds for discipline is too vague and arbitrary, and would be difficult to support if the disciplinary action were challenged. This term should be omitted. A possible alternative term might be conduct unbecoming a Fishery Management Council employee.

4. a. Provision

Section I.D.1.c.(4) Administrative Provisions

(4) The Council shall pay the actual expenses of the Committee members, in accordance with controlling law, except that expenses of Federal employees shall be paid at the discretion of the Council, in accordance with NOAA Rules, while engaged in the performance of Council business.

b. Discussion

NOAA Administrative Standard Award Conditions, § C states: "The Recipient is prohibited from expending Federal or non-Federal grant funds, or in-kind goods or services, for purposes of providing transportation, travel, and any other expenses for any Federal employee". This prohibits the Council from paying the expenses of a Federal employee who is engaging in the performance of Council business. The latter part of this SOPP provision dealing with payment of Federal employee expenses should be deleted.

5. a. Provision

Section I.D.2.c. Administrative Provisions for Advisory Panels

Administrative Provisions. The Council shall pay the actual expenses of the Committee members, in accordance with controlling law, except that expenses of Federal employees shall be paid at the discretion of the Council, in accordance with NOAA Rules, while engaged in the performance of Council business.

b. Discussion

NOAA Administrative Standard Award Conditions, § C states: "The Recipient is prohibited from expending Federal or non-Federal grant funds, or in-kind goods or services, for purposes of providing transportation, travel, and any other expenses for any Federal employee". This prohibits the Council from paying the expenses of a Federal employee who is engaging in the performance of Council business. The latter part of this SOPP provision dealing with payment of Federal employee expenses should be deleted.

6. a. Provision

II.a.3. Conduct of Meetings

Section c references outdated CFR provisions, 50 CFR 601.36, and 50 CFR

605.23(b).

b. Discussion

Recommend citing to the appropriate regulations. The reference to 50 CFR 601.36 can be changed to 50 CFR 600.230. However, the regulations formerly found at 50 CFR 600.605 were placed in the Council Handbook which has been eliminated.

7. a. Provision

II.a.4. Record

Section b references outdated CFR provisions 50 CFR 601.27 and 50 CFR Part 603.

b. Discussion

Recommend citing to the appropriate regulations if applicable regulations exist. The reference to 50 CFR Part 603 may be cited at 50 CFR 600.130. It is currently unclear what section of the current regulations subsume 50 CFR 601.27.

8. a. Provision

III.I. Travel Reimbursement Procedures.

Section c states "Travel via first class air must be justified on the reimbursement voucher and approved by the Council Chair or his/her authorized representative."

b. Discussion

Because the Council is subject to GSA Travel Regulations and the OMB Circular A-122 cost principles regarding the allowance of travel costs, recommend adding to the sentence above, "after ensuring compliance with GSA Travel Regulations and OMB Circular A-122".

9. a. Provision

III.J. Foreign Travel

Section 1 states that routine across-the-border travel to Mexico and Canada is exempt from obtaining approval.

b. Discussion

OMB Circular A-122, Cost Principles for Non Profit Organizations, states that direct charges for foreign travel are allowable only when the travel has received prior approval of the awarding agency. Foreign travel is defined as any travel outside of Canada and the United States, its territories and possessions. OMB Circular A-122, Attachment B, § 55.e. Therefore, to allow travel to Mexico without approval is contrary to the cost principles governing the awards made to the Councils. Recommend this section of the SOPPs be edited to exclude "Mexico" as a place travel is allowed without authorization.

10. a. Provision

IV. Financial Management

The introductory paragraph references OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

11. a. Provision

IV.A.2.a. Programmatic. Nature of Request

a. Nature of request. The Council may enter into cooperative agreements with Federal agencies, State, and private institutions on matters of mutual interest which further the objectives of the Magnuson-Stevens Act. Approval from the Secretary of Commerce must be obtained prior to entering into such agreements, and each agreement must specify the nature and extent of Council participation. 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 NOAA regulations.

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.

12. a. Provision.

IV.B. Procurement.

The introductory paragraph references OMB Circular A-110.

- b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

13. a. Provision

IV.B. Procurement

The introductory paragraph states "... Proposed sole source contracts over \$10,000 must be approved in writing by the Grants Officer"; and Subsection 2 states that "... Such purchases over \$10,000 must be approved by the Grants Officer."

- b. Discussion

There is no requirement for this restriction and thus it appears to be a deviation from guidance provided at 15 CFR 14.44. Because 15 CFR Part 14 is incorporated into all Council awards recommend deleting this provision

14. a. Provision

IV. C. Property Management

Section 4 discusses disposal of surplus items. These procedures do not follow procedures as outlined at 15 CFR Part 14.

- b. Discussion

Recommend deleting this section and stating that disposition of surplus property will be in accordance with 15 CFR Part 14.

15. a. Provision/Discussion

II. Council Meetings and Hearings

Section A.3.(h). After the first sentence add "50 CFR 600.225".

16. a. Provision/Discussion

Section V.B Disposition of Records: The goal of an effective disposition program is misstated. Records that are required to be maintained must be kept, whether or not they exceed "the volume of records created."

17. a. Provision/Discussion

Section V.D Privacy Act Records: The "need to know" exception to the Privacy Act pertains only to those employed within the agency, not to "government officials" outside the agency. An individual is entitled to access to his own records, unless there is an applicable Privacy Act exemption. An individual does not control the use of his records; they may be disclosed without his consent, pursuant to the Privacy Act exceptions. The individual's right to request correction or amendment of records about himself applies only to those records that are in a Privacy Act system of records. There are no exemptions from the requirements of the Privacy Act; the Privacy Act does include exceptions to the rule of no disclosure without the prior written consent of the individual and does include exemptions to disclosure to that individual. These exceptions and exemptions are part of the Privacy Act. There are both civil and criminal penalties for violations of the Privacy Act.

18. a. Provision/Discussion.

Section V.E Freedom of Information Act: Written requests for information are

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 Council'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.

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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 Council's 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 for assistance~~

in accordance with DOC policy.

E. North Pacific FMC

1. a. Provision:

Section 4.G.(2) Sick Leave. . . . [A]t retirement or in the event of death of the employee, a deposit may be made to the employee's retirement fund for unused sick leave up to 100 days . . .

b. Discussion:

As stated in a memorandum dated February 15, 1995, from Frances Silva of the Department of Commerce Office of General Counsel to Richard H Schaefer, Director, Office of Fisheries Conservation and Management, Pacific Fishery Management Council employees are enrolled thru the Alaska Public Employees' Retirement system (PERS). According to this memorandum, PERS prohibits the deposit of unused sick leave into the retirement account. If the Council employees are still enrolled in PERS, and unless the PERS rules have been amended, this provisions should be amended to be consistent with PERS restrictions.



2. a. Provision

4.J. Foreign Travel. Subpart (2) states "The Council chairman or his/her authorized representative may approve routine across-the-border travel to Canada or Mexico for Council members and employees within specified Federal rates."

b. Discussion

OMB Circular A-122, Cost Principles for Non Profit Organizations, states that direct charges for foreign travel are allowable only when the travel has received prior approval of the awarding agency. Foreign travel is defined as any travel outside of Canada and the United States, its territories and possessions. OMB Circular A-122, Attachment B, § 55.e. Therefore, to allow travel to Mexico without prior approval of NOAA is contrary to the cost principles governing the awards made to the Councils. Recommend this section of the SOPPs be edited to exclude "Mexico" as a place travel is allowed without prior authorization from NOAA..

3. a. Provision

Section 6. Financial Management. Introductory paragraph states "Office of Management and Budget Circulars No. A-110 and A-122, and 15 CFR Part 296 provide uniform administrative requirements applicable to the Council, including standards for financial management, financial reporting, property management, and

procurement. The Council will operate in full compliance with these standards".

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110. Additionally, 15 CFR Part 296 does not apply to NOAA and reference to this provision should be deleted.

4. a. Provision

Section 6.A.(2). Programmatic. This section states "The Council may enter into cooperative agreements with Federal agencies, State, and private institutions on matters of mutual interest which further the objectives of the Magnuson Act. Approval from the Secretary of Commerce must be obtained and each agreement must specify the nature and extent of Council participation. . ."

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.

5. a. Provision

6.B. Procurement. This section states that all procurements must comply with the terms and conditions of the award and OMB Circulars A-110 and A-122. Additionally, this section states that proposed sole-source contracts less than

\$100,000 must be submitted to the Regional Administrator prior to the award, and that proposed sole source contracts over \$100,000 must be approved in writing by the Regional Administrator and the Grants Officer

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110. Additionally, there is no requirement that proposed sole-source contracts less than \$100,000 must be submitted to the Regional Administrator prior to the award, and that proposed sole source contracts be approved in writing by the Regional Administrator and Grants Officer. This provision is a deviation from guidance found at 15 CFR 14.44 and should therefore be deleted.

6. a. Provision

6.D. Real Property. This section states that the leasing, renting, and acquisition of real property and space will be effected in a manner consistent with customary practices related to contracts with public entities.

b. Discussion

These issues are covered in OMB Circular A-122. Because A-122 is incorporated into the Council's award, the provisions should state "The leasing, renting, and acquisition of real property and space will be effected in a manner consistent with OMB Circular A-122".

7. a. Provision/Discussion

7.D. Privacy Act Records. This section should be amended to clarify that all Privacy Act records will be handled in accordance with the Privacy Act. Although some kinds of Privacy Act records are included, the list is not exhaustive.

8. a. Provision/Discussion

7.E. FOIA. This section should explain that the NOAA FOIA/Privacy Act officer logs in requests; also, the Council does not recover costs - payments collected under FOIA are transferred to the U.S. Treasury. 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. The Handbook does not exist, so the SOPPs should reference the

in accordance with DOC policy.

4. a. Provision

Section VII.C.1.c. regarding 18 U.S.C. § 207 needs adjusting.

b. Discussion

Change this section to read as follows: 18 U.S.C. 207 - prohibits a former official permanently from representing others before a Federal agency or Federal court concerning a particular matter involving specific parties in which the official participated personally and substantially as a Federal official or for two years concerning a matter which was under the person's official responsibility during their last year of Government service."

G. South Atlantic FMC

1. a. Provisions

Section 6a.(4) (Council Staffing) and Section 15 (Management) both reference OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

2. a. Provision

Section 6.a.(7).05, second paragraph, states "... or (2) In any manner of general public concern which is likely to have a direct and predictable effect on a member's financial interest unless that interest is in harvesting, processing, or marketing activities and has been disclosed in a report filed under Section I. There is no Section I.

b. Discussion

Recommend including in the SOPPs the following: "Council members appointed by the Secretary must submit a Statement of Financial Interest that discloses any financial interest held in any harvesting, processing, or marketing activity that is being, or will be, undertaken within any fishery over which the Council has jurisdiction. The requirement extends to the spouse, minor children, or partner of

Department regulations.

F. Gulf of Mexico

1. a. Provision

Section VII. Staff/Council Members. This section references OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

2. a. Provision

Section XIV, Financial Management, Budget, Procurement, and Property Management Practices, state that the Council's grant activities are governed by OMB Circular A-110 and 15 CFR Part 29B (Audit Requirements).

b. Discussion.

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110. Additionally, Audit requirements for the Councils are found at OMB Circular A-133, instead of 15 CFR Part 29B, and should be referenced as such.

3. a. Provision

Section VII.C.1.b. regarding 18 U.S.C. §§ 203, 205 needs adjusting.

b. Discussion

Change this section to read as follows: "18 U.S.C. 203, 205 - prohibits officials from contacting any Federal agency or Federal court on behalf of others concerning a particular matter involving specific parties with the intent to influence Government action if they participated personally and substantially in the matter as a Council member. Furthermore, officials may not receive compensation for the representational activities of others regarding such matters."

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the member, or organization (other than the Council) in which the member is serving as an officer, director, trustee, partner or employee."

H. Western Pacific Regional FMC

1. a. Provision

The Administrative Management section on page 13 references OMB Circular A-110.

b. Discussion

The provisions of OMB Circular A-110 were implemented by Commerce by promulgation of 15 CFR Part 14. 15 CFR Part 14 is incorporated into all of the Council awards, and should be referenced in the SOPPs instead of OMB Circular A-110.

This concludes our comments on the SOPPs. If you have questions regarding these comments please contact Michael Cannon of my office at (301) 713-2176.

cc: Melanie Fields-Jones
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