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United States Government Accountability Office
Washington, DC 20548

May 20, 2009

The Honorable Henry A. Waxman
Chairman
Committee on Energy and Commerce
House of Representatives

Subject: *Fisheries Management: Alleged Misconduct of Members and Staff of the Western Pacific Fishery Management Council*

Dear Mr. Chairman:

In recent years, several Hawaii-based conservation advocacy organizations and others have raised a variety of concerns about the conduct of members and staff of the Western Pacific Fishery Management Council (Western Pacific Council) related to lobbying and conflicts of interest, among other things. The Western Pacific Council is one of eight regional fishery management councils established by the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). The council is responsible for developing management plans for fisheries in federal waters¹ off Hawaii, American Samoa, Guam, the Northern Mariana Islands, and other U.S. Pacific islands. The council has 13 voting members—including 5 designated state and federal fishery managers and 8 members of the public with expertise in commercial and recreational fishing and marine conservation who are appointed by the Secretary of Commerce.² The council employs an executive director with a staff of 13 to assist in the performance of its functions. An attorney from the National Oceanic and Atmospheric Administration (NOAA), an agency within the Department of Commerce, advises the council on regulatory and procedural matters and attends all council meetings.

The Western Pacific Council currently finances all of its operations with grants from the Department of Commerce. As a federal grant recipient, the council is subject to Office of Management and Budget (OMB) requirements, such as OMB Circular A-122.³ Among other things, these requirements prohibit the use of federal funds to engage in certain lobbying activities at both the federal and state level. However, they do not prohibit the council from using federal funds to provide technical and factual presentations to federal and state legislators when asked to do so.

¹Federal waters typically extend from 3 to 200 nautical miles off the coast of the United States and its possessions and trust territories.

²In addition, the council has 3 nonvoting members representing the U.S. Fish and Wildlife Service, the U.S. Coast Guard, and the U.S. Department of State.

³OMB Circular A-122, *Cost Principles for Non-Profit Organizations*, has been promulgated as a regulation at 2 CFR Part 230.

Public council members are exempt from federal criminal conflict of interest law regarding participation in matters affecting their financial interests when they make decisions on council matters as long as they are in compliance with the financial disclosure and recusal requirements set out in the Magnuson-Stevens Act and its implementing regulations. Council members may not vote on matters that would have a “significant and predictable effect” on the financial interests they are required to disclose, but they may participate in deliberations on such matters if they recuse themselves and identify the interest that would be affected. These requirements help fulfill one of the purposes of the act, which is to encourage the participation of a wide range of stakeholders—including those with commercial fishing interests—in developing fishery management plans.

You asked that we determine the validity of allegations against the Western Pacific Council related to (1) lobbying, (2) conflicts of interest, (3) the use of and accounting for federal funds, and (4) council operations. In conducting our work, we reviewed relevant laws and regulations, Commerce Department guidance, and council policies and procedures. We also reviewed council records—such as meeting minutes, publications, videos, testimony, financial disclosure forms, financial records, audit reports, and grant documents—and Hawaii state legislation and legislative reports. We interviewed individuals that have raised concerns about the council’s conduct; officials from NOAA’s National Marine Fisheries Service (NMFS); council members and staff; and others, such as Hawaii state legislators alleged to have knowledge of the council’s misconduct. We conducted our review between October 2008 and May 2009 in accordance with generally accepted government auditing standards. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provides a reasonable basis for our findings and conclusions based on our audit objectives.

Results in Brief

Overall, we found little or no evidence to substantiate many of the allegations related to lobbying, conflicts of interest, the use of and accounting for federal funds, and council operations, in part because some of the allegations were factually inaccurate. However, we identified some concerns related to lobbying, the use of and accounting for federal funds, and council operations.

- *Lobbying.* We found conflicting evidence about whether the council had lobbied a member of Congress, as well as evidence that the council had delivered some testimonies that could be considered lobbying because they included statements of the council’s opposition to pending legislation. According to OMB Circular A-122, federal grantees cannot use federal funds to attempt to introduce, enact, or modify legislation through communication with Congress, but are allowed to use federal funds to present technical and factual information related to the performance of their grant-funded activities in response to a documented request by a legislative body, its members, or staff. However, the council does not maintain such documentation. Consequently, we are recommending that NOAA require the council to maintain documentation of all requests for input from federal and state legislators.
- *Use of and accounting for federal funds.* We determined that the council had made and accounted for cash payments for per diem travel costs to participants at a series of

conferences. Generally speaking, such cash payments are not advisable because they are vulnerable to risk of loss or unauthorized use. Consequently, we are recommending that NOAA direct the council to pay per diem costs for meeting participants by check to the extent practicable.

- *Council operations.* We identified various council practices that limit transparency regarding the council's contacts with federal and state legislators and its policies for providing public access to council records. Consequently, we are recommending that NOAA work with the council to implement a variety of actions to help improve the transparency of the council's operations, such as notifying NOAA regional counsel before meeting with federal and state legislators or testifying before one of their committees, and maintaining copies of documents available for public inspection, such as council meeting minutes and briefing book materials prepared for council members in advance of council meetings, on its Web site.

Background

Fishery management issues can be highly contentious. The interests of fishermen, fish processors, coastal communities, the government, and environmental organizations are often different and sometimes mutually incompatible. Such differences can lead to adversarial relationships among those interested in marine resource management. Over the years, differences have arisen, and have been expressed in the press and through complaints filed with the Commerce Department's Office of Inspector General, between the Western Pacific Council and members of groups who hold different views regarding the management of marine resources in waters within the council's jurisdiction.

The Magnuson-Stevens Act has established standards that regional fishery management councils, including the Western Pacific Council, must follow when developing fishery management plans. For example, the council's fishery management plans must prevent overfishing while achieving, on a continuing basis, the optimum yield from the fishery. In addition, the act allows the council to consider historical fishing practices and the cultural and social practices of affected communities when developing fishery management plans. Once the council prepares a plan, it submits the plan to the Secretary of Commerce for approval. Once approved, the plan is implemented by NMFS and enforced by NMFS's Office for Law Enforcement, the U.S. Coast Guard, and local enforcement agencies.

The Western Pacific Council currently finances all of its operations with grants from the Department of Commerce. In fiscal year 2007, for example, the council received \$4.4 million from NOAA, according to NOAA. As a federal grant recipient, the council is subject to OMB Circular A-122 rules on the use of federal grant funds. Specifically, OMB Circular A-122 sets forth cost principles for nonprofit federal grantees and, among other things, disallows the use of federal grant funds to (1) attempt to influence the introduction, enactment, or modification of federal or state legislation through contact with legislators or legislative staff members, or (2) attempt to influence the introduction, enactment, or modification of federal or state legislation through grassroots lobbying.⁴ Under OMB Circular A-122, the council may provide

⁴Grassroots lobbying refers to indirect efforts to influence legislation by preparing, distributing, or using publicity, or by urging people to contribute to or participate in any mass demonstration, march, rally, fundraising drive, lobbying campaign, or letter writing or telephone campaign.

technical and factual presentations on topics directly related to the performance of the council's grant through hearing testimony, statements, or letters to a legislature, its members, or staff in response to a documented request.

According to the Commerce Department, a violation of these cost principles could result in (1) grant termination; (2) a special condition for future awards, such as education or training for the grantee; or (3) disbursement of the grant on a reimbursement basis only, meaning that the grantee would have to show that costs had been incurred in line with the cost principles before receiving federal grant funds to cover these costs. However, because the Magnuson-Stevens Act requires the Secretary of Commerce to fund the councils, terminating a council's grant is not a realistic option. Placing a condition on mandatory funding is also not a realistic option because the councils must be funded, even if a condition is violated. Finally, while requiring a council to seek reimbursement for costs would place an administrative burden on the council that might encourage compliance, there may be little, if any, cost actually associated with some restricted lobbying activities. In addition, a reimbursement approach could require NOAA to allocate resources to grant oversight that may not be commensurate with the grant amounts at issue.

The Magnuson-Stevens Act and its regulations encourage representation of diverse interests on the councils, including commercial and recreational fishing interests. To allow those with financial interests in fisheries or fishery-related activities to participate on the councils, the act generally exempts public council members from federal conflict of interest law regarding participating in matters affecting their financial interests when they deliberate and vote on council matters, as long as they are in compliance with alternative provisions specifically applicable to council members.⁵ These provisions require public members to report any interest in a harvesting, processing, lobbying, advocacy, or marketing activity within any fishery over which the council has jurisdiction. Doing so allows them to vote on any matter that will not have an expected and substantially disproportionate benefit to their financial interests and is not primarily a matter of individual concern. If the decision would have such an effect, then the council member may not vote. However, the member may participate in discussions and deliberations regarding the matter after recusing himself and identifying the financial interest that would be affected. If the matter is primarily of individual concern, then the council member may not participate in voting, deliberations, rendering advice, and making recommendations. Commerce Department guidance defines "matters primarily of individual concern" as "those matters that affect a small number of identified, or easily identifiable, parties, rather than broad policy matters affecting many entities."

The Magnuson-Stevens Act requires each fishery management council to publish a Statement of Organization, Practices, and Procedures (SOPPs) for carrying out the council's functions under the act. Among other things, the SOPPs provide information on the councils' accounting and budgetary control procedures and their operating policies and procedures.

⁵Consistent with the views of the Justice Department's Office of Legal Counsel in similar circumstances, the Commerce Department does not consider public council members to be subject to the regulations (found at 5 CFR Part 2635) governing the ethical conduct of executive branch employees because they are not under the supervision of a federal officer or employee.

Lobbying

We found limited and inconclusive evidence regarding whether members and staff of the Western Pacific Council had engaged in lobbying activities in support of legislation or policy positions. These allegations included claims that the council had lobbied members of the executive branch, members of Congress, and members of the Hawaii state legislature; testified before Congress and the Hawaii state legislature; and organized grassroots lobbying efforts.

- *Lobbying members of the executive branch.* We examined allegations that the council had communicated with the Secretary of Commerce and the President's Council on Environmental Quality regarding the council's opposition to the executive orders establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve⁶ and its subsequent designation as a marine sanctuary. The council's executive director acknowledged communicating the council's opposition to the fishery closures and no-anchoring provisions in the executive orders to the Secretary of Commerce and the Council on Environmental Quality. However, such contacts do not constitute prohibited lobbying under OMB rules. Specifically, OMB Circular A-122 does not bar council members and staff from communicating their views within the executive branch on executive branch matters.
- *Lobbying members of Congress.* We examined allegations that the council had attempted to lobby members of Congress. We found limited and conflicting evidence regarding these allegations. OMB Circular A-122 disallows the use of federal funds for efforts to introduce, enact, or modify legislation through communication with members of Congress. However, OMB Circular A-122 does allow the use of federal funds to present technical and factual information related to grant performance in response to a documented request by a legislative body, its members, or staff. Council officials acknowledged having met with members of Congress and their staffs, but said that they did so in response to requests for information. They also acknowledged having made courtesy visits to members of the Hawaiian congressional delegation while in Washington, D.C., but denied that these visits were used to lobby members of Congress regarding pending legislation. We interviewed a former member of Congress who believed that council representatives had come to his office without an invitation and lobbied him regarding pending legislation. According to the council's executive director, the legislator had invited council representatives to meet with him and the meeting did not involve lobbying. We were unable to resolve the conflicting recollections of this incident. We were also unable to determine whether the council's contacts with members of Congress were in accordance with OMB Circular A-122 because, according to council officials, they do not maintain documentation that would show the date and reason for each congressional contact, nor do they routinely notify NOAA regional counsel of these contacts. In addition, council officials told us that each year, council members and staff received a copy of the Commerce Department's rules of conduct for council members

⁶On December 4, 2000, President Clinton signed Executive Order 13178, establishing the Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve. The executive order set forth and asked for comment on certain conservation measures, including a prohibition on commercial fishing in specified areas within the reserve. After a 30-day comment period, President Clinton issued Executive Order 13196, which amended Executive Order 13178 and, among other things, made permanent those fishing closures.

and employees, including rules on lobbying, but only new council members received training on these rules.

- *Lobbying members of the Hawaii state legislature.* We investigated several allegations that the council had drafted legislation and contacted legislators regarding bills before the Hawaii state legislature. We also investigated an allegation that a council contractor had lobbied state legislators on the council's behalf in support of bills resulting from a series of conferences—known as Puwalu—that the council organized and cosponsored to help increase the participation of native Hawaiians in the fishery management process. However, we found no evidence to support these allegations. To determine the validity of these allegations, we interviewed council staff, who denied having drafted state legislation or lobbied state legislators. The council's executive director said that the council has provided information to state legislators at their request. However, the council does not keep documentation that would show the date and reason for each contact, nor do they routinely notify NOAA regional counsel of these contacts. Council staff also denied having contracted with the organizer of the Puwalu series to lobby the state legislature, and our review of the council's contracts with the Puwalu organizer showed that they did not include lobbying activities. We also interviewed Hawaii state legislators whom the council and the council contractor had allegedly lobbied. One legislator said that the council had not drafted the bill in question and no legislator could recall having been lobbied by the council regarding pending legislation. Another legislator told us that the contractor had lobbied him in support of legislation resulting from the Puwalu series, but identified herself as representing a group of native Hawaiian elders—not the council.
- *Testifying before Congress and the Hawaii state legislature.* We investigated several allegations that the council had testified before Congress and the Hawaii state legislature in opposition to various pieces of legislation and had also written testimony for fishermen to deliver before the Hawaii state legislature. We found evidence that the council had delivered some testimonies that could be considered lobbying, but we did not find evidence to substantiate allegations that the council had written testimony for fishermen. OMB Circular A-122 disallows the use of federal funds for expenses associated with testimony that is unsolicited or, even if solicited, is not purely technical or factual and directly related to the performance of a federal grant. Moreover, under OMB Circular A-122, the request to testify must be documented for any expenses associated with the testimony to be allowable. While the council's executive director told us that council members and staff had testified at the request of congressional and state legislative committees, council staff kept no documentation of these requests, nor did they routinely notify NOAA regional counsel of such requests. Therefore, we could not determine whether the council had been asked to testify. Such documentation is particularly important in the case of testimony before Hawaii state legislative committees because these committees allow solicited and unsolicited testimony, according to state legislators we spoke with. Further, among the testimonies we reviewed, we found several that included statements of advocacy for particular policy positions, in addition to technical and factual information. Specifically, we found that, in 1999 and 2000, the council's chairman testified at least five times before U.S. congressional and Hawaii state legislative committees. These testimonies were largely factual, but also included statements of the council's opposition to pending legislation. As the agency administering the council's grant, NOAA is responsible for implementing the requirements of OMB

Circular A-122. Therefore, it would be up to NOAA to determine whether federal funds were used for lobbying and, if so, what the appropriate remedy to pursue would be.

- *Organizing grassroots lobbying.* We looked into several allegations that the council had engaged in efforts to get others to influence federal and state legislation, primarily through the media and the Puwalu series of conferences. However, we could find no evidence to support these claims. Such conduct would violate OMB Circular A-122, and any associated costs would be unallowable expenditures of federal grant money. Specifically, we were unable to substantiate allegations that the council used the media to organize grassroots lobbying because the alleged instances appeared to involve an executive order rather than legislation, and OMB Circular A-122 does not prohibit attempting to influence executive branch decisions. In addition, we were unable to find evidence to substantiate allegations related to the Puwalu series. Specifically, council staff and the series organizer told us that the series was not intended to produce legislation, and the persons making the allegations provided no solid evidence to the contrary.

Conflicts of Interest

We found no evidence to support allegations that public council members inappropriately voted or deliberated on matters concerning their financial interests.

- *Council members voting on decisions in which they had conflicts of interest.* We reviewed allegations ranging from general concerns that public council members with significant commercial fishing interests have benefited from council decisions, to concerns that a public council member could have personally benefited from a specific decision on which he had voted. However, we found no evidence to substantiate these allegations. The Magnuson-Stevens Act requires public council members to disclose their financial interest in harvesting, processing, lobbying, advocacy, or marketing activities within any fishery over which the council has jurisdiction. Further, such a council member may not vote on a matter that would have a “significant and predictable effect” on such an interest, defined as a close causal link between the decision and an “expected and substantially disproportionate benefit” relative to the interest of other participants in the fishery. NOAA regulations define “expected and substantially disproportionate benefit” to mean a greater than 10 percent interest in the total harvest of the fishery or sector of the fishery in question; in the fishery’s harvesting, marketing, or processing activities; or in the vessels using the same gear type. Council members also may not vote on matters primarily of individual concern. During our review, one person who had raised concerns about conflicts of interest told us he was aware of the conflict of interest requirements but disagreed with them. Specifically, he said he believed that council members should not be allowed to vote on matters in which they have an interest, regardless of the size of their interest.
- *Council members participating in deliberations on decisions in which they had conflicts of interest.* We reviewed allegations that when public council members recused themselves from voting on decisions in which they had conflicts of interest, they still participated in, and in some cases led, council deliberations on those matters. However, we determined that such participation is generally permissible. Specifically, the Magnuson-Stevens Act allows public council members to participate in deliberations on

matters in which they have conflicts of interest after notifying the council that they will not be voting on the matter and after identifying the financial interest that would be affected. According to Commerce Department guidance, a recusal from voting may be announced at any time before voting on the matter. However, we found that it was not always clear from council meeting minutes whether members who had recused themselves had identified the financial interest that would be affected, as required by the Magnuson-Stevens Act. Finally, Commerce Department guidance states that a member disqualified from voting on a matter primarily of individual concern may not participate in deliberations on the matter. NOAA Regional Counsel for the Pacific Islands Region told us that there had been no violations of this prohibition since at least November 2005.⁷

The Use of and Accounting for Federal Funds

We found no evidence to support allegations that the Western Pacific Council improperly used and accounted for federal funds.

- *Improperly using federal funds.* We reviewed allegations that the council improperly used federal funds by organizing and sponsoring the Puwalu series. We found no evidence to support these allegations. One of the purposes of the Magnuson-Stevens Act is to ensure that the councils prepare, monitor, and revise fishery management plans in a way that will enable a broad range of stakeholders to participate in and advise on the establishment and administration of those plans. The act also encourages councils to develop ecosystem-based approaches to fisheries management. According to council officials, the purpose of the five Puwalu conferences, which were held between August 2006 and November 2007, was to engage native Hawaiians in resource management issues and encourage practitioners of native Hawaiian fishing traditions to become more involved in the development of an ecosystem-based approach to fisheries management. In the opinion of officials at NMFS's Pacific Island Regional Office, the series was well thought out and clearly in line with the approved uses and goals of the council's multiyear grant.
- *Improperly accounting for federal funds.* We reviewed general allegations that the council had improperly accounted for federal funds. We found no evidence to substantiate these allegations. Specifically, our review of the council's 2006 and 2007 independent auditor reports found that the council received unqualified audit opinions for both years. Further, the independent auditor did not identify any significant deficiencies in the design and operation of controls that would adversely affect the council's ability to prevent or detect financial reporting misstatements, or to comply with requirements applicable to each major council program and OMB Circular A-133.⁸ Similarly, our limited review of council expenditures found that they were supported by adequate documentation and properly recorded.⁹

⁷The Office of the Pacific Islands Regional Counsel was established in November 2005.

⁸OMB Circular A-133 sets forth standards for obtaining consistency and uniformity among federal agencies for the audit of states, local governments, and nonprofit organizations expending federal awards.

⁹We reviewed a judgmental sample of transactions to obtain a better understanding of the extent and nature of council expenditures, and the design and operation of internal controls in place concerning

- *Inappropriately distributing cash.* We reviewed allegations that the council distributed cash in white envelopes to certain participants of the Puwalu series in an attempt to buy loyalty to the council. We found that a total of 97 participants received cash payments at four of the five Puwalu conferences; however, we found no evidence to suggest that these payments were made to buy loyalty. Instead, they represented the participants' per diem for meals and incidental travel expenses to attend the conferences. Council staff said that they chose to make these payments in cash instead of by check because they believed it was the best way to maximize the attendance of native Hawaiian cultural practitioners, many of whom live off the land using traditional Hawaiian practices and may not have bank accounts or the identification necessary to cash checks. We reviewed seven cash payments and found that they were properly supported and accounted for. However, generally speaking, such cash payments are not advisable because, according to our *Standards for Internal Control in the Federal Government*,¹⁰ cash is vulnerable to risk of loss or unauthorized use.

We determined that allegations related to the following matters were based on incorrect information.

- *Mismanaging community demonstration project grants.* We reviewed allegations that the council had mismanaged grants made under the Western Pacific Community Demonstration Project Program (CDPP). We determined that NOAA, not the council, is responsible for managing these grants. The Magnuson-Stevens Act authorizes the Secretary of Commerce to make grants to eligible western Pacific communities, based on recommendations from the council, for the purpose of establishing demonstration projects to foster and promote traditional indigenous fishing practices. Once projects are selected, NOAA provides funds directly to the grantees. According to a NOAA official we spoke with, NOAA has sole responsibility for overseeing the CDPP grants.
- *Using certain enforcement fines.* We reviewed allegations that the council receives money from enforcement fines that it can spend however it wants. We determined that this allegation is factually inaccurate. The 2006 amendments to the Magnuson-Stevens Act established the Western Pacific Sustainable Fisheries Fund, which includes fines imposed on foreign vessels in waters off unincorporated areas under the council's jurisdiction, and specifies how these monies are to be used. As of March 2009, the council had received no monies from this fund, according to NOAA officials.
- *Paying profit sharing to council staff.* We reviewed allegations that council staff were receiving profit sharing, or a percentage of the grant funds that go to the council. We found that these allegations were factually inaccurate. NOAA officials told us that the term "profit sharing" is used to describe the amount of the agency's annual contribution to staff retirement plans and is not based on any kind of profit or percentage of the council's funding.

the receipt and expenditure of grant funds. Our review was based upon limited procedures. The results are not generalizable and would not necessarily identify all instances of inappropriate accounting for government funds.

¹⁰GAO, *Standards for Internal Control in the Federal Government*, GAO/AIMD-00-21.3.1 (Washington, D.C.: November 1999).

- *Compensating the executive director.* During our review, we heard allegations that the executive director is paid at an inappropriate level. We found that these allegations were factually inaccurate. According to NOAA regulations, the annual pay rate of council staff members must be consistent with the pay rates established for General Schedule (GS) federal employees and the Alternative Personnel Management System for the U.S. Department of Commerce. The council has set the executive director's pay at a rate in the range allowed for a GS-15 federal employee. In addition, the council has used the discretion allowed for in the regulations to adjust staff pay rates based on the cost of living differential for Hawaii.
- *Identifying and accounting for Puwalu funding.* We reviewed allegations that the council was unable to identify the funding sources it used to organize and sponsor the Puwalu series and unable to account for the use of those funds. However, the council was able to provide this information to us and we found no irregularities. Specifically, our review of 14 Puwalu series expenditures noted that they were charged to the appropriate grants and properly accounted for.¹¹

Council Operations

We found no evidence to support allegations that the Western Pacific Council improperly denied the public access to records, and we found some evidence to support allegations that the council delayed providing information requested by an individual council member. We also found that the council has not clearly defined its policies regarding access to its records.

- *Denying the public access to council records.* We reviewed allegations that the council denied the public access to council records. We found no evidence to support these allegations. The Magnuson-Stevens Act requires that a council's administrative record, including meeting minutes, and records or other documents made available to or prepared for or by the council in connection with council meetings, be made available for public inspection and copying in the council office. The council makes these records, such as council meeting minutes and briefing book materials prepared for council members in advance of council meetings, available at its office. However, it has posted few of these records on its Web site. In contrast, the Pacific Fishery Management Council's Web site contains meeting minutes from 2001 to the present and briefing book materials from 2002 to the present, and the North Pacific Fishery Management Council's Web site contains meeting minutes from 2000 to the present. In addition, the executive director told us that it is the council's policy to require members of the public to file a Freedom of Information Act (FOIA) request to obtain information that is not normally made available to the public. However, we found that the council's SOPPs do not fully communicate these policies. Specifically, the SOPPs state that summary minutes of council meetings are available to the public for inspection in the council office. However, the SOPPs do not mention the availability of other records or documents for public inspection, nor do they mention that members of the public must file a FOIA request to obtain information that is not normally made available to the public for inspection. By not providing a complete statement of its records access policy, the council may be causing confusion about what records are available and how to access them.

¹¹See footnote 9, above.

- Withholding information requested by individual council members.* We reviewed allegations that council staff had delayed providing budget information requested by individual council members. In the instance we reviewed, we found that it took council staff about 8 weeks to provide the requested information—copies of the council’s 2006 and 2007 annual budgets and the council’s 2006 audit report. Shortly thereafter, the council member decided to file a FOIA request to get additional information. The Magnuson-Stevens Act and its regulations do not specifically address council member requests for records. However, the executive director told us that council members have unrestricted access to council records. In addition, the council’s SOPPs state that council members desiring special reports or information should request them from the council chair or executive director. According to the executive director, it can be time-consuming for staff to prepare detailed documents that are not normally prepared for the council. The executive director also expressed concern about safeguarding sensitive information, such as staff compensation, that the public does not normally receive. However, we found that the council has no written policies and procedures for responding to council members’ requests for information, including the time frames for responding and the types of documents that council staff should reasonably be expected to prepare. The lack of such policies and procedures may create the perception that council staff are withholding information that council members need to fulfill their duties.
- Describing the Western Pacific Council as a policy-making body.* During the course of our review, we found that the council sometimes describes itself as a “policy-making” body. However, while the council plays a significant role in developing fishery management policy, it does not have the authority to approve or authorize such policy. Instead, the Secretary of Commerce is ultimately responsible for the management, conservation, and protection of living marine resources in federal waters. For this reason, describing itself as a policy-making body could cause confusion.

Conclusions

The conflicts that arise between regional fishery management councils and stakeholder groups can be exacerbated by a lack of transparency in council actions, which, in turn, can lead to perceptions of misconduct and mismanagement. In the case of the Western Pacific Council, the council’s failure to maintain documentation of all requests for information from federal and state legislators—a generally allowable use of the council’s grant funds—and its decision to distribute cash per diem payments to some meeting participants—even if properly accounted for—may have contributed to the allegations of misconduct. Enhanced transparency regarding council activities and policies would help facilitate informed stakeholder participation in the council process, provide checks against misconduct and mismanagement, and help protect against unfounded accusations of impropriety.

Recommendations for Executive Action

To help ensure compliance with OMB Circular A-122 requirements governing federal grant recipients, we recommend that the Administrator of NOAA direct the Western Pacific Fishery Management Council to maintain documentation of all requests for information from federal and state legislators.

To reduce the risk of loss or unauthorized use associated with reimbursing meeting participant expenses with cash, we recommend that the Administrator of NOAA direct the Western Pacific Fishery Management Council to pay per diem costs for meeting participants by check to the extent practicable.

To improve the transparency of the council's operations, we recommend that the Administrator of NOAA work with the Chair of the Western Pacific Fishery Management Council to implement actions such as

- notifying NOAA regional counsel before meeting with federal or state legislators or testifying before one of their committees;
- asking NOAA regional counsel to provide an annual briefing to council members and staff on the rules governing their conduct, including limits on contacts with legislators;
- adopting procedures that require council meeting minutes to include not only a council member's statement of recusal from voting, but also the nature of the financial interest that would be affected;
- maintaining current and archived copies of documents available for public inspection, such as the council's meeting minutes and briefing book materials, on the council's Web site;
- developing and making available the council's policy regarding the types of records that are available to the public at the council office, the types of records that are available through a FOIA request, and the procedures for reviewing or requesting these records;
- communicating directly with a council member who has requested council information and, if necessary, negotiating a timely response so that council members needing information do not have to file FOIA requests; and
- clarifying the council's advisory role by describing itself as a body that develops fishery management policy for review and approval by the Secretary of Commerce.

Agency and Other Interested Party Comments and Our Evaluation

We provided a draft copy of this report to the Department of Commerce and the Western Pacific Council for their review and comment. We received a written response from the Secretary of Commerce that includes comments from NOAA. We also received comments from the council. NOAA agreed with all of our recommendations and said it will take action to address the concerns identified. NOAA also provided technical comments, which we incorporated into the report as appropriate. The Western Pacific Council's written response consisted of technical and editorial comments, which we incorporated as appropriate. NOAA's and the council's comments are presented in enclosures I and II.

As agreed with your office, unless you publicly announce the contents of this report earlier, we plan no further distribution until 30 days from the report date. At that time, we will send copies of this report to the Secretary of Commerce, the Administrator of NOAA, the Director of the National Marine Fisheries Service, the Chair of the Western Pacific Fishery Management Council, and interested congressional committees. In addition, the report will be available at no charge on the GAO Web site at <http://www.gao.gov>.

If you or your staff have any questions about this report, please contact David Maurer at (202) 512-3841 or maurerd@gao.gov, or Susan Ragland at (202) 512-9406 or raglands@gao.gov. Contact points for our Offices of Congressional Relations and Public Affairs may be found on the last page of this report. In addition to the individuals named above, Stephen Secrist, Assistant Director; Glenn Slocum, Assistant Director; Antoinette Capaccio; Daniel Egan; Richard Johnson; Susan Malone; Alison O'Neill; and Brian Tremblay made key contributions to this report.

Sincerely yours,



David C. Maurer
Acting Director, Natural Resources
and Environment



Susan Ragland
Director, Financial Management
and Assurance

Enclosures (2)

Enclosure I

Comments from NOAA

Note: A GAO comment supplementing those in the report text appears at the end of this enclosure.



UNITED STATES DEPARTMENT OF COMMERCE
Office of the Secretary
Washington, D.C. 20230

May 12, 2009

Mr. David C. Maurer
Director, Natural Resources and Environment
U.S. Government Accountability Office
441 G Street, NW
Washington, DC 20548

Dear Mr. Maurer:

Thank you for the opportunity to review and comment on the Government Accountability Office's draft report entitled *Fisheries Management: Alleged Misconduct of Members and Staff of the Western Pacific Fishery Management Council* (GAO-09-508R). On behalf of the Department of Commerce, I enclose the National Oceanic and Atmospheric Administration's programmatic comments on the draft report.

Sincerely,


Gary Locke

Enclosure

Department of Commerce
National Oceanic and Atmospheric Administration
Comments on the Draft GAO Report Entitled
Fisheries Management: Alleged Misconduct of Members and Staff of the
Western Pacific Fishery Management Council
(GAO-09-508R - May 2009)

General Comments

The Department of Commerce's National Oceanic and Atmospheric Administration (NOAA) appreciates the opportunity to review the Government Accountability Office's (GAO) draft report. As indicated below, NOAA concurs with all three draft report recommendations and will take action to address the concerns identified.

NOAA Response to GAO Recommendations

Recommendation 1: "To help ensure compliance with OMB Circular A-122 requirements governing federal grant recipients, we recommend that NOAA direct [the Western Pacific Fishery Management Council [WESPAC]] to maintain documentation of all requests for information from federal and state legislators."

NOAA Response: NOAA agrees with the recommendation and will direct WESPAC to maintain documentation of all requests for information from federal and state legislators.

Recommendation 2: "To reduce the risk of loss or unauthorized use associated with reimbursing meeting participant expenses with cash, we recommend that NOAA direct WESPAC to pay per diem costs for meeting participants by check to the extent practicable."

NOAA Response: NOAA agrees with the recommendation and will direct WESPAC to pay per diem costs for meeting participants by check to the extent practicable.

Recommendation 3: "To improve the transparency of WESPAC's operations, we recommend that NOAA work with WESPAC to implement actions such as:

- Notifying NOAA regional counsel before meeting with federal or state legislators or testifying before one of their committees.
- Asking NOAA regional counsel to provide an annual briefing to council members and staff on the rules governing their conduct, including limits on contacts with legislators.
- Adopting procedures that require council meeting minutes to include not only a council member's statement of recusal from voting, but also the nature of the financial interest that would be affected.
- Maintaining current and archived copies of the council's administrative record, including council meeting minutes, on the council's Web site.
- Developing and making available the council's policy regarding the types of records that are available to the public at the council office, the types of records that are available through a FOIA request, and the procedures for reviewing or requesting these records.

Enclosure I

- Communicating directly with a council member who has requested council information and, if necessary, negotiating a timely response so that council members needing information do not have to file FOIA requests.
- Clarifying the council's advisory role by not describing itself as a policy-making body."

See comment 1.

NOAA Response: NOAA agrees with the recommendation and will work with WESPAC, taking appropriate actions to improve the transparency of WESPAC's operations. GAO should note, however, that an "administrative record" in a court case may include a large amount of background information not typically posted on agency or Council Web sites. NOAA views GAO's references to "the administrative record" as pertaining to those documents provided to the Council (i.e., Fishery Management Plans, amendments, and analysis, including drafts for Council votes, records of discussion, and votes (i.e., minutes)), but not necessarily internal staff background documents or other documents that may or may not be part of a litigation administrative record.

Enclosure I

GAO Comment

1. We revised the text to make clear that we were suggesting that the council maintain current and archived copies of documents available for public inspection, such as the council's meeting minutes and briefing book materials, on the council's Web site.

Enclosure II

Comments from the Western Pacific Fishery Management Council



**Western
Pacific
Regional
Fishery
Management
Council**

May 5, 2009

David C. Maurer
Director: Natural Resources and Environment
Susan Ragland: Financial Management and Assurance
US Government Accountability Office
441 G St., NW
Washington, DC 20548

Dear Directors Maurer and Ragland:

Thank you for the opportunity to review the draft GAO report that responds to allegations by some conservation advocacy organizations of misconduct by the Western Pacific Regional Fishery Management Council.

We propose a few edits which we believe clarify some of the findings in the report (which we have enclosed).

First is a request to replace the acronym "WESPAC" throughout the document with the word "Council" or the acronym "WPRFMC," as we refer to our organization using either of these two terms and do not generally use the acronym WESPAC.

Second, we have made some edits to the Results in Brief section. We suggest that this section include a summary of the Conflicts of Interest findings as this issue is one of the four items that Rep. Waxman asked to be reviewed. We also request that some additional text from the main body of the report be added to the Results in Brief so this section clearly reflects the report's findings. It is likely that most people and the media will focus only on this part of the report.

Third, there are a few areas in the main part of the report that could be clarified, and we have suggested revisions to the text.

Fourth, the Council requests that a list of the interested parties be included in the report.

We respectfully request that you and your staff consider these comments. We will be pleased to respond to any questions or comments you may have on our review of the draft report.

Sincerely,

A handwritten signature in black ink, appearing to read "Sean Martin".

Sean Martin
Council Chair

Enclosure

cc: David Maurer, Susan Ragland, Glenn Slocum

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1164 BISHOP STREET • SUITE 1400 • HONOLULU • HAWAII 96813 USA • TELEPHONE (808) 522-8220 • FAX (808) 522-8226
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