



UNITED STATES DEPARTMENT OF COMMERCE  
The Inspector General  
Washington, D.C. 20230

February 12, 2015

The Honorable Walter B. Jones  
United States House of Representatives  
2333 Rayburn House Office Building  
Washington, DC 20515

Dear Congressman Jones:

In July 2014, the Department of Commerce Office of Inspector General (the "OIG") was contacted by your office regarding an alleged conflict of interest by a Pennsylvania delegate to the Atlantic States Marine Fisheries Commission (the "Commission"). Your office asked the OIG to investigate the alleged conflict of interest and treat the complaint as a congressional inquiry.

After conducting an extensive review of the facts and law, we informed your office of our findings. We explained to your staff that the Commission was not a federal entity and its commissioners did not appear to be subject to federal ethics laws. We indicated that we would refer the matter to the Pennsylvania Office of Attorney General, as the delegate appeared to be a state actor and his actions may have violated the Pennsylvania ethics statute, 65 Pa. Cons. Stat. § 1101 et seq. In addition to our referral to the Attorney General's office, we provided your office with several additional avenues to address the apparent conflict of interest. Our analysis is included in a memorandum attached to this letter.

Since our referral to the Pennsylvania authorities, however, we have identified two issues appropriate to bring to your attention and to the attention of Congress more generally. First, our investigation has revealed an apparent gap in ethics laws governing the Atlantic States Marine Fisheries Commission and at least some of its commissioners. Second, although our investigation related to the Commission and not the regional Fishery Management Councils (the "Councils"), our analysis of the Commission's conflict-of-interest provisions revealed a lack of clarity between federal conflict-of-interest requirements and a federal regulation imposed on members of the Councils.

(1) Apparent Gap in Ethics Laws Governing the Atlantic States Marine Fisheries Commission and its Commissioners

We referred the matter to the Pennsylvania Attorney General in November 2014. In January 2015, the Pennsylvania Attorney General's office informed us that it closed its investigation. According to the Pennsylvania Attorney General's staff and state ethics counsel, under Pennsylvania case law, the Pennsylvania ethics statute does not apply to an organization formed by interstate compact unless (i) the compact specifically states that member states' ethics laws apply, or (ii) the member states pass similar legislation.<sup>1</sup> The Pennsylvania officials also stated

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<sup>1</sup> Both the Pennsylvania Attorney General and ethics counsel pointed to *Delaware River Port Authority v. Pa. State Ethics Comm'n*, 585 A.2d 587 (Pa. 1991), as the controlling authority. In *Delaware River Port Authority*, the court held that the application of Pennsylvania's ethics statute would result in the "unilateral imposition of additional

that the compact creating the Commission does not specifically state that member states' ethics laws apply and that Pennsylvania and at least one other state had not passed similar ethics legislation. Therefore, they concluded that the Commission and its commissioners, including the Pennsylvania representatives, were not subject to Pennsylvania law.

Accordingly, we believe there is a disconcerting gap in legal coverage regarding the Commission and possibly other similarly situated entities. In particular, our analysis has established that at least the Pennsylvania commissioners and their proxies on the Atlantic States Marine Fisheries Commission, if not commissioners from all member states, are not subject to federal or state ethics laws. Therefore, it appears that matters before the Commission remain at risk for ethics violations, including financial conflicts of interest, without recourse. We believe this gap can be addressed in various ways, including (a) member states amending the Commission's compact to specifically state that member states' ethics laws apply, (b) member states individually adopting similar ethics legislation, or (c) the enactment of federal legislation that would extend federal ethics laws to the Commission and its commissioners.

## (2) Lack of Clarity between Magnuson-Stevens Act and a Federal Regulation

Over the course of the investigation, we also uncovered an issue concerning the Commission's conflict-of-interest policy. In or around October 2014, following the initiation of the OIG's preliminary inquiry, the Commission implemented a new conflict-of-interest policy that addressed many of the deficiencies of its prior policy. Notably, however, the new policy does not require commissioners to recuse themselves from discussion of an issue in which they face a conflict of interest. Instead, the new policy allows commissioners and their proxies to participate in the discussion on an issue and requires recusal from participation in the state caucus and state delegation vote, as described more fully below.

Commission documents show that the Commission contemplated requiring that commissioners or their proxies with a financial conflict of interest recuse themselves from participation in the discussion, as well as the state caucus prior to a vote.<sup>2</sup> Ultimately, rather than choosing this option, the Commission opted for the less restrictive approach, allowing commissioners and their proxies to participate in the board discussions. Commissioners must recuse themselves from making or seconding motions, participating in the state caucus and sitting at the Board table for caucusing and voting.<sup>3</sup> The Commission indicated that the option approved by the Commission

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duties on the authority." 585 A.2d at 590. In reaching this conclusion, the court noted that the compact at issue in that case did not expressly allow member states Pennsylvania and New Jersey to impose conflict-of-interest laws on Delaware River Port Authority members. 585 A.2d at 588. The court found that an ethics requirement by either state, without approval by the other member state, would amount to additional duties on all members, regardless of their particular state. 585 A.2d at 589. Neither party contended that Pennsylvania and New Jersey passed substantially similar legislation. *Id.* Referencing New Jersey case law, the court also noted that New Jersey's conflict-of-interest statute does not apply to a "bi-state agency," because bi-state officers "cannot be an officer of a particular state without simultaneously being classified as an officer of all states party to the interstate compact." *Id.*

<sup>2</sup> Atlantic States Marine Fisheries Commission, *Memorandum re Policy on Financial Disclosure and Conflict of Interest Decision Document*, August 6, 2014, available at

[http://www.asafc.org/files/Meetings/SummerMeeting2014/BusinessSession\\_Supplemental.pdf](http://www.asafc.org/files/Meetings/SummerMeeting2014/BusinessSession_Supplemental.pdf).

<sup>3</sup> Atlantic States Marine Fisheries Commission, *Policy on Commissioner Financial Disclosure and Conflict of Interest*, 2014, available at

[http://www.asafc.org/files/Meetings/FinancialDisclosureAndConflictOfInterestPolicy\\_Aug2014.pdf](http://www.asafc.org/files/Meetings/FinancialDisclosureAndConflictOfInterestPolicy_Aug2014.pdf).

was “similar to the regional council process,” referring to the conflict-of-interest requirements of the regional Fishery Management Councils, as found in the MSA.<sup>4</sup>

According to the MSA, regional Council members may not “vote on a decision which would have a significant and predictable effect on [their] financial interest.” However, they may participate in *deliberations* on matters in which they have a significant financial conflict after “notifying the Council of the voting recusal and identifying the financial interest that would be affected.”<sup>5</sup>

As a threshold matter, we note that this exception – permitting Council members to participate in deliberations on matters in which they have disclosed significant financial conflicts and recused themselves from voting – could have a detrimental impact on the Councils. In particular, even though a conflicted Council member may not vote on a matter, comments by such a member during deliberations could undermine the public’s perception of that Council’s impartiality.

Moreover, we note a lack of clarity between these MSA provisions and certain related regulations implemented by the National Oceanic and Atmospheric Administration (“NOAA”). In contrast with the MSA provisions at issue, NOAA’s regulations prohibit any Council member from *participating* in a “particular matter primarily of individual concern” in which he or she has a financial interest.<sup>6</sup> A matter “primarily of individual concern” is defined as:

[M]atters that affect a small number of identified, or easily identifiable, parties, rather than broad policy matters affecting many entities. For example, a contract between [a Council member] and a company that employs [the member] would be a matter primarily of individual concern for [that Council member]; thus, [the Council member] would be disqualified from participating in any Council action regarding the contract, even if the company was listed on [his or her] Financial Interest Form.<sup>7</sup>

In our view, there is a lack of clarity between the requirements of this NOAA regulation and the MSA provisions described above. The conflict-of-interest prohibitions in the MSA are explicit: members excluded from voting due to a conflict may participate in deliberations after notifying his or her regional Council of the voting recusal and identifying the financial interest that would

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<sup>4</sup> *Id.*

<sup>5</sup> The MSA states, in part:

After the effective date of regulations . . . an affected individual required to disclose a financial interest under paragraph (2) shall not vote on a Council decision which would have a significant and predictable effect on such financial interest. A Council decision shall be considered to have a significant and predictable effect on a financial interest if there is a close causal link between the Council decision and an expected and substantially disproportionate benefit to the financial interest of the affected individual relative to the financial interests of other participants in the same gear type or sector of the fishery. An affected individual who may not vote may *participate* in Council deliberations relating to the decision after notifying the Council of the voting recusal and identifying the financial interest that would be affected. (emphasis added)

16 U.S.C. § 1852(j)(2).

<sup>6</sup> 50 C.F.R § 600.225.

<sup>7</sup> Department of Commerce, *Regional Fishery Management Councils: Rules of Conduct for Members*, p. 5, 2014, available at [http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e\\_h1\\_members\\_conduct\\_rules.pdf](http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e_h1_members_conduct_rules.pdf).

be affected. Therefore, the MSA clearly allows deliberations relating to the decision even when a conflict is present, as long as it was disclosed previously. In contrast, NOAA's regulation takes an arguably stricter approach, barring all participation in certain instances. Adding to the confusion, the NOAA regulation attempts to distinguish between matters "primarily of individual concern" and matters that have a "significant and predictable effect" on a financial interest, and can be read to prohibit conduct that the MSA specifically allows.

We believe the apparent tensions between the MSA and the NOAA regulation could create confusion concerning the ethical restrictions placed on members of the various Councils and that clarifying these requirements will help protect the public from future conflicts of interest. It would also set a clear standard for similar organizations and entities, such as the Atlantic States Marine Fisheries Commission, that model the Councils' ethics requirements.<sup>8</sup>

In closing, we appreciate the opportunity to examine the complaint involving the Atlantic States Marine Fisheries Commission. We hope our analysis on the scope of ethics laws as it applies to the Commission, as well as the financial conflict-of-interest requirements governing the Fishery Management Councils, will be useful to you and your office. Please let me know if you would like to discuss further any of the issues raised above.

Sincerely,



Todd Zinser

Enclosure

cc:

The Honorable John Thune  
Chairman  
Committee on Commerce, Science &  
Transportation  
United States Senate

The Honorable Rob Bishop  
Chairman  
Committee on Natural Resources  
U.S. House of Representatives

The Honorable Bill Nelson  
Ranking Member  
Committee on Commerce, Science &  
Transportation  
United States Senate

The Honorable Raul Grijalva  
Ranking Member  
Committee on Natural Resources  
U.S. House of Representatives

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<sup>8</sup> As we reviewed this matter, we also noted that the MSA insulates Council members from criminal liability under the federal conflict-of-interest statute, 18 U.S.C. § 208, if they disclosed the conflict on required disclosure documents. Members therefore appear to be immunized from criminal liability, even if they vote on matters that have a significant and predicable effect on their financial interest – an action specifically prohibited by the MSA. By protecting conflicted Council members from criminal liability, the MSA seemingly bestows a benefit on Council members that is not generally granted to federal officials otherwise subject to the criminal conflict-of-interest statute.



February 12, 2015

## MEMORANDUM

TO: File

SUBJECT: ASMFC Farming and Harvest License (NOAA)  
14-0761-I

This memorandum summarizes the OIG's investigation into a complaint by a private citizen ("complainant"), who alleged that a member of the Atlantic States Marine Fisheries Commission ("the Commission") had a financial conflict of interest in certain matters before the Commission and failed to recuse himself from participating in those matters.<sup>1</sup> As described in detail below, the OIG investigated the matter and determined that the Commission was not a federal entity for purposes of this investigation, federal ethics laws likely do not apply to the alleged conduct, and pursuing potential misconduct under the grant terms and conditions is not an effective avenue for the OIG to address the complaint. The memorandum concludes with a review of the complainant's potential avenues to address the alleged improper conduct on the Commission.

### I. Summary of Allegations

On July 8, 2014, the complainant reported to the OIG that the Commission declined to issue his business a license to raise and export a specific species of seafood on three separate occasions.<sup>2</sup> The complainant alleged that a member of the Commission's Pennsylvania delegation<sup>3</sup> had a financial conflict of interest regarding the complainant's license application<sup>4</sup>. The complainant further alleged that, despite this financial conflict of interest, the Commission member participated in the Commission's consideration of his license applications.<sup>5</sup> In particular, the complainant asserted that the Commission member participated in discussions concerning the application and voted once to deny the license.<sup>6</sup> The complainant stated that, although the Commission member abstained from two subsequent votes, he "participated fully in all discussions and teleconferences" prior to each vote.<sup>7</sup> The complainant alleged that the Commission receives grants from the National Oceanic and Atmospheric Administration ("NOAA").<sup>8</sup>

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<sup>1</sup> The identities of individuals involved in this matter are not disclosed.

<sup>2</sup> OIG Hotline Complaint (July 8, 2014), *hereinafter* Hotline Complaint. *See also*, Letter from the Attorney for the Complainant, to the Atlantic States Marine Fisheries Commission (Nov. 19, 2013).

<sup>3</sup> Hotline Complaint; Atlantic States Marine Fisheries Commission, *Commissioner Bios*, available at [http://www.asmfc.org/files/commissionerManual/AllOtherSections/14\\_CommissionerBios.pdf](http://www.asmfc.org/files/commissionerManual/AllOtherSections/14_CommissionerBios.pdf).

<sup>4</sup> Hotline Complaint.

<sup>5</sup> *Id.*

<sup>6</sup> *Id.*

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*

In mid-July 2014, Congressman Walter Jones's office contacted the OIG regarding this complaint and requested that the OIG treat the complaint as a congressional inquiry.

## **II. Federal Ethics Laws Do Not Apply**

As a threshold matter, the OIG's investigation focused on whether the allegations constituted a violation of federal law. The Commission member's alleged conduct could implicate several federal laws. For instance, 5 C.F.R. § 2635.702 prohibits government officers or employees from using their public office for private gain.<sup>9</sup> The federal conflict-of-interest criminal statute prohibits an employee of the executive branch from participating in a "particular matter" in which the employee has knowledge of a financial interest.<sup>10</sup> Similarly, employees of the executive branch are prohibited from holding a financial interest that may conflict with the impartial performance of government duties<sup>11</sup> and should avoid the appearance of impropriety.<sup>12</sup>

These laws are applicable in the instant matter, however, only if the Commission is a federal entity. For the reasons stated below, the investigation concluded that federal ethics laws do not apply to the Commission.

### **a. Commission's Member States Remain Sovereign**

The states along the Atlantic Coast formed the Commission in the early 1940s in an effort to join forces to manage, promote, and protect shared migratory fishery resources.<sup>13</sup> In 1942, fifteen states and the District of Columbia ratified an Interstate Compact that was later approved by the United States Congress and signed by the President.<sup>14</sup> The Compact does not limit the powers or sovereignty of the member states over their state waters.<sup>15</sup> While the Commission worked toward its goal of promoting and protecting shared migratory fishery resources, it had no enforcement power and could not compel a state to follow its recommendations.<sup>16</sup> Under the Compact, each state is represented on the Commission by three commissioners: the executive

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<sup>9</sup> 5 C.F.R. § 2635.702(a).

<sup>10</sup> 18 U.S.C. § 208. The Office of Government Ethics ("OGE") promulgated regulations that relate to the prohibition on financial conflicts of interest. 5 C.F.R. § 2635.402.

<sup>11</sup> 5 C.F.R. § 2635.403.

<sup>12</sup> 5 C.F.R. § 2635.101(b)(14).

<sup>13</sup> Atlantic States Marine Fishery Commission, *About Us*, available at <http://www.asmf.org/about-us/program-overview>.

<sup>14</sup> Public Laws 77-539 and 81-721. The fifteen states that ratified the Compact were Maine, New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Delaware, Maryland, Virginia, North Carolina, South Carolina, Georgia, Florida, and Pennsylvania. Atlantic States Marine Fisheries Commission, *Atlantic States Marine Fisheries Compact*, Articles II, XII, § 2 (December 2003). Congress approved the Compact pursuant to Article I, Section 10 of the United States Constitution, commonly known as the "Compact Clause."

<sup>15</sup> Atlantic States Marine Fisheries Commission, *Atlantic States Marine Fisheries Compact*, Article IX (December 2003), available at <http://www.asmf.org/files/pub/CompactRulesRegulations.pdf>.

<sup>16</sup> Atlantic States Marine Fisheries Commission, *Atlantic States Marine Fisheries Compact*, Article I, IX, *supra*.

officer of the state's marine fisheries management agency, a state legislator, and an individual appointed by the state's governor to represent stakeholders' interests.<sup>17</sup>

**b. Atlantic Coastal Act Defines Separate Roles for the Commission and Federal Government**

Participation in the Commission was voluntary for decades after its inception.<sup>18</sup> As a result, states did not consistently comply with interstate fishery management plans adopted by the Commission.<sup>19</sup> To address the “disparate, inconsistent, and intermittent state and federal regulation that has been detrimental to the conservation” of Atlantic Coastal fishery resources, Congress enacted the Atlantic Coastal Fisheries Cooperative Management Act (“Atlantic Coastal Act” or the “Act”) in 1993.<sup>20</sup> The purpose of the Act was “to support and encourage the development, implementation, and enforcement of effective interstate conservation and management” of the fisheries along the Atlantic Coast.<sup>21</sup>

Under the Act, the Commission must develop “coastal fishery management plans (‘CFMPs’) to provide for the conservation of coastal fishery resources.”<sup>22</sup> As the name implies, CFMPs manage fisheries located in state waters, inland waters, and coastal waters (0-3 miles from shore) that are under the jurisdiction of two or more states, or waters under the jurisdiction of one or more states and the exclusive economic zone (3-200 miles from shore).<sup>23</sup> State compliance with fishery management plans is required.<sup>24</sup> When CFMPs involve fisheries that migrate through both state waters and the exclusive economic zone, the Commission must coordinate with the appropriate regional Fishery Management Council<sup>25</sup> to “determine areas where such coastal fishery management plan may complement Council fishery management plans.”<sup>26</sup>

The Commission monitors each state's implementation and enforcement of the CFMPs to determine whether each state is doing so effectively, and reports its findings to the Secretary of Commerce on an annual basis.<sup>27</sup>

The Act mandates a cooperative state-federal program for the conservation of Atlantic coastal fisheries. The responsibilities of the states and the federal government for the joint program are clearly defined under the Act.<sup>28</sup> The states are “responsib[le] for managing Atlantic coastal

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<sup>17</sup> Atlantic States Marine Fisheries Commission, *Atlantic States Marine Fisheries Compact*, Article III, *supra*. The state legislator is appointed by the state's Commission or Committee on Interstate Cooperation, or the Governor of that state, should no such committee exist.

<sup>18</sup> *New York v. Atl. States Marine Fisheries Comm'n*, 609 F.3d 524, 528 (2nd Cir. 2010).

<sup>19</sup> *Id.*

<sup>20</sup> 16 U.S.C. § 5101(a)(3).

<sup>21</sup> *Id.* § 5101(b).

<sup>22</sup> *Id.* § 5104(a)(2)(A). *See also*, *New York v. Gary Locke*, 2009 U.S. Dist. LEXIS 37091, \*6-7 (E.D.N.Y. April 30, 2009).

<sup>23</sup> *Id.* § 5102(1), (2).

<sup>24</sup> *Id.* § 5104(b)(1).

<sup>25</sup> The Fishery Management Councils are described, *infra*.

<sup>26</sup> *Id.* § 5104(a)(1).

<sup>27</sup> *Id.* § 5104(c).

<sup>28</sup> *Id.* § 5101(a)(4).

fisheries” through fishery oversight and management by the Commission.<sup>29</sup> The federal government must support the Commission’s interstate management of coastal fishery resources.<sup>30</sup> The government fulfills its responsibility through programming that helps the states cooperate in a number of areas, and by providing funds for fisheries management support and planning activities.<sup>31</sup> CFMPs do not require separate federal approval, but the states themselves are required under the Act to implement and enforce CFMPs through state legislation.<sup>32</sup> If a state fails to implement or comply with a CFMP, the Commission may notify the Secretary of Commerce.<sup>33</sup> The Secretary of Commerce, upon an independent finding of such failure or noncompliance, must impose a moratorium on “fishing in the fishery in question within the waters of the noncomplying state” if the CFMP is “necessary for the conservation of the fishery.”<sup>34</sup>

**c. Courts Dismiss the Argument that the Commission is a Federal Agency under the ADA**

Two courts have addressed whether the Commission is a federal agency; both courts concluded that the Commission is not a federal agency. In *New York v. Atl. States Marine Fisheries Comm’n* (“ASMFC”),<sup>35</sup> the Commission appealed to the Second Circuit after the district court ruled that fishing groups could assert a claim against the Commission under the Administrative Procedures Act (“APA”).<sup>36</sup> The Commission argued that the APA did not apply to actions by an interstate compact entity.<sup>37</sup> After a thorough analysis, the Second Circuit held that the Commission was not a federal agency, rejecting the plaintiffs’ argument that the Commission was more than a congressionally authorized state cooperative.<sup>38</sup>

In reaching its decision, the Second Circuit found that the Commission’s powers are those set forth in the Compact.<sup>39</sup> The court found that, while it coordinates with the federal government, the Commission “exists outside the federal administrative law framework.”<sup>40</sup> The court analyzed the Commission’s authority, holding that:

The authority exercised by [the Commission] under the Compact is not federal in nature. The signatory states have agreed to

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<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> NOAA Fisheries, Office of Sustainable Fisheries, *The Atlantic Coastal Fisheries Cooperative Management Act*, available at [http://www.nmfs.noaa.gov/sfa/state\\_federal/State-Federal-WEB/acfcmafs.htm](http://www.nmfs.noaa.gov/sfa/state_federal/State-Federal-WEB/acfcmafs.htm).

<sup>32</sup> *Id.* §§ 5102(10); 5104(b).

<sup>33</sup> *Id.* § 5106(c).

<sup>34</sup> *Id.* § 5106(a), (c).

<sup>35</sup> 609 F.3d 524, 530 (2nd Cir. 2010).

<sup>36</sup> The Administrative Procedure Act governs the process by which Federal agencies develop and issue regulations. 5 USC §551 et seq. It provides a private right of action against federal agencies. 5 U.S.C. §§ 701(b)(1), 702.

<sup>37</sup> *ASMFC*, 609 F.3d at 530.

<sup>38</sup> *Id.* at 526. The Second Circuit also discussed and declined to hold that the Commission was a quasi-agency. *Id.* at 534-37.

<sup>39</sup> *Id.* at 532.

<sup>40</sup> *Id.*

coordinate their regulatory activity in order to “promote the better utilization of the fisheries.” But, there is no indication that the contracting states understood themselves to be compacting to create a Federal agency.<sup>41</sup>

According to the *ASMFC* court, the fact that the states and the federal government work towards a common goal under the Act does not convert an interstate body into a federal body.<sup>42</sup> The Second Circuit noted that the authority to regulate territorial waters remained with the states and that the federal government’s role is to support that activity.<sup>43</sup>

The court in *Martha’s Vineyard v. Gary Locke* also refused to find that the Commission was a federal agency.<sup>44</sup> Under facts similar to *ASMFC*, the court held that there was nothing to indicate that the member states agreed to create a federal agency.<sup>45</sup> The *Locke* court looked to the Act in support of its holding, noting that the Act “delineates coastal fishery management responsibility between the states and the federal government.”<sup>46</sup> Similar to *ASMFC*, the court highlighted that each entity has a specific and separate role.<sup>47</sup> Specifically, the court ruled that it was clear from the language of the Atlantic Coastal Act that the “primary responsibility of managing coastal fisheries rests with the states, and that the federal government’s role is simply supporting.”<sup>48</sup> As the Compact is between the contracting states, the court found that the federal government’s support is minimal.<sup>49</sup>

**d. NOAA Office of General Counsel Does Not View the Commission as a Federal Agency**

The OIG interviewed personnel in NOAA’s Office of General Counsel (“OGC”) in order to understand how the Commission operates and how CFMPs are enforced. During that interview, NOAA OGC stated that the agency does not view the Commission as a federal agency.<sup>50</sup> According to the OGC personnel, its conclusion is based on the fact that the Commission was formed by Interstate Compact and does not have any power or control over the states to enforce its CFMPs.<sup>51</sup> To support its position, NOAA OGC noted that it is the Secretary of Commerce, not the Commission, who decides whether to issue a moratorium.<sup>52</sup> NOAA OGC also noted that, while the Act provides that the Secretary of Commerce may issue certain regulations, these regulations and any Fishery Management Plan (“FMP”) created pursuant to the Magnuson-

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<sup>41</sup> *Id.* at 533 (citing *New Jersey v. Delaware*, 552 U.S. 597, 615-616 (2008) (omitting internal quotation marks).

<sup>42</sup> *Id.* at 533.

<sup>43</sup> *Id.*

<sup>44</sup> 811 F.Supp. 2d 308 (D.D.C. 2011).

<sup>45</sup> *Id.* at 314.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 314 (citing 16 U.S.C. § 5101(a)(4)).

<sup>49</sup> *Id.* at 315.

<sup>50</sup> Informal Interview of a NOAA Office of General Counsel employee (Aug. 7, 2014).

<sup>51</sup> *Id.*

<sup>52</sup> See 16 U.S.C. § 5106(a)(2).

Stevens Act, mentioned *infra*, cannot rule over a state body.<sup>53</sup> The regulations are applicable only in federal waters.

**e. The Commission is Dissimilar to the Regional Fishery Management Councils**

In analyzing whether the Commission is a federal entity, we examined the nature of regional Fishery Management Councils (“FMCs”), which are federal entities created by statute. The Magnuson-Stevens Fishery Conservation and Management Act, as amended in 1996 by the Sustainable Fisheries Act, 16 U.S.C. §§ 1801, et seq. (“MSA”), was enacted to conserve and manage fisheries off the coast of the U.S.<sup>54</sup> The MSA created eight federal FMCs with each FMC granted authority over certain geographic areas.<sup>55</sup> Pursuant to the MSA, the United States claimed sovereign rights and exclusive fishery management authority over all fish, and all Continental Shelf fishery resources, within the exclusive economic zone.<sup>56</sup> In contrast to the Commission, whose commissioners are appointed by state entities, the majority of FMC members are appointed by the Secretary of Commerce.<sup>57</sup> Further, the MSA requires that the FMCs prepare a FMP for each fishery in federal waters that is in need of conservation and management.<sup>58</sup> NOAA Fisheries is charged with reviewing and approving FMPs.<sup>59</sup> NOAA does not have such power over the Commission’s Coastal Fishery Management Plans.

Unlike the Atlantic Coastal Act, the MSA specifically addresses the financial conflict-of-interest standards applicable to FMC Council members.<sup>60</sup> Under the MSA, Council members must disclose all financial interests<sup>61</sup> and are barred, generally, from participating in any matter that will have a significant and predictable effect on those interests.<sup>62</sup> However, when the conflict involves interests in a fishery harvesting, processing, lobbying, advocacy, or marketing activity “[p]ublic disclosure, rather than disqualification, is the statutory method for a public member of a Fishery Management Council to resolve a potential conflict.”<sup>63</sup>

Based on the considerable differences between the FMCs and the Commission, as well as our research into the legal posture of the Commission – particularly the case law ruling that the Commission is not a federal entity – we concluded that the Commission was not a federal entity

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<sup>53</sup> *Id.*

<sup>54</sup> *Campanale & Sons v. Donald Evans*, 311 F.3d 109, 110 (1st Cir. 2002).

<sup>55</sup> 16 § 1801(b)(5); 16 U.S.C. § 1852.

<sup>56</sup> 16 U.S.C. §1801(b)(1).

<sup>57</sup> 16 U.S.C. § 1852.

<sup>58</sup> 16 U.S.C. § 1851(a).

<sup>59</sup> 16 U.S.C. § 1854(a).

<sup>60</sup> A public member of an FMCs is “considered a Federal employee for purposes of criminal conflict-of-interest statutes applicable to other United States Government employees.” Department of Commerce, *Regional Fishery Management Councils: Rules of Conduct for Members*, p. 2 (2014), available at [http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e\\_h1\\_members\\_conduct\\_rules.pdf](http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e_h1_members_conduct_rules.pdf).

<sup>61</sup> 16 U.S.C. § 1852(j)(2).

<sup>62</sup> 16 U.S.C. § 1852(j)(7); Department of Commerce, *Regional Fishery Management Councils: Rules of Conduct for Members*, p. 2 (2014), available at

[http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e\\_h1\\_members\\_conduct\\_rules.pdf](http://www.fisheries.noaa.gov/sfa/management/councils/training/2014/e_h1_members_conduct_rules.pdf).

<sup>63</sup> *Id.* at 3.

for purposes of this matter and therefore the subject of the allegations would likely not be subject to federal ethics laws.

### III. Difficult to Show Misconduct Under Grant Terms and Conditions

The investigation next looked into whether there was misconduct tied to the issuance of a Commerce grant award. Although the Commission is an inter-state entity, the Commission receives grants from NOAA.<sup>64</sup> All Commerce grantees must accept the terms and conditions found in the grant application documents in order to receive a Commerce grant. The grant documents require that the grantee maintain standards of conduct.<sup>65</sup> A grant recipient's standards of conduct must address conflicts of interest in the awarding of the grant, as grantees are prohibited from participating in the award if there is a real or apparent conflict of interest. The code of conduct requirement relates specifically to the receipt of grants funds.<sup>66</sup>

The investigation confirmed that the Commission had a conflict-of-interest policy in place that met the Department of Commerce Standard Terms and Conditions at the time the Commission received its grant funds. Under the Commission's *Employee Handbook*, the Commission's staff must notify their supervisor if they are considering any outside employment opportunities to ensure there is not a conflict of interest.<sup>67</sup>

Although the grant documents require a conflict-of-interest policy covering the awarding of grants, they do not require that each grant recipient have a policy addressing financial conflict of interest outside of the grant award.<sup>68</sup> The alleged conflict of interest in this matter applies to a post-award conduct of a Commission member. As a result, we concluded that any relationship between the alleged misconduct and the conflict-of-interest policy requirement found in the grant documents is attenuated. Even assuming that there was a connection between the conflict-of-interest policy requirement in the grant documents and the alleged misconduct, the Commission

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<sup>64</sup> The investigation found that NOAA awarded at least three grants to the Commission. The largest of these grants, NA10NMF4740016, is entitled A Cooperative Program for the Conservation of Atlantic Coast Fisheries. The funding associated with this grant over the last five years amounts to approximately \$10,265,144.00. Email from a NOAA National Marine Fisheries Service employee, to OIG (Sept. 3, 2014) (on file with OIG).

<sup>65</sup> The grant documents require that the grantee: (1) "[E]stablish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain," Standard Form SF-424B; (2) "Maintain written standards of conduct to establish safeguards to prohibit employees from using their positions for a purpose that constitutes or presents the appearance of personal or organizational conflict of interest, or personal gain in the administration of this award," Department of Commerce Standard Terms and Conditions, § 1 (March 2008); and (3) "[M]aintain a written code of standards of conduct governing the performance of their employees engaged in the award and administration of contracts," 15 CFR Part 24.36(b)(3).

<sup>66</sup> Informal Interview of a Department of Commerce, Office of the Assistant General Counsel for Finance and Litigation employee (Sept 2, 2014).

<sup>67</sup> Email from an Atlantic States Marine Fisheries Commission employee, to OIG (Nov. 11, 2014) (on file with OIG); Atlantic States Marine Fisheries Commission, *Employee Handbook* (June 2013) (on file with OIG).

<sup>68</sup> Informal Interview of a Department of Commerce, Office of the Assistant General Counsel for Finance and Litigation employee (Sept. 18, 2014).

had a Code of Conduct in place covering the commissioners that included a general policy on financial conflict-of-interest.<sup>69</sup>

The Commission's conflict-of-interest policy was not without its deficiencies. Noticeably absent was a requirement that all commissioners and proxies disclose financial conflicts of interest at the time of appointment and update it annually. Also absent was an indication of what constituted a "direct or indirect" financial conflict of interest, as well as the requirement that a "direct or indirect" financial conflict bar discussion and voting on the issue for which there is a conflict. However, the grant documents do not require that certain provisions be included in a conflict-of-interest policy, only that the standards of conduct "establish safeguards to prohibit employees from using their positions for a purpose that constitutes" a conflict of interest.<sup>70</sup>

In October 2014, the Commission put in place a more robust financial conflicts-of-interest policy.<sup>71</sup> Most of the issues identified above were addressed in the new policy. The lone point on which the policy remains deficient is that it does not require recusal prior to discussion of the conflicted matter, only prior to "participating in the caucus and voting."<sup>72</sup> The new policy, including the ability to participate in deliberations relating to the decision, appears to mirror the conflict-of-interest requirements of the Fishery Management Councils, as stated in the Magnuson-Stevens Act.<sup>73</sup>

In light of the above information, we concluded that pursuing potential misconduct under the grant terms and conditions is not an effective avenue for the OIG to address the complaint.

#### **IV. Potential Remedies Available to Complainant**

Based on the OIG's findings that (i) the Commission is not a federal entity and the commissioner does not appear to have been subject to federal ethics provisions, and (ii) pursuing the alleged misconduct under the grant's terms and conditions would not be effective, the OIG identified additional avenues that are more appropriate to address both the conflict-of-interest and the underlying licensing issues.

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<sup>69</sup> Atlantic States Marine Fisheries Commission, *Rules and Regulations*, Article I, Section 1(b) (December 2003), available at <http://www.asmfc.org/files/pub/CompactRulesRegulations.pdf>. The Commission's conflict-of-interest policy stated the following: "Commissioners appointed by the States are responsible for upholding the integrity of the Commission and its member States. No Commissioner shall engage in criminal or disgraceful conduct prejudicial to the Commission, any other Commissioner or any other State. No Commissioner shall have a direct or indirect financial interest that conflicts with the fair and impartial conduct of official duties. The Executive Committee shall have the sole authority to consider allegations of breaches of this code, including appeals from Commissioners alleged to be in violation herewith. In the case of a breach, the Executive Committee may direct the Chair to notify the appropriate appointing authority in the Commissioner's home state."

<sup>70</sup> Department of Commerce, *Standard Terms and Conditions*, § 1 (March 2008).

<sup>71</sup> Atlantic States Marine Fisheries Commission, *Policy on Commissioner Financial Disclosure and Conflict of Interest* (Aug. 6, 2104), available at [http://www.asmfc.org/files/Meetings/FinancialDisclosureAndConflictOfInterestPolicy\\_Aug2014.pdf](http://www.asmfc.org/files/Meetings/FinancialDisclosureAndConflictOfInterestPolicy_Aug2014.pdf).

<sup>72</sup> *Id.*

<sup>73</sup> 16 U.S.C. § 1852(j).

**a. Referral to the Pennsylvania Attorney General**

On November 14, 2014, the OIG formally referred the matter to the Attorney General for the Commonwealth of Pennsylvania for any actions they deem appropriate. The Pennsylvania ethics statute provides that no public official or public employee shall engage in conduct that constitutes a conflict of interest.<sup>74</sup> The Pennsylvania Attorney General is best situated to determine whether the Commission member violated § 1103(a) in his role on the Commission.<sup>75</sup>

In January 2015, the Pennsylvania Attorney General's office informed the OIG that it closed its investigation after concluding that the Commission and its commissioners, including the Pennsylvania representatives, were not subject to Pennsylvania law. According to the Pennsylvania Attorney General's staff and state ethics counsel, under Pennsylvania case law, the Pennsylvania ethics statute does not apply to an organization formed by interstate compact unless (i) the compact specifically states that member states' ethics laws apply, or (ii) the member states pass similar legislation.<sup>76</sup> The instant matter fails to meet either criterion set forth in the case law cited by the Attorney General's office, as the compact creating the Commission does not specifically state that member states' ethics laws apply, and Pennsylvania and at least one other state had not passed similar ethics legislation.

**b. Recommendations Made to Rep. Walter Jones' Office**

On November 12, 2014, the OIG spoke with aides for Rep. Walter Jones. During that conversation, OIG informed the congressman's aides that it planned to refer the matter to the Pennsylvania Attorney General for the reasons stated above. OIG also provided the staff with additional avenues available to the congressman:

1. Request that the North Carolina Commissioners appeal the denial of the complainant's permit application using the Commission's internal appeals process.
2. File a complaint with the Commission's Executive Committee for conduct prejudicial to the Commission.
3. Refer the matter to the Pennsylvania Inspector General.

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<sup>74</sup> 65 Pa. Cons. Stat. § 1103(a).

<sup>75</sup> Each violation of that section is a felony punishable by imprisonment up to five years and a fine up to \$10,000 or both. 65 Pa. Cons. Stat. § 1109.

<sup>76</sup> Both the Pennsylvania Attorney General and ethics counsel pointed to *Delaware River Port Authority v. Pa. State Ethics Comm'n*, 585 A.2d 587 (Pa. 1991), as the controlling authority. In *Delaware River Port Authority*, the court held that the application of Pennsylvania's ethics statute would result in the "unilateral imposition of additional duties on the authority." 585 A.2d at 590. In reaching this conclusion, the court noted that the compact at issue in that case did not expressly allow member states Pennsylvania and New Jersey to impose conflict-of-interest laws on Delaware River Port Authority members. 585 A.2d at 588. The court found that an ethics requirement by either state, without approval by the other member state, would amount to additional duties on all members, regardless of their particular state. 585 A.2d at 589. Neither party contended that Pennsylvania and New Jersey passed substantially similar legislation. *Id.* Referencing New Jersey case law, the court also noted that New Jersey's conflict-of-interest statute does not apply to a "bi-state agency," because bi-state officers "cannot be an officer of a particular state without simultaneously being classified as an officer of all states party to the interstate compact." *Id.*

4. Refer the matter to the Pennsylvania State Ethics Commission.
5. Refer the matter to the Pennsylvania Committee on Interstate Cooperation, which has sole authority to appoint the Pennsylvania representative on the Commission.
6. Refer the matter to the NOAA Grants Officer for a violation of the grant's Standard Terms and Conditions.

OIG provided the congressman's office with contact names and addresses related to the various avenues available to the congressman's office.

## **V. Conclusion**

Based on the information provided above, no further investigative action remains.