

July 13, 2004

Mr. J. Michael Hemsley, PE
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Ocean.US
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RE: Federal agency participation in IOOS Regional Associations

Dear Mike:

Recently you brought to the Sea Grant Law Center questions about federal agency participation in the Regional Associations (RAs) that are forming to implement the integrated and sustained ocean observing system (IOOS). The RAs will be lobbying Congress to write legislation favorable to ocean observation activities, including funding legislation. In addition, some RAs (for example, the Gulf of Maine OOS, or GoMOOS) may be organized as tax-exempt organizations under Internal Revenue Code § 501(c)(3). Your concern is that federal agencies may be unable to participate in organizations that lobby or have 501(c)(3) tax-exempt status.

This letter contains the results of the Sea Grant Law Center's research into your questions. It is intended to be for information purposes only, and is not formal legal advice.

Question 1: Can federal agencies participate in groups that lobby Congress?

To answer this question, it will be useful to begin with a related issue: whether federal agencies may *themselves* lobby Congress. Examining this issue will help define agency latitude in this area.

The federal government, as a general principle, will not subsidize lobbying. With respect to lobbying by federal executive agencies, this principle is manifested in 18 U.S.C. § 1913, a statute entitled "Lobbying with appropriated moneys":

No part of the money appropriated by any enactment of Congress shall, in the absence of express authorization by Congress, be used directly or indirectly to pay for any personal service, advertisement, telegram, telephone, letter, printed or written matter, or other device, intended or designed to influence in any manner a Member of Congress, a jurisdiction, or an official of any government, to favor, adopt, or oppose, by vote or otherwise, any legislation, law, ratification, policy or appropriation, whether before or after the introduction of any bill, measure, or resolution proposing such legislation, law, ratification, policy or appropriation; but this shall not prevent officers or employees of the United States or of its departments or agencies from communicating to any such Member or official, at his request, or to Congress or such official, through the proper official channels, requests for any legislation, law, ratification, policy or appropriations which they deem necessary for the efficient conduct of the public business, or

from making any communication whose prohibition by this section might, in the opinion of the Attorney General, violate the Constitution or interfere with the conduct of foreign policy, counter-intelligence, intelligence, or national security activities.

Sec. 1913 prohibits the use of congressionally-appropriated funds for certain lobbying and public relations-type activities. This prohibition encompasses funds appropriated to executive agencies. The predecessor statute to § 1913 was intended to stop executive agencies from directly urging the public, via grassroots lobbying, to influence Congress in the agencies' favor (for example, by telegram campaigns in favor of particular funding bills). Sec. 1913 precludes not only direct government support of agency lobbying activities, but also indirect support; for example, an agency channeling its funds to a special interest group that conducts lobbying activities favorable to the agency.

Executive agencies are not shut out of the legislative process, however. The statute expressly allows an agency to communicate with Congress on legislation as long as the agency uses "proper official channels" and deems the legislation "necessary for the efficient conduct of the public business." In fact, agency input is considered beneficial. One court has declared

When the executive branch informs Congress of a perceived need for a change in existing law or a proposed law, it serves an important and well-established purpose in the legislative process. "With countless advocates outside of the government seeking to influence its policy, it would be ironic if those charged with making governmental decisions were not free to speak for themselves in the process."

So, an agency may communicate with Congress on current or future legislation, but the agency is limited in its authority to use appropriations to pay for influence. An example may be helpful to clarify the distinction. Suppose the National Marine Fisheries Service (NMFS) wants \$1 billion to buy a thousand solid gold buoys, which it will use to protect endangered sea turtles. NMFS could not spend \$10,000 of its appropriated funds on a mass mailing of letters encouraging people to call their senators and urge them to fund the buoy proposal. Likewise, NMFS could not give \$10,000 to Greenpeace to use for similar lobbying purposes. However, NMFS *could* contact Congress directly, through proper channels, and seek funding for the buoys in the next appropriations bill, as long as the agency deems the funding to be necessary for it to efficiently conduct the public business of protecting endangered sea turtles.

The same analysis should apply when the agency is not acting alone, but rather as a member of an organization that seeks to influence legislation. If a federal agency with a stake in ocean observation were to join an RA, it would retain its authority to communicate with Congress on ocean observation issues. It would also continue to be prohibited by § 1913 from spending appropriations, directly or through the RA, on lobbying efforts.

For the above reasons, it is my opinion that the fact that an RA may seek to influence legislation does not by itself preclude a federal executive agency from joining, provided the agency otherwise has the authority to join. However, care must be taken to ensure that agency funds are

not used for lobbying (unless Congress has expressly authorized that use, which is unlikely).

Question 2: Can federal agencies be members of a 501(c)(3) organization?

Under Internal Revenue Code § 501(c)(3), an organization organized exclusively for one or more specific purposes (including scientific and educational purposes) can qualify for tax-exempt status if all conditions are met. Research uncovered no general legal prohibition on federal agencies joining 501(c)(3) organizations. Therefore, the fact that an RA is a 501(c)(3) organization should not preclude a federal agency from joining the RA provided the agency otherwise has the authority to do so.

An additional issue: limits on lobbying by 501(c)(3) organizations

An issue you did not ask about, but that is closely related to your questions, is the limitation on lobbying by 501(c)(3) organizations. In keeping with the general principle against federal subsidies for lobbying efforts, a 501(c)(3) organization cannot “devote more than an insubstantial part of its activities to attempting to influence legislation by propaganda or otherwise” without losing its tax-exempt status. This limitation applies whether or not a federal agency is a member of the organization.

I raise this issue because you mentioned that one RA, GoMOOS, is a 501(c)(3) organization, and that future RAs may be also. Judging from Ocean.US’ “Draft Guidance for the Establishment of Regional Associations,” it does not appear that lobbying is a substantial part of the RAs’ activities. However, please be aware that the amount of lobbying 501(c)(3) organizations can participate in, while retaining tax-exempt status, is limited. I recommend consulting a qualified tax attorney if there is concern about a particular situation.

I hope this response is helpful to you. I would be happy to do additional research for you on any aspect of these questions, or any other related question. Thank you for bringing your questions to the Sea Grant Law Center.

Sincerely,

Josh Clemons
Research Counsel