June 1, 2005

Mr. J. Michael Hemsley, PE
Deputy Director for Coastal Operations
Ocean.US
2300 Clarendon Blvd., Suite 1350
Arlington, VA 22201-3667

RE: Tort Liability

Dear Mike,

As you are well aware, the implementation of the U.S. ocean observing system raises numerous legal questions from intellectual property rights to contract liability. It is impossible to adequately address in one memorandum the diverse legal concerns raised at the NFRA organizational meeting held in Washington, D.C., February 16-18, 2005. Over the next few months, the National Sea Grant Law Center will prepare several memoranda of law for Ocean.US and the Regional Associations on a variety of legal issues. It is our hope that these memos will provide the foundation for a more comprehensive future publication such as a report or law review article.

Please find attached the first of these memoranda which discusses tort liability issues associated with IOOS. This information is intended as advisory research only and does not constitute legal representation of Ocean.US or the Regional Associations by the Law Center. It represents our interpretation of the relevant laws and cases and does not necessarily reflect the views of the Mississippi-Alabama Sea Grant Consortium, the National Sea Grant Office or any other agency or entity.

I hope you and your colleagues find this information useful. Please contact me if you have any concerns, follow-up questions, or research topic suggestions.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center

IOOS Tort Liability Issues

According to *An Integrated and Sustained Ocean Observing System (IOOS) for the United States: Design and Implementation*, "IOOS is envisioned as a national and international network that systematically acquires and disseminates data and products in response to [user] needs." IOOS will be very similar to the National Weather Service, which maintains a system of observations to provide weather forecasts and warnings and meteorological products to a variety of user groups. It is anticipated that once IOOS is implemented, Ocean.US, the Regional Associations (RAs), or other related entities will supply real-time reports of direct observations of oceanic conditions, maps and other products, and forecasts of algal blooms, climate events such as El Niño, and other coastal conditions.

Raw data supplied by buoys and other instruments may be used by meteorologists to improve forecasts, fishermen to determine whether to go to sea, or city planners to identify high risk areas. Maps, charts, and other products produced by the RAs will also be used by a variety of individuals to plan courses of actions. The RAs may also have the capacity in the future to predict the occurrence of harmful algal blooms or storm surges.

There are risks to providing such services. Buoys and other instruments can fail. Maps and charts can be inaccurate or incomplete. Predictions do not always come true. When government agencies, business, and private citizens begin to access IOOS data or products to make decisions about when to go fishing, where to put an aquaculture cage, whether to close a beach, etc., someone will inevitably get hurt, either physically or economically, and blame the parties responsible for maintaining the system or producing the product. However, although an individual may think his/her injuries were caused by IOOS data or products, Ocean.US, a RA, or anyone else for that matter is not necessarily liable for those injuries.

So what is the potential liability of Ocean.US or the Regional Associations if an individual uses IOOS data to make a decision and is injured in some way? The most common basis for a lawsuit in this scenario would be negligence, which is a tort. For the purposes of this memo, I am assuming that the RAs are federal entities or have been awarded federal agency status by Congress.

Federal Tort Claims Act

The federal government and its entities enjoy sovereign immunity and may not be sued without their consent. Congress, however, through the Federal Tort Claims Act (FTCA) has waived immunity for tort claims based on negligence law. The FTCA "applies to claims (1) for money damages, (2) arising from damage to property, personal injury, or death, (3) caused by a negligent or wrongful act (4) of a federal government employee (5) acting within the scope of his or her employment, (6) in circumstances where a private person would be liable under state law."[1] Despite this seemingly broad waiver of sovereign immunity, the FTCA contains two

[1] Jonathan A. Willens, National Institute of Trial Advocacy, Commentary, Overview of Chapter 171: Tort Claims Procedure, LEXSTAT 28 US NITA PREC 2671 (2004).

exceptions that make it unlikely that either Ocean.US or the RAs would be held liable for damages incurred as a result of IOOS data, predictions, or products.[2]

Discretionary Function

The FTCA bars claims based on the acts of government employees carrying out statutory or regulatory obligations or performing discretionary functions.[3] To be protected by the discretionary function exception, the government employee's act must involve an element of judgment or choice and the conduct must be based on consideration of public policy.[4] The Supreme Court has stated that an element of judgment or choice is not present if a "federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."[5] The underlying basis for this two-part test developed by the U.S. Supreme Court is that "Congress wished to prevent 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort."[6]

The vast majority of FTCA cases involving government forecasts are dismissed by the courts under the discretionary function exception. The following cases are illustrative of the types of government activities that enjoy immunity as discretionary functions.

In *Brown v U.S.,* following a storm on Georges Bank that left several fishermen dead, the personal representatives of the deceased fishermen brought a tort claim against the U.S. based on the government's failure to repair or replace a sporadically malfunctioning weather reporting buoy. The plaintiffs argued that if the government had replaced the buoy the National Meteorological Center could have more accurately predicted the storm. The First Circuit, overturning the decision of the district court, held that the government's decision not to replace the buoy fell within the discretionary function exception. The district court had ruled that the government was not shielded from liability. Although the court acknowledged that the government's decision to have a weather monitoring and prediction system was a discretionary function, "once a system was in place and mariners began to rely on it, the time for policy judgments was past."[7] The First Circuit disagreed with this reasoning stating that the extent to which the government undertakes activities is also discretionary. "There can be no justified reliance upon, or expectation of, any particular degree of performance; something more is needed to establish liability."[8] The court noted if it held otherwise and even a small number of plaintiffs succeeded in convincing a judge that the government should have done better, "the burden on the fisc would be both unlimited and intolerable."[9]

The discretionary function exception has also shielded the government from lawsuits associated with Hurricane Audrey in 1957. Following the storm, hundreds of plaintiffs sued the government

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[2] It is important to remember, however, that even though most cases would be dismissed for lack of subject matter jurisdiction, very little can be done to stop an injured party from filing suit.
[3] 28 U.S.C. 2680(a) (2005).
[4] *See U.S. v. Gaubert*, 499 U.S. 315, 322-23 (1991).
[5] *Berkovitz v. U.S.*, 486 U.S. 531, 536 (1988).
[6] *U.S. v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 814 (1984).
[7] *Brown v. U.S.*, 599 F. Supp. 877, 889 (1984).
[8] *Brown v. U.S.*, 790 F.2d 199, 201 (1986).
[9] *Id.* at 204.

claiming that the Weather Bureau negligently failed to give the public adequate warnings regarding the intensity, path, etc. of the storm. The 5th Circuit affirmed the decision of the district court that the wording of weather bulletins and advisories were determinations involving judgment and discretion. "Means and methods of obtaining observational data require continual exercise of judgment and discretion. The means and manner of communicating with the public – not spelled out in any statute – also involve the exercise of judgment and discretion."[10]

More recently, the discretionary function exception protected the NWS from liability after a woman drowned in 1998 attempting to rescue two of her children caught in a rip current. The morning of the drowning, the NWS had broadcast "Hazardous Weather Outlooks" for the area on the NOAA Weather Channel that mentioned rip currents and sent the information to vendors. As part of an experimental project, the St. Johns Beach Patrol was notified by the NWS that the experimental computer model suggested rip current activity would increase at the beach, but the warning was not passed on to the public. The 11th Circuit dismissed the FTCA action filed by the deceased woman's husband because the failure of the U.S. to warn of the rip current danger "involved the exercise of discretion in furtherance of public policy considerations."[11]

Any IOOS litigation would closely mirror the NWS line of cases. The government's decision to participate in ocean observing and implement IOOS is clearly a discretionary function. The government is not required to participate in the ocean observing systems. Although there is a blueprint for the system's design, *An Integrated Ocean Observing System: A Strategy for Implementing the First Steps of a U.S. Plan (2000)* and a MOA creating Ocean.US to develop a national capability for "integrating and sustaining ocean observations and predictions," there is no formal legislative or regulatory mandate that any federal agency or entity carry out the plan.

IOOS may not always lack a legislative mandate. The *Coastal Ocean Observation System Integration and Implementation Act of 2005* was introduced in the U.S. House of Representatives on April 6, 2005. The Act, if passed as introduced, would require the Committee on Ocean Policy to "establish and maintain an integrated system of coastal and ocean observations . . . [to] provide for *long-term*, continuous and quality controlled observations." The draft legislation should not change the above analysis, however, although it does contains a few provisions that plaintiffs may try to latch onto. For example, the Act would require NOAA to "implement and maintain appropriate elements in the observing system." While at first blush this seems like a mandate, the agency retains the discretion to determine what the "appropriate" elements are. In addition, although RAs shall "work with government entities and programs . . . to provide timely warnings," determining what is "timely" should still be considered a discretionary function. The extent to which the government wishes to allocate resources and manpower to maintaining the required observing systems and making predictions from those observations should remain discretionary as well.

Misrepresentation

The FTCA also bars claims against the United States based on misrepresentation and deceit.[12]

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[10] *Bartie v. U.S.*, 216 F. Supp. 10, 19 (D. La. 1963).
[11] *Monzon v. U.S.*, 253 F.3d 567, 573 (11th Cir. 2001).
[12] 28 U.S.C. 2680(h) (2005).

The misrepresentation exception bars "claims arising from commercial decisions based on false or inadequate information provided by the government."[13] "Misrepresentation may result from the failure to provide information, as well as from providing information that is wrong."[14] This exception is extremely broad and should result in the dismissal of almost all claims against the government based on inadequate or false IOOS data or products. Some courts, however, have rejected the application of the misrepresentation exception and impose liability when the injury was the result of a government employee's negligent performance of operational tasks, such as a negligent transmittal of data, as opposed to an individual's reliance of inaccurate government data. This case law should not be a cause of worry unless individuals responsible for collecting, transmitting, and analyzing IOOS data fail to follow protocols or use due care.

Conclusion

Ocean.US and other organizations involved in implementing IOOS should not be overly concerned about liability emanating from data sharing and forecasts. The FTCA will shield the government from most claims for money damages. It is important to remember that the FTCA does not protect private entities and if the RAs do not obtain federal status through future legislation, they could be found liable under state tort law.

I hope the above information serves to dispel some liability concerns. The Law Center would be happy to conduct follow-up research if the RAs have questions about a particular activity or state law. Thank you once again for bringing you questions to the Law Center and I look forward to working with Ocean.US and NFRA on future issues.

Sincerely,

Stephanie Showalter
Director, National Sea Grant Law Center

cc. David Martin, Co-Chair, National Federation of Regional Associations Governing Committee

[13] *Frigard v. U.S.*, 862 F.2d 201, 202 (9th Cir. 1988).
[14] *Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 239 (2nd Cir. 1967).