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July 18, 2013

Mr. Scott Lang  
Lang, Xifaras & Bullard  
115 Orchard Street  
New Bedford, MA 02470

Mr. Lang,

This responds to your letter of June 13, 2013 which raises conflict of interest questions involving groundfish actions by the New England Fishery Management Council (Council) in general and Council member Mr. Tom Dempsey's participation in these actions specifically. As discussed in this letter, I have determined that Mr. Dempsey's votes on Council decisions taken during his tenure on the Council, did not violate federal law prohibiting a Council member from voting on any Council decision for which the member has a conflict of interest as defined in the Magnuson-Stevens Act and federal regulations. In making this determination, questions raised in your letter regarding conflict of interest issues involving the Council in general are addressed.

As a matter of general federal law, public members of Fishery Management Councils are considered Federal employees for certain purposes including Federal conflict of interest requirements. Federal conflict of interest law prohibits, in most cases, a Government employee from participating in any matter that would have a direct and predictable effect on the employee's personal financial interests or on the interests of the employee's non-Federal employer. The nature of the organization—whether for profit or non-profit—and the nature of the service—compensated or unpaid—does not affect the requirement to disqualify.

The Magnuson-Stevens Act, at 16 U.S.C. § 1852 (j), however, provides a specific exception to public members of Fishery Management Councils. It states that Council members are not covered by general federal law conflict of interest requirement with regard to any interest in a harvesting, marketing, processing, lobbying, or advocacy activity that is reported on a NOAA Financial Interest Statement,<sup>1</sup> provided that the matter at issue is not of primarily individual concern<sup>2</sup> and they do not vote on a Council decision<sup>3</sup> which will have an "expected and substantially disproportionate benefit" on the member's financial interest. We have implemented regulations, as required by the Magnuson-Stevens Act, that

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<sup>1</sup> NOAA Form 88-195, Statement of Financial Interests for Use by Voting Members and Nominees of Regional Fishery Management Councils

<sup>2</sup> Matters of primarily individual concern are matters of interest to a small number of identified, or easily identifiable parties, such as a contract between the FMC and a vendor. Fishery Management Plans are usually not matters of primarily individual concern, although they may be for fisheries with only a few vessels.

<sup>3</sup> A council decision is defined as approval of a fishery management plan (FMP) or FMP amendment (including any proposed regulations); request for amendment to regulations implementing an FMP; finding that an emergency exists involving any fishery (including recommendations for responding to the emergency); and comments to the Secretary on FMPs or amendments developed by the Secretary. It does not include a vote by a committee of a Council.

define what constitutes “expected and substantially disproportionate benefit” and specifically prescribe when a Council member is prohibited from voting on Council decisions See 50 CFR §600.235.

Under our regulations, an “expected and substantially disproportionate benefit” exists when a Council member, or an entity which employs a Council member, has a greater than 10% interest in the total harvest of the fishery or a sector<sup>4</sup> of a fishery, or a greater than 10% interest in the marketing or processing of the total harvest of the fishery (or sector), or full or partial ownership of more than 10% of the vessels using the same gear type within the fishery. However, this 10% interest in the harvest of a fishery or marketing or processing activity of a fishery or vessels in a fishery applies only if the entity in which the member is employed or has a position is *directly* engaged in harvesting or processing or marketing.

Specifically addressing the context of your letter’s inquiries, a Council member who is employed by an entity with interests in a fishery is not required to recuse himself from voting on Council decisions and will not run afoul of conflict of interest requirements provided:

- (1) the Council member has reported his financial interests on a NOAA Financial Interest Statement;
- (2) the Council decision does not concern an allocation of a harvesting, marketing, or processing activity to the entity itself (rather than its members) that exceeds a greater than 10% direct interest in harvesting, processing, or marketing activities in the fishery (or sector of a fishery) subject to the Council decision ;
- (3) the Council member does not have—through personal interests (including interests of a spouse or minor child) or employment with another entity—a greater than 10% direct interest in harvesting, processing, or marketing activities in the fishery (or sector of a fishery) subject to the Council decision; and
- (4) the Council decision does not involve a matter of primarily individual concern.<sup>5</sup>

Further clarification was recently provided by letter to Council member David Goethel from the Department of Commerce General Counsel concerning fishing interests as they apply to a multispecies fishery such as the Northeast Multispecies fishery :

[Finally,] [Y]ou asked about whether the 10% rule applies to all species in a fishery or only the some of the species. When determining if a disqualification applies, whether based on the interests of the member or the member’s employer, the gear type and species are both relevant. The percentage of the interest in the fishery is determined by the matter before the Council; if the Council is considering an action that will affect harvesting activities of one species using one gear type, only the percentage of the harvesting of that gear type and species is considered. If the matter at issue concerns a combination of species and gear types, interests in all relevant species and gear types are aggregated to determine whether the matter will have an expected and disproportionate effect on the member’s (or the member’s employer’s) financial interests.<sup>6</sup>

In determining whether Mr. Dempsey was required to recuse himself from voting on any Council decisions during his tenure, I reviewed his financial disclosure form, your letter and attachments, additional information provided by him concerning the interests of his employer, Cape Cod Commercial Fishermen’s Alliance (CCCFA) (formerly Cape Cod Commercial Hook Fishermen’s Association), in the harvesting, processing or marketing activities in the New England multispecies fishery and NMFS’s files concerning CCCFA interests in these same activities. Based on the criteria outlined above and the

<sup>4</sup> “Sector” in this context is a generic reference to a sub-component of the fishery such as vessels using specific gear, not necessarily a “sector” as defined in the Northeast Multispecies fishery.

<sup>5</sup> You do not claim that any matters on which Mr. Dempsey voted were of primarily individual concern and I have not discovered any such matters during Mr. Dempsey’s tenure on the Council.

<sup>6</sup> Letter from David Maggi, Chief, Ethics Law and Programs Division, Office of the Assistant General Counsel for Administration, U.S. Department of Commerce, to David Goethel, December 18, 2012.

review of this information, Mr. Dempsey was not required to recuse himself from any Council decisions during his tenure, and, therefore, has not violated the conflict of interest provisions of the Magnuson-Stevens Act or applicable regulations. Mr. Dempsey has submitted, as required to be exempt from general conflict of interest requirements, a NOAA Financial Statement stating his employment with CCCFA and the nature of CCCFA's interests in fisheries under the jurisdiction of the Council. Other than his employment with CCCFA, Mr. Dempsey does not have any personal interests in any fishery. He does not own a fishing vessel nor has he been issued a federal fishing permit. CCCFHA, with whom Mr. Dempsey is employed, does not have a greater than 10% direct interest in the harvesting, processing or marketing activities in the New England multispecies fishery as a whole or on an individual stock basis. CCCFA owns several permitted vessels and multispecies fishing permits but the total number of such vessels and permits combined is less than 1% of all multispecies permits.

The total amount of potential sector contribution amounts allocated to CCCFA, on a stock by stock basis, is also well under 10% for each stock. I did not look at the percentage interest of CCCFA on stock/gear basis because sector fisheries are not necessarily defined or managed that way. Moreover, it is not possible to determine whether CCCFA or any other entity has a greater than 10% interest in one gear type and one species because permits and allocations are not based on such breakdowns and vessels and sectors are not necessarily obligated to fish with one gear type. Nor are there any restrictions on leasing of allocations based on gear types or stocks of fish.

Your letter states that CCCFA participates in the Georges Bank Cod Hook Gear Sector presumably referring to the fact that CCCFA vessels and permits are enrolled in this sector. While it is true that vessels and permits are enrolled in this sector, there is no direct interest in or nexus between Mr. Dempsey or CCCFA, and the overall sector allocation that is attributable to Mr. Dempsey for purposes of whether he may vote on council decisions that affect sector vessels. CCCFA total contributions to the sector in terms of potential sector contributions (PSC) are well below the 10% threshold as a percentage of overall multispecies PSCs and on a stock by stock basis. The fact that the overall annual catch entitlement for the entire sector may exceed 10% for Eastern GB cod is not attributable to Mr. Dempsey for conflict of interest purposes because that percentage is made up by all vessels and permits in the sector, not only the CCHFA vessels and permits.

Your letter also seems to suggest that Mr. Dempsey's interests should be evaluated by viewing the sector as a fishery unto itself for purposes of determining conflicts of interest. As explained above, under the groundfish FMP, management measures have not been based on any particular sector interests or the type of gear or stock targeted by a vessel or sector. For this reason, the Council has not taken any votes, which we are aware of, during Mr. Dempsey's tenure that would have resulted in an "expected and substantially disproportionate benefit" to him based on his financial interests in a fishery or sector, including the Georges Bank Cod Hook Gear Sector, targeting a specific stock fished by a specific gear.

Your letter's claim that CCCFA provides certain management services and office space to the Georges Bank Cod Hook Gear sector is also not determinative here. The fact that CCCFA may provide such services does not change my determination because such a relationship does not equate to a direct interest in the harvesting, processing or marketing of a fishery exceeding the 10% interest threshold.

Your letter states that CCCFA operates the Cape Cod Fisheries Trust which buys scallop and groundfish permits and quotas from retiring fishermen and that the trust reported \$321,969 in net income from leasing permits. Based on my information, the Trust is part and parcel of CCCFA and does not own any permits independent of CCCFA. So, any and all interests of the trust are identical to CCCFA in terms of percent interest in fisheries meaning there is no additional evaluation needed of Mr. Dempsey's interests in fisheries raised by the Trust activities.

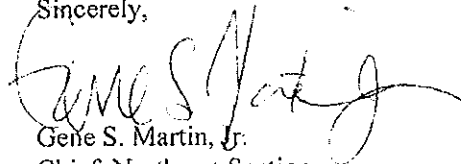
The only specific Council action cited in your letter that may have raised a conflict of interest violation was the Council's recent public comment and letter to NMFS on Framework 48's proposed rule regarding how catch of Eastern Georges Bank cod and haddock is accounted for. However, as your letter

acknowledges, no vote was taken on such comment and, therefore, there was no conflict of interest concern raised by the Council's comment because there was no vote from which Mr. Dempsey could recuse himself. Mr. Dempsey was free to express his views on this issue without concern for the outcome on his interests as long as no vote was taken.

In sum, there is no information or evidence documenting or indicating that Mr. Dempsey was required to recuse himself from voting on any Council decisions regarding groundfish actions or any other fishery action voted on by Mr. Dempsey during his tenure. Regarding groundfish committee meetings, a Council member is free to vote regardless of the extent of interests the Council member may have in a fishery because committee votes are not considered Council decisions under our regulations. The fact that Mr. Dempsey's employer has some interests in the outcome of Council decisions is not by itself evidence of any unacceptable conflict of interest given that the Magnuson-Stevens Act contemplates and even requires that some council members should be from the commercial fishing industry. It is only when a Council decision rises to a level that results in an expected and substantial disproportionate benefit that the conflict of interest requirements prevent a vote by a council member with commercial fishing interests. No vote on a Council decision that Mr. Dempsey has made has reached this threshold. Moreover, even if Mr. Dempsey must recuse himself on a Council decision, he is still free to participate in the discussion at the Council on the merits of any issue that may affect his interests and even state how he would vote on such decision.

If you would like to discuss this response further, please call me at 978-281-9242 or email me at [gene.s.martin@noaa.gov](mailto:gene.s.martin@noaa.gov).

Sincerely,



Gene S. Martin, Jr.  
Chief, Northeast Section  
Office of NOAA General Counsel

cc: Thomas Dempsey  
Rip Cunningham