MEMORANDUM

To: Josie Quintrell, Director of IOOS Association

Date: November 4, 2013

From: Nancy Bloodgood,
Partner, Foster Law Firm, LLC

Re: Liability issues regarding Regional Associations (RAs) and the Integrated Coastal and Ocean Observation System Act of 2009 (ICOOS).

You have inquired about various liability issues regarding data and data products that SECOORA and other IOOS Regional Associations (RAs) collect and place on websites and/or provide to the public. This is a complicated issue that involves several legal doctrines and the ICOOS Act. I will attempt to explain the legal issues that may affect the RAs.

Please note that these are general comments and that each RA should seek their own legal advice regarding their particular governing documents and specific state laws affect their liability.

1. **The Concept of Sovereign Immunity**.

   As a preliminary matter, the doctrine of "sovereign immunity" pertains to many of your questions and is a good place to start when addressing liability.

   Sovereign immunity is an old English common law doctrine that stands for the proposition that the sovereign (or the state) cannot commit a legal wrong and is, therefore, immune from any and all civil liability. "*Rex non potest peccare*" or "the King can do no wrong." The concept of sovereign immunity was brought from England to the United States and the federal government and most states have enacted statutes that afford some degree of extra protection from suit to governmental employees when they exercise discretion while performing their jobs. Therefore, to the extent sub-awardees of RAs are employees of federal or state institutions, they may already be afforded more limited liability for their actions than non-governmental employees as explained below.

   a. **The Federal Tort Claims Act**. The Federal Tort Claims Act, 28 U.S.C. §§1346 (b), 2671-2680, applies to federal government employees and provides increased immunity from suit to the federal government due to the actions of its employees. In short, 28 U.S.C. § 2680 provides that if an employee of the federal government, while exercising due care, acts or fails to act, there is no liability. In other words, if an employee makes a mistake while working, he or she is has limited immunity from liability. There is significant jurisprudence regarding the Federal Tort Claims Act but there are a few points to keep in mind. First, the courts look to each state's tort liability laws when they determine what effect of the Federal Tort Claims Act has on a claim, so its impact will vary from state to state. Second, the test the federal

courts have developed to determine when it applies has two prongs: 1) is the employees conduct permitted by statute or law and 2) does the conduct involve the employee making social, economic or political policy considerations. Third, this law is complicated and local counsel should be consulted as its application depends in large part on state law.

b. **Master/Servant relationship in an employment context.** It helps to understand that in an employment context, the employer gives instructions to the employee and when the employee is following the employer's instructions and performing his or her job, the employer (or master) is responsible for the employee's actions; the employee is the agent of the employer, who controls his or her work through the employment relationship. Therefore employees will not incur individual liability unless they are acting outside the scope of their job duties- in other words, independently of their master's instructions.

c. **State Tort Claims Acts**. Most states (e.g., Maine, South Carolina, North Carolina, and Florida) have statutes that limit the liability of government employees when the employee exercises discretion while performing their jobs on behalf of the state or any political subdivision of the state, such as a County or state school. Some of these state statutes are very complicated. Each state's statute must be reviewed separately to understand the amount of liability government employees have in the various states, as the law differs from state to state. In South Carolina, the statute is called the Tort Claims Act and it is found in S.C. Code § 15-78-10 *et seq*. In South Carolina, as in many jurisdictions, a suit brought against an employee of any state or local entity is really a suit against the entity and the individual employee need not be named.

d. **"Exercising Discretion"**. Under both federal and state law, the definition of "exercising discretion" is similar. In both instances, exercising discretion means an employee of a governmental entity is using judgment when making decisions, choices or considering various options. Thus, if a government employee thinks about what to do or how to act and then chooses to act in a particular manner, even if in hindsight the employee's choice was wrong, there is no liability.

e. **"Acting outside the scope" of a job**. Though a government employee has limited liability when functioning as the agent of a governmental entity, when a government employee acts outside his or her job description (for instance, getting in a fight with another employee or causing intentional harm), he or she will lose that immunity and can be sued as any other employee can. Collecting data, analyzing the data and deciding how to present data and data products on a website or to the public are all tasks employees of RAs are authorized to perform, so it should be rare that statutory immunity is lost due to an employee's unauthorized actions.

2. ICOOS Act of 2009.

This Act was intended to provide the same type of limited liability afforded to federal employees to nonfederal employees to promote the establishment of a national integrated system of observing systems through a network of regional information coordination entities who collect and disseminate ocean data. Unfortunately, the proposed regulations appear to attempt to increase the risk to RAs (referred to as Regional Information Coordinating Entities in the Act) by limiting the liability of only three (3) employees of a certified RA who are acting within the scope of their authority, and who are carrying out the purposes of the ICOOS Act.

Usually, if someone were to bring a suit, it would be against the entity, not any individual employee. This is particularly true if the RA is incorporated as a 501(c)(3) organization.

Employees can be liable under certain laws for their actions in addition to their employer being held liable. For instance, there is individual liability for employees under the Fair Labor Standards Act (FLSA) and the Family Medical Leave Act (FMLA), but NOT under Title VII (anti-discrimination laws) Under § 997.30 of the proposed Regulations for the ICOOS Act, subsection (b) applies to RAs and subsection (c) applies to employees of RAs. The language limiting the number of employees who receive additional immunity under ICOOS is only found in subsection (c). Therefore, there is different immunity for the RAs than there is for their employees (as to employees, ICOOS' immunity is limited to only three (3) employees per the proposed regulations.)

The statute provides that RAs which are certified are part of the ICOOS System are considered part of NOAA and their employees for purposes of tort liability are considered federal employees and, thus, have limited liability when they are operating within the scope of their employment in carrying out the purposes of ICOOS. *Section 12304(B)(4)(e).*

Section 997.30 of the proposed regulations repeats the language in the Act regarding "any" employee of a RA being considered a federal employee, but then limits the definition of an "employee" to: 1) an individual employed or contracted by a certified RA; and who is 2) one of three individuals certified by the RA as responsible for the collection, management, or dissemination of data; and who is 3) responsive to federal government control. This provision defines "employee" in such a manner that "any" employee can qualify but only three individuals can be certified, so the liability is limited to three (3) individuals who can either be employees or performing work under contract. For instance, the liability does not apply to corporations, so the RAs and its subawardees, who are not one of the 3 designated individuals, gain no additional protection from this Act.

The proposed regulations are confusing. If only there (3) employees are collecting and posting data and they all act negligently while performing their work, it appears there will be limited liability for their acts and, thus, minimal problems for the RA. What if there are four (4) employees who act negligently? Is the RA only liable for the actions of the fourth employee? Are the damages prorated? What if the third and fourth employee shared a task over several months' time? By attempting to limit the federal government's broad grant of

immunity in the ICOOS Act (and remember the actual law always trumps regulations), the agencies writing the regulations may only be creating issues which will generate more questions and result in litigation.

For limiting a RA's exposure, an RA may want to consider naming the persons ultimately in charge of each project as one of the 3 persons to ensure that the most immunity possible is obtained because under Master/Servant relationship described above, it would be the supervisors who are responsible for the actions of the employees. An RA may want to provide added protection to the supervisors since they would likely be the ones who would be most vulnerable. In other words, perhaps it would be a good idea to name the supervisor who is responsible for the most employees' actions as one of the three designated employees.[1]

3. Charitable Immunity/ 501 (c) (3)'s.

Charitable organizations often are granted limited liability per state law. As with sovereign immunity, charitable immunity arose in England but between the 1940's and 1992, almost every state in the United States abrogated or limited the charitable immunity doctrine. For instance, in South Carolina, S.C. Code § 33-56-180 limits the amount of damages recoverable for injury or death caused by employees of a charitable organization, but does not otherwise limit the charitable organization's ability to be sued. Charitable immunity is not as all-encompassing as sovereign immunity.

RAs who are 501 (c) (3)[2] organizations may have additional protection from liability. A 501(c)(3) designation limits personal liability. Board members will not be held personally responsible, unless they are grossly negligent in their responsibilities. For example, if a Board member knows a sub-awardee is intentionally providing false information, he or she could be acting grossly negligent and his or her behavior might be determined to be reckless or wanton or even malicious. Additionally, if the IRS determines that individual Board members are not ensuring a 501 (c) (3) organization's programs are operated exclusively for tax-exempt purposes, and compensation is not set at arms' length, an organization could lose its tax exempt status resulting in individual liability for board members. Though operating a 501 (c) (3) provides more immunity from liability than operating a for-profit corporation, additional insurance for the entity and the individual board members may still be a good idea and should be discussed with each RAs insurance provider and legal counsel.

RAs that are operating under a Memorandum of Understanding (MOU) are operating under contract. As with any contract, the MOU should be reviewed by legal counsel to ensure that it includes provisions for limiting the liability of the RAs. For instance, the use of "hold harmless" clauses may be allowed in some states and if indemnification provisions are not an option, than the MOU can be written to require the RA to be named as an additional insured on private liability insurance policies.

[1] Please note that I am not licensed to actively practice law in any State other than S.C. so it is important that each RA seek legal advice specific to their state.

[2] Section 501 (c) is a section of the federal Internal Revenue Code that applies in all states.

4. **Disclaimers.**

Perhaps the most effective way to limit risk is through the use of data disclaimers or user agreements. Most states have statutes and case law that dictate the language that should be used in disclaimers that attempt to limit a business' liability for products it provides to the public (in this case, data and data products.) There are express and implied warranties of merchantability and how implied warranties can be repudiated is a matter of state law. For instance, in South Carolina, S.C. Code § 36-2-316, titled "Exclusion or modification of warranties," disclaimers must be conspicuous and specific. Here is a sample disclaimer for SECOORA based on South Carolina statutes and case law that is similar to some already used by other RAs:

"THERE ARE NO UNDERSTANDINGS, AGREEMENTS, AND REPRESENTATIONS, EXPRESS OR IMPLIED WARRANTIES (INCLUDING ANY REGARDING MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE) RESPECTING THIS DATA. FURTHER, NO EMPLOYEE OF SECOORA, AGENT OR OTHER PERSON IS AUTHORIZED TO GIVE ANY WARRANTIES ON BEHALF OF SECOORA, OR TO ASSUME ANY LIABILITY IN CONNECTION WITH THE USE OF THIS DATA."

5. **User Agreements**.

Even stronger protection can be obtained through the use of "user agreements" which are similar to releases; the person using the data or data products signs a binding agreement acknowledging that he or she relies on the data at his or her own risk. These types of agreements are becoming more and more prevalent on websites and in most states (certainly South Carolina) an individual will be assumed by the Courts to have understood and consented to any document that he or she signs, whether they read it or not before signing it. A User Agreement usually contains a disclaimer and requires the person accessing the information to acknowledge there may be errors in it. Any user agreement should be very obvious (bolded, large type, underlined, setoff from other information, etc.) and set up in such a manner on a website that the data and data products cannot be accessed until the user agrees to the terms. Again, state law may vary regarding the specific requirements for these agreements but most courts and record offices now use them and they are becoming more and more common as they provide particularly strong protection.

6. **Officers and Directors' Liability Insurance**.

A (D&O policy) is liability insurance payable to the directors and officers of a company, or to the organization itself, as indemnification (reimbursement) for losses or advancement of defense costs if a legal action is brought for alleged wrongful acts of Board members of RAs in their capacity as directors and officers. To the extent state and federal laws, disclaimers and user agreements do not provide complete immunity, a D&O policy is intended to cover the remainder of the liability. Often these policies have EPLI endorsements for employee's claims against the business and additional endorsements for other potential problems can be purchased separately.

7. Errors and Omissions Insurance.

This insurance is directed more at protecting "professional services" provided by employees against claims made for inadequate work or negligent actions. Errors and omissions insurance, similarly to D&O policies, often cover both court costs and any settlements up to the amount specified on the insurance contract. This insurance is very similar to a D&O policy but whereas a D&O policy applies to protect Directors and Officers of a business from liability, errors and omissions insurance protects employees who provide professional services when they are accused of negligence.

To summarize:

My interpretation of the law and the rules is that certified RAs are treated as agents of NOAA and have the same immunity as NOAA has as an organization. However, it apparently is not the intent of the drafters of the proposed regulations to limit liability coverage. Final resolution of this issue may require litigation. In the meantime, there are several actions that RAs can take to minimize their risk:

1) RAs who operate under MOU's should insert "hold harmless" language into the MOU agreement that afford them extra protection.

2) All RAs should consider using "User Agreements" for the data and product served on their website. This would provide the strongest protection as the user actively agrees to the term before using the data. At a minimum, all RAs should utilize disclaimers prepared based on the requirements of their state laws. In this regard, use precatory, not mandatory language whenever possible. For instance, avoid hard forecasts and always use words like "may", "such that", "could", and "possibly" as it is hard for someone to allege they reasonably relied on such language.

3) Private liability insurance for directors and officers, as well as an RA's professional employees, with endorsements addressing each RA's particular risks, should be considered realizing that some RAs may need less private insurance than others.

4) Providing forecasts are riskier than providing real time or historic data so particular care should be taken when issuing forecasts.

5) Finally, state laws differ and it is essential that each RA seek legal advice from attorneys in your own state regarding how state law and the Federal Tort Claims Act would likely be applied by the courts to your particular situation.