

May 5, 2004

Ms. Virginia Lee, Assistant Director
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Narragansett, RI 02882

Dear Virginia:

At the Sea Grant Marine Extension Program Leaders' Assembly Meeting in April you raised a question about potential liability arising from the publication of ocean observing system (OOS) data on the Web. This letter contains the results of the Law Center's research. This letter is intended to be for informational purposes only, and does not constitute formal legal advice.

By email we decided to start with the more basic question of whether the National Sea Grant Office and/or the state Sea Grant programs can be sued. Based on our conversation at the conference it sounds like the main concern is with liability for negligence, so to keep this discussion focused I will consider only negligence suits. The analysis in this letter may not apply to other kinds of suits (for example, breach of contract).

The National Sea Grant Office

The National Sea Grant Office, located within the National Oceanic and Atmospheric Administration (NOAA) and maintained by the Secretary of Commerce, is part of the federal government. As such, it enjoys the federal government's general sovereign immunity, which shields it from being sued without its consent.

Congress has given its consent for the federal government to be sued for negligence in the Federal Tort Claims Act (FTCA). Under the FTCA the federal government may be sued in federal district court

for money damages...for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

State law, rather than federal law, governs the substance of negligence actions. The FTCA allows the federal government to be brought into court; once it is there, the court applies the negligence law of the state in which the negligent act or omission took place.

There are exceptions to the FTCA's waiver of sovereign immunity, only one of which is relevant to our question. The FTCA does *not* waive the government's immunity to

[a]ny claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

This “discretionary function” exception protects the federal government from liability for its employees’ conduct when (1) that conduct involves an element of judgment or choice, and (2) that judgment is exercised in furtherance of the public policy expressed in the controlling statute. The exception does not apply when a statute or regulation clearly prescribes a course of action, because then there is no element of judgment.

Thus, the National Sea Grant Office could be sued for negligence in some circumstances. More facts are necessary to analyze whether liability might arise in a specific situation.

The State Sea Grant Programs

The state Sea Grant programs, unlike the National Sea Grant Office, are not federal entities. State programs may be administered by state entities (like the University of Rhode Island), private entities, or a combination of the two. Private entities have no sovereign immunity from suit. States, like the federal government, do enjoy sovereign immunity; they cannot be sued without their consent.

Some states have enacted their own Tort Claims Acts, similar to the FTCA, and are therefore subject to at least some negligence suits. There are other, less common ways a state can waive its sovereign immunity as well. Because state laws vary, each state that might be subject to liability must be considered individually. It would be safest to assume that a particular state entity (for our purposes, probably a state university) *could* be subject to liability for negligence until analysis of that state’s laws proves otherwise.

Conclusion

The National Sea Grant Office and the state Sea Grant programs, while generally shielded from suit by sovereign immunity, may be subject to suit for negligence in some situations. Liability will depend on the facts of the specific situation and, for state programs, the law of the relevant state.

I hope this information is useful to you. This response is necessarily very general because of the general nature of the question, but I would be happy to do further research and analysis for you on a specific set of facts or on any other legal issue that comes up.

Thank you for bringing your question to the National Sea Grant Law Center.

Sincerely,

Josh Clemons
Research Counsel

Cc: LaDon Swann, Mississippi-Alabama Sea Grant Consortium
William Hooper, Mississippi Law Research Institute