

GRAY'S REEF NATIONAL MARINE SANCTUARY ADVISORY COUNCIL

November 1, 2022

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Living Resources Research
Lauren Stefaniak, Vice-Chair
University Education

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Michael Denmark
Citizen-at-Large
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NOAA Fisheries Service (Ex Officio)
Jaime Gormley
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NOAA Office of Law Enforcement (Ex Officio)
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GA Department of Natural Resources
Shelly Krueger
GA Sea Grant (Ex-Officio)
Stan Rogers
Gray's Reef Nat'l Marine Sanctuary (Ex Officio)

10 Ocean Science Circle
Savannah, GA 31411

John Armor
Director, Office of National Marine Sanctuaries
1305 East-West Highway, 11th Floor
Silver Spring, Maryland 20910

Dear Director Armor,

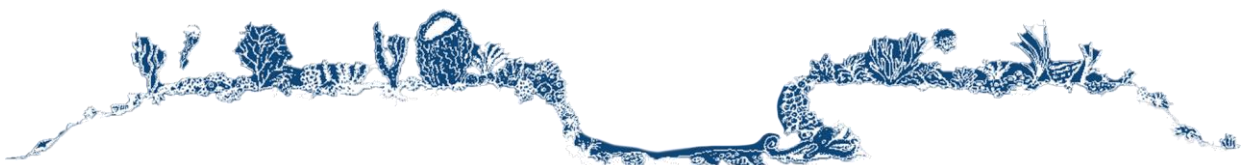
The Gray's Reef National Marine Sanctuary (GRNMS) Advisory Council has held discussions internally and with the Office of National Marine Sanctuaries (ONMS) through the GRNMS office since August 2020 about an ONMS "Likeness & Profile" form. Despite Advisory Council (AC) member input and several rounds of AC questions and ONMS responses, we find that the current versions of both the "Likeness & Profile" and "Copyright License" forms (attached) still contain problematic provisions, related principally to AC member presentation of copyrighted materials. While we understand the need and desire to ensure legal protections for all parties involved in such agreements, the current copyright provisions in the forms pose a range of concerns to the AC.

The importance of reaching some consensus on the content of these agreements in a timely manner became clear at our March 2022 Advisory Council meeting when a member raised the need for video records of AC meetings to better demonstrate the value of the AC for engagement with constituents on multiple issues and recruitment of new members. Use of visual and related materials provided by AC members, and others engaged with the AC, are stymied due to uncertainties and cautions these agreements elicit.

Three principal issues remain after all this time. The first regards the "Likeness and Profile" form, which includes the following statement:

I hereby warrant that I have sole copyright ownership of any written copy, photograph(s), video, film footage, audio, and/or any information presented by me or provided to ONMS, or that I have obtained permission from the copyright owner(s). Further, I agree to indemnify ONMS in the event that it suffers liability or damages as a result of its use of any written copy, photograph(s), video, film footage, and/or any information referenced in this paragraph.

This repeats a similar section contained in previous versions of this form and fails to address the provision of "fair use doctrine" in our copyright laws. I offer the following illustrative example to demonstrate why this copyright provision is problematic for AC members: While giving a presentation about a research project at a GRNMS AC meeting, a member uses a previously published and



copyright protected image or graph to inform (educate) the audience about some issue. Use of this material would be allowed under fair use doctrine, whether from their own work or others, given the presentation serves the public interest and is not done for compensation. However, let's assume a recording of the meeting is subsequently used by NOAA or a third party beyond simple public record, in a manner exceeding allowable uses under the fair use doctrine. In this scenario, the original presenter does not violate copyright provisions, but a third party subsequently does so, whether NOAA, the National Marine Sanctuary Foundation, or other assignees. Why then does the liability fall solely on the presenter, according to the current ONMS form?

Secondly, nowhere in the "Likeness and Profile" form does it state that the fundamental purpose for recording a public meeting or similar event is to establish a public record. The form only addresses use of recorded images/video/audio for derivative purposes. Specifically, the agreement states:

The intended use of these materials is for ONMS communication, outreach, and education products that promote awareness, appreciation and management of the marine environment. I understand that in furtherance of these goals, ONMS may assign my ... Likeness to the National Marine Sanctuary Foundation.

If recordings of a meeting for public record are exempt, or explicitly excluded, this agreement should include a clear statement to that effect. If not, the agreement language should be amended to be inclusive of such use.

The third and final issue concerns the "Copyright License" form. Paragraph 4 of the form states:

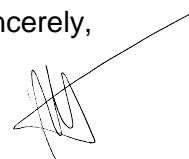
I understand that a notice acknowledging copyright protection shall be placed on any use of the referenced Work(s).

It is unclear what this means. Some individuals may not have sole rights to a product, but they may have the authority to grant permission for use of the product. Again, an example may help illustrate this point. An academic scientist produces images as part of grant work conducted at GRNMS and has authority to grant use of the images. How will this be acknowledged in some way, other than implying the scientist holds sole copyright, rather than shared copyright with their institution? It seems there is a need for greater detail and specificity that follows each image or video. Along these same lines, there are multiple types of copyright provisions under the Creative Commons license. Can (or do) these apply here? Such provisions would be much better at parsing allowable uses and permissions, based on non-commercial and commercial uses from public archives.

We acknowledge that we are not lawyers, but we do know enough to recognize that these agreements do not appear to protect the interests of AC members and our associates. We would greatly appreciate a more direct and detailed conversation with NOAA Legal Counsel to better understand and perhaps modify these agreements to the benefit of all.

Thank you, in advance, for your consideration of these issues. Our ultimate goal is to ensure the Advisory Council can most effectively provide advice to ONMS and engage our diverse constituencies regarding conservation and stewardship of our natural heritage.

Sincerely,

A handwritten signature in blue ink, appearing to read "Peter Auster", with a long horizontal line extending to the right from the end of the signature.

Peter Auster, Chair