



To: Scientific Integrity Task Force  
White House Office of Science and Technology Policy

**From: Public Employees for Environmental Responsibility (PEER)**

**Subject: Scientific Integrity and Personnel Policies Must Be Married**

Date: June 14, 2021

### **Introduction**

As outlined by the 2009 presidential directive which ordered their adoption, agency scientific integrity policies are supposed to both prohibit political manipulation of science and provide “additional protection” for scientists<sup>1</sup>. These two functions require some connection to agency personnel policies – both to punish violators and to shield specialists who are under bureaucratic attack.

Unfortunately, the policies were finalized largely without ensuring any meaningful connection to either discipline or employee defense. The consequence of that failure is that these policies have remained toothless, with no sanctions for violation and no protection for the scientists whose findings clash with an official agenda or which touch upon controversial topics.

### **No Penalty for Scientific Misconduct**

Many of the scientific integrity policies are completely divorced from the civil service disciplinary system. That has meant that federal managers who violate scientific integrity policies can do so with impunity, as their actions trigger no adverse consequences.

This disconnect is illustrated by recent remarks from Francesca Grifo, EPA’s Scientific Integrity Officer, who replied when asked by a reporter what action would be taken against managers who improperly altered scientific assessments:

“We’re not playing a blame game. The way our scientific integrity policy is written is that specific disciplinary accountability is not in our lane. So, our work is to figure out what happened and safeguard the science.”<sup>2</sup>

Left unanswered is how EPA can “safeguard the science” if those who compromise or suppress the science can do so – and continue to do so – without any sanction.

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<sup>1</sup> Memorandum of March 9, 2009: Scientific Integrity, 74 Fed. Reg. 10,671 (Mar. 11, 2009)

<sup>2</sup> <https://theintercept.com/2021/04/26/epa-corruption-cleanup/>

The disconnect is also reflected by the fact that many agencies do not include scientific misconduct within their official table of penalties, which outline the suggested penalties (usually for both first and repeat offenses) on a wide range of misconduct, ranging from unexcused absences, to theft, to violent behavior.<sup>3</sup> This gap suggests that agency leadership does not consider scientific misconduct violations as worthy of discipline, as there is no suggested range of penalties even for deliberate scientific misconduct.<sup>4</sup>

Some agencies, such as the Department of Interior, prevent scientific integrity review panels from even recommending discipline for a manager guilty of violations.<sup>5</sup> Moreover, typically policies do not require disciplinary review in the event that an adverse finding is made, or even make a referral for that purpose. Thus, politically-motivated scientific suppression, alteration, or other misconduct largely goes unpunished.

### **Recommendation**

There should be a specific range of penalties applied to scientific misconduct reflected in every agency's Table of Penalties. Moreover, all agencies should be required to undertake a disciplinary review in any case where misconduct has found to have occurred.

### **No Punishment for Political Appointees**

One major anomaly in these policies supposedly aimed at curbing political manipulation of government science is the lack of clear application to political appointees. It is political appointees, after all, who presumably are a major source for politically motivated misconduct.<sup>6</sup>

However, political appointees are beyond the reach of the civil service disciplinary process. They are only answerable to the political official who appointed them. To the extent that the official is acting to further the agency's political agenda, it is unlikely that person will face any punishment and, in fact, may even be promoted.

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<sup>3</sup> One of the few exceptions is the U.S. Fish & Wildlife Service Table of Penalties <https://training.fws.gov/courses/references/job-aids/supervisors/documents/TableofPenalties-FullDocument.pdf> It provides:

“30. Violating the Department's Code of Scientific Conduct (or other professional code of conduct that applies to employees required to maintain a professional license or membership).

First Offense: Written Reprimand to 30-day suspension

Second Offense: 30-day suspension to removal

Third Offense: Removal Refer to 305 DM 3. 31”

By contrast, the scientific integrity policy is not referenced in the Department of Interior's Table of Penalties: <https://www.nifc.gov/eo/docs/DOIManualTableOffensesPenalties.pdf>

<sup>4</sup> For example, EPA provides specific penalties for Research Misconduct under a 2000 presidential order on that subject <https://ori.hhs.gov/sites/default/files/epapolicy.pdf> but has made no similar penalty provision for violations of its Scientific Integrity Policy.

<sup>5</sup> See DOI 305 DM 3 at 3.8 Processing Complaints of Scientific Misconduct or Loss of Scientific Integrity. D(8): “The final report may make related recommendations, including changes to policy, but the report must not recommend any specific personnel actions or other corrective measures.” (Emphasis added)

<sup>6</sup> See, e.g., <https://www.peer.org/scientific-fraud-infests-fish-and-wildlife-service-top-ranks/>

Earlier this year, when a member of the White House staff was reported to have engaged in threatening behavior, President Biden immediately had that official removed.<sup>7</sup> The White House also issued a statement indicating zero tolerance for acts of incivility by its staff.

One product of the Task Force process should be the adoption of a similar zero tolerance policy by the White House and all Cabinet officers that any political appointee found guilty of scientific misconduct (or the loss of scientific integrity) should be removed from federal service.

### **Recommendation**

When a Scientific Integrity Officer or review panel determines that a political appointee has engaged in scientific misconduct or caused the loss of scientific integrity, the identity of that official should be reported both to the White House and to the relevant Cabinet Officer. That report should be publicly displayed on the agency website.

### **Policies Provide Scientists No Enforceable Protection**

The 2009 Obama Scientific Integrity Directive called for “additional” expanded whistleblower protections or procedures to prevent retaliation against or suppression of scientific work due to its policy, economic, or political implications. This part of Obama’s directive was largely ignored or given lip service.<sup>8</sup>

Most all of the policies reference the Whistleblower Protection Act (WPA) as the sole source of legal protection for scientists. However, in this context, the WPA only covers disclosures of violation of agency rules. Thus, scientists who file scientific misconduct/integrity complaints are disclosing an alleged violation of a rule and, for that reason, already have whistleblower status. In this regard, PEER has successfully represented scientists who suffered reprisal after filing these complaints before the Office of Special Counsel (OSC) on the basis that filing that complaint entitled that person whistleblower protection.<sup>9</sup>

The WPA does not cover scientists who are not whistleblowers but who are suffering retaliation or obstruction for pursuing research on controversial matters or publishing research that does not support an agency position. Nor does the WPA cover scientists who face blowback after expressing a differing professional opinion – an option explicitly endorsed by some agency policies.<sup>10</sup>

In addition, while some of the policies that provide for the filing of differing professional opinions express that those who make those filings will be protected, these policies do not specify what these protections will be and who would implement them.<sup>11</sup>

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<sup>7</sup> <https://thehill.com/homenews/administration/538788-white-house-press-aide-resigns-after-threatening-politico-reporter>

<sup>8</sup> See <https://www.peer.org/whistleblower-protections-for-scientists-sidelined/>

<sup>9</sup> See <https://www.peer.org/scientific-whistleblower-complaint-resolved/>

<sup>10</sup> For example, EPA’s SIP Sec. IV declares that the agency “welcomes differing views and opinions on scientific and technical matters...”

<sup>11</sup> EPA’s SIP at IVA3c declares that the policy “extends whistleblower protection to all EPA employees...who express a differing scientific opinion” but does not explain what this means, how it works, or who enforces these protections.

In short, President Obama’s promise of “additional” protections for scientists who face reprisals due to the substance or context of their research findings has largely gone unfulfilled.

The central challenge is having to rely upon the vehicle of agency rules as the sole means for curtailing agency discretion. As the expression “rules are meant to be broken” denotes, agencies can, and often do, set aside their own rules when it is convenient to do so. In these cases, the gist of the conflict is between institutional objectives and scientific integrity. In such a conflict, the former will almost always likely prevail.<sup>12</sup>

Moreover, agency rules are not externally enforceable in court.<sup>13</sup> Thus, there is no external check on agencies setting aside their own rules, no matter how emphatically declared.

Protection of whistleblowers required the enactment of a law – the Whistleblower Protection Act (which, in has been statutorily strengthened in subsequent years to combat agency evasions).<sup>14</sup> The ideal solution would be for Congress to enact a Scientist Protection Act which would provide protections that are enforceable against the Executive Branch in court, in the same manner that, for example, the Whistleblower Protection Act is enforced.<sup>15</sup>

In the absence of a new statute, there is an administrative path to address enforcement of scientific integrity policies. Apart from protecting whistleblowers, OSC has very broad but little used jurisdiction under 5 USC § 1216:

“(a) In addition to the authority otherwise provided in this chapter, the Special Counsel shall, except as provided in subsection (b), conduct an investigation of any allegation concerning . . . (4) activities prohibited by any civil service law, rule, or regulation, including any activity relating to political intrusion in personnel decisionmaking.” (Emphasis added.)

For example, OSC uses this authority to take action to remedy and prevent discrimination on the basis of sexual orientation in the federal workplace by enforcing an executive order to that effect.<sup>16</sup> Similarly, OSC could extend protection to scientists if they were covered by an executive directive to that effect, or a directive from Cabinet Secretaries or agency heads.

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NOAA, in addition, purports to similarly protect persons accused but not convicted of misconduct. See Administrative Order 202-735D.2 at Sec. 5.10. “NOAA protects those who uncover and report scientific and research misconduct, as well as those accused of scientific and research misconduct in the absence of a finding of misconduct, from prohibited personnel practices...” The nature of these protections remains unspecified.

<sup>12</sup> See case studies described here: <https://www.peer.org/can-biden-science-task-force-break-old-bad-habits/>

<sup>13</sup> 5 U.S.C. §§ 552(b)(2) and 553(a)(2) regarding matters outside the scope of enforcement through the Administrative Procedure Act.

<sup>14</sup> <https://docs.house.gov/meetings/GO/GO24/20170201/105513/HHRG-115-GO24-Wstate-DevineT-20170201.pdf>

<sup>15</sup> PEER has proposed such a statute that would protect those who participate in the peer review process either as authors or reviewers. See <https://www.peer.org/federal-scientists-face-official-barriers-in-publishing/>

<sup>16</sup> <https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity>

Thus, the administration could fill this scientist protection vacuum create by a presidential directive to prohibit retaliation based upon the content of scientific research or its implications. Alternately, it could ensure that each agency rule contains such a prohibition (rather than the bland boilerplate they presently contain).

Through this mechanism, OSC could start enforcing against punishing scientists for assembling politically sensitive data, making controversial findings or expressing differing professional opinions.

OSC could make this jurisdiction even clearer by sending a letter to agencies urging them to include information about reports of scientific integrity lapses when informing their employees about their whistleblower rights. In addition, OSC could integrate scientific integrity policy information into its required certification of agencies' WPA training programs.<sup>17</sup>

### **Recommendation**

President Biden should direct the U.S. Office of Special Counsel should enforce violations of scientific integrity policies in the same manner as it now enforces workplace discrimination, whistleblower, or other civil service rules.

### **Conclusion**

A central challenge for the Scientific Integrity Task Force will be devising ways in which the scientific integrity policies will be meaningfully enforced. Enforcement of these policies entails them acting both as a sword for punishing violators and as a shield for protecting scientists suffering reprisal due to the content, not the quality, of their scientific work. Both of these functions are key to the value of any such policy.

Failure to meet this challenge will mean that the Task Force also will have failed to accomplish the central task President Biden assigned to it to “conduct a thorough review of the effectiveness of agency scientific-integrity policies developed since the issuance of the Presidential Memorandum of March 9, 2009.”<sup>18</sup>

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<sup>17</sup> 5 U.S.C. § 2302(c)

<sup>18</sup> <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/01/27/memorandum-on-restoring-trust-in-government-through-scientific-integrity-and-evidence-based-policymaking/>