



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

962 Wayne Ave • Suite 610 • Silver Spring, MD 20910

To: Scientific Integrity Task Force, White House Office of Science and Technology Policy (OSTP)

From: Public Employees for Environmental Responsibility (PEER)

Subject: Core Scientific Transparency Policies Should Not Vary from Agency to Agency

Date: July 14, 2021

Summary

When President Biden issued an Executive Memo to all agencies on the topic of scientific integrity on January 27, the White House issued an accompanying “Fact Sheet” stating that:

“the Biden-Harris Administration will protect scientists from political interference and ensure they can think, research, and speak freely to provide valuable information and insights to the American people.”¹ (Emphasis added)

To make this vision a reality, OSTP must adopt uniform scientific integrity standards that apply to all federal agencies. The current agency-by-agency approach to scientific integrity policies undermines scientific transparency and freedom to research and publish because of the way bureaucracies seek to control the information its employees relay to the outside world. To help address this dynamic, PEER urges OSTP to adopt the following three recommendations:

1. The right to publish. The White House OSTP should abandon the current agency-by-agency approach to developing scientific integrity policies in favor of uniform freedom to publish standards that apply equally throughout civilian service. Those standards should ensure that agency approval is not required prior to submitting research for publication by a peer-reviewed journal.
2. Increased media access. The White House, through Executive Order or other action, should establish a policy that all civilian employees may speak with reporters without agency approval or pre-coordination if they are not speaking as official representatives of their agency.
3. Transparency of agency records. The White House should adopt a government-wide policy that administrative records must include the whole record, including dissenting opinions, and it should direct agencies that scientific material, including “draft” studies, shall not be withheld in responding to FOIA requests.

¹ FACT SHEET: President Biden Takes Executive Actions to Tackle the Climate Crisis at Home and Abroad, Create Jobs, and Restore Scientific Integrity Across Federal Government | The White House

1. Background

The Obama administration initially adopted scientific integrity policies individually drafted by agency managers. This agency-specific approach has presented dangers to transparency and research freedom in many agencies. Perhaps the most egregious example was the policy developed by the U.S. Department of Agriculture. Its Scientific Integrity Policy explicitly authorizes it to block publication of research containing any –

“statements that could be construed as being judgments of or recommendations on USDA or any other federal government policy.”²

This stunning gag order buried in the middle of a scientific integrity policy seems premised on the notion that science has its place, so long as it does not ruffle any feathers by raising implications about the effects of government policies. This restriction is of questionable constitutionality when applied to scientists’ work on their own time, outside their official role.³ PEER represented a USDA entomologist who was ordered to remove his authorship of an article in a peer-reviewed publication due to the references in the paper to impacts from industrialized mono-crop agriculture.⁴

Notably, this policy was developed under USDA Secretary Tom Vilsack, whose earlier tenure was replete with concerns about industry influence in constraining the subject matter of agency research.⁵ Mr. Vilsack has now returned as USDA Secretary – suggesting that these constraints in USDA’s policy will continue.

During the promulgation of the first set of scientific integrity policies under Obama, the White House Office of Science Technology and Policy (OSTP) exercised little oversight over agency policy formulation. OSTP issued guidelines that were so vague that they provided little real guidance.⁶ OSTP’s lax approach meant that, by the end of the Obama administration, agencies had adopted policies of various scopes and provisions, some incomplete, many with hopelessly hazy sections, and most containing little by way of enforcement.⁷

Unfortunately, a new-found rigor in OSTP oversight is not assured going forward. Creating a Scientific Integrity Task Force largely composed of more than 40 agency officials suggests a continued deference to agency-specific rules and restraints. This process is configured in a fashion that may result in more disparity among agency policies rather than less.

To prevent a repeat of the prior experience, PEER urges OSTP to adopt clear and uniform measures in the following three areas of scientific freedom and transparency:

1. The right to publish;
2. Increased Media access; and
3. Transparency of agency records.

² USDA DR/1074-001, Sec.6(e)1)c1.

³ See <https://www.peer.org/usda-sued-to-end-scientific-censorship/>

⁴ <https://www.peer.org/usda-scientist-punished-for-pollinator-research/>

⁵ <https://www.peer.org/vilsacks-disturbing-suppression-of-usda-science/>

⁶ <https://www.peer.org/new-obama-science-integrity-guidance-timid-torn-and-tardy/>

⁷ <https://www.peer.org/donald-trump-s-postponed-science-test/>

I. Right to Publish

A PEER analysis of policies in effect at 18 cabinet or independent agencies, as well as seven sub-cabinet departments and two arms of the White House reveals that most have provisions that limit or prohibit publication of research.⁸ Moreover, when political censorship or suppression of research occurs in these science-based agencies, affected scientists have little legal recourse if their work is altered or squelched.

Several agencies explicitly require official approval before a scientist or specialist may submit any research for publication. Some agencies limit this review to work-related publications. Still, other agencies, such as the Department of Interior, have no publication policy at all, leaving scientists uncertain about what they may do. Another set of agencies has conflicting rules, while still others, such as USDA, prohibit certain publications altogether. By contrast, only a handful of agencies, such as the National Science Foundation, explicitly allow staff specialists to seek publication without prior official review.

One agency, the National Oceanic & Atmospheric Administration (NOAA), sends a peculiarly mixed message. On the one hand, NOAA's policy encourages outside publication and sets up a review process that purports to prevent agency censorship. But, on the other hand, this NOAA policy is explicitly made subject to a policy by its parent agency, the Department of Commerce, which explicitly requires official approval of all technical writings and speeches.⁹ Commerce would not respond to a PEER petition that its policies be harmonized with that of NOAA or drop its control of research altogether.¹⁰

The U.S. Environmental Protection Agency (EPA) had conceded the absence of any protocol for approval of employee publications in its original 2013 Scientific Integrity Policy. Seven years later, the agency approved a 70-page guide, entitled “Best Practices for Clearance of Scientific Products at EPA.”¹¹ This guide, however, contains no substantive policies governing whether staff scientist submissions will be approved for publication. Instead, it lays out an elaborate gauntlet that a prospective staff author must navigate first to get clearance to release data, let alone have it published.

In short, for most federal scientists, there is no guarantee that they may “research and speak freely,” as the White House promised.

Finally, there is no cogent rationale for different civilian science agencies having different clearance policies for approval of their scientists submitting research to a peer-reviewed journal for publication. For example, why should a Fish & Wildlife Service (Interior) scientist have greater freedom to submit research to a peer-reviewed publication than a scientist from

⁸ https://www.peer.org/wp-content/uploads/attachments/12_10_18_PEER_analysis.pdf

⁹ <https://www.peer.org/noaa-scientific-integrity-plan-has-big-gaps-to-fill-in/> At the same time, NOAA forbids “advocacy” by any scientist who receives one of its Sea Grants but has refused to clarify or rescind this overly-broad prohibition. See <https://www.peer.org/noaa-keeps-gag-rule-on-university-marine-scientists/>

¹⁰ See <https://www.peer.org/lift-gag-order-muzzling-noaa-scientists/>

¹¹ https://www.epa.gov/sites/production/files/2018-05/documents/best_practices_for_clearance_of_scientific_products_at_epa_final_21may2018.pdf

NOAA(Commerce)? All federal civilian scientists should have the same guaranteed right to seek publication of research without being subject to agency pre-approval.

Recommendation: The White House OSTP should reconsider its current agency-by-agency approach in favor of uniform freedom to publish standards that apply equally throughout civilian service. Those standards should ensure that agency approval is not required prior to submitting research for publication by a peer-reviewed journal.

II. Media Access

A related area is the ability of federal scientists to answer questions put to them by media reporters. Here, again there is wide variation from agency to agency.

The U.S. Forest Service, for example, has an all-inclusive mandatory Headquarters review prior to the release of any information to the media.¹² Yet, its parent agency, USDA, has a Scientific Integrity Policy that declares "it is the policy of the Department to: (a) Encourage, but not require, USDA scientists to participate in communications with the media regarding their scientific findings (data and results)...."¹³ However, the balance of that paragraph urges but does not require coordination with both scientists' managers and press office before speaking with the media.

This duality is perhaps best exemplified by EPA. In an all-employee memo on April 12, 2021, incoming Administrator Michael Regan committed his agency to "transparency and operating in a "fishbowl"...EPA also should be accessible to the press, which performs a vital role in informing the public about EPA's actions." He added that coordination "with the managers of your program and media relations experts in the Office of Public Affairs" is requested only "When interacting with the press in the performance of your official duties...."¹⁴

In early July, PEER disclosed reports by scientists within EPA's Office of Pollution Prevention and Toxics (OPPT) of routine alteration of new and existing chemical assessments to remove or significantly downplay risk calculations.¹⁵ That disclosure has received significant press attention.¹⁶

In an all-employee email of July 7, 2021, OPPT Chief of Staff Alison Pierce wrote:

"We've had a slight uptick recently in reporters contacting OPPT employees, so I'm sending out one of our periodic reminders that OPPT has SOPs in place should a member of the press reach out to you or your staff. Please remember that we are not authorized to answer press questions directly, and that OPPT (and EPA) have processes that should be followed should someone reach out to you."

¹² See <https://www.peer.org/forest-service-chief-mum-on-why-he-imposed-gag-order/>

¹³ USDA DR/1074-001, Sec.6(e)1)a.

¹⁴ <https://www.epa.gov/sites/production/files/2021-04/documents/regan-messageontransparencyandearningpublictrustinepaoperations-april122021.pdf>

¹⁵ <https://www.peer.org/epa-risk-assessments-doctored-to-mask-hazards/>

¹⁶ See, for example, <https://thehill.com/policy/energy-environment/561750-epa-employees-allege-changes-to-assessments-that-downplayed>

Pierce distributed a protocol warning staff, if contacted by a reporter, “don’t start answering any questions. Explain that press inquiries must be handled through our press office.”¹⁷

These conflicting messages underline a strong aversion on the part of agencies to allow their scientists to interact with members of the media. To the extent that the White House wants to overcome this ingrained institutional reluctance, it should take steps to remove media muzzles from the hands of agency managers.

Recommendation: The White House, through Executive Order or other action, should establish a policy that all civilian employees may speak with reporters without agency approval or pre-coordination if they are not speaking as official representatives of their agency.

III. Transparency of Agency Records

Despite ample rhetoric devoted to the idea of transparency, public access to government research is not guaranteed by any agency scientific integrity policy.

In recent years, scientific transparency has been further narrowed by two developments. First, during the Trump administration, as its initiatives were challenged in court, federal agencies started purging administrative records to remove evidence that did not support the administration's actions or revealed internal dissent or controversy that could have increased the legal vulnerability of challenged actions.¹⁸

The second development was a recent U.S. Supreme Court decision (and the first majority opinion issued by Justice Amy Coney Barrett) that strengthens the ability of government agencies to withhold the release of research materials to the public in response to Freedom of Information Act requests.¹⁹

With respect to administrative records, federal law requires agencies to compile and share "the whole record" to explain the basis for their actions. Yet, the statute does not define the term. Not only are there varying court opinions outlining what the record should contain, but agencies themselves have taken different positions on what should be included.

For example, the NOAA guidance states that the administrative record “consists of all documents and materials directly or indirectly considered by agency decision-makers and includes evidence contrary to the agency’s position.”

By contrast, the EPA takes the position that “materials containing solely the policy advice, recommendations, or opinions of EPA or other federal government staff that were generated as part of the internal deliberative process for formulating the EPA decision are not generally part of the administrative record.”

¹⁷ https://www.peer.org/wp-content/uploads/2021/07/7_8_21-OPPT-Dont-talk-to-press-message-final.pdf

¹⁸ See, for example, September 6, 2018, confidential guidance issued by the U.S. Fish & Wildlife Service citing unpublished Department of Justice advising that “an AR [administrative record] associated with litigation on an agency decision . . . should not include deliberative documents. . . [because] including them in the administrative record would inhibit agency decision-making.” https://www.peer.org/wp-content/uploads/attachments/1_31_19_FWS_guidance.pdf

¹⁹ <https://www.peer.org/supreme-court-foia-decision/>

It seems oxymoronic that an administrative record to enable a court to gauge the quality of official decision-making should exclude all deliberative documents. Nor is there an apparent rationale for the scope of an administrative record to vary from agency to agency or from administration to administration.

As for FOIA, as things stand now, agencies can functionally hide scientific research from public view by simply keeping it in draft form, for weeks, months, and, in some cases, years.²⁰

Yet, an agency's legal ability to withhold documents is not a requirement that they be withheld. Withholding material under FOIA exemptions is largely discretionary. Nothing prevents an agency from releasing studies, analyses, or technical findings merely because they are not finalized or still in "draft" form.

To the extent that the Biden administration wants to ensure scientific transparency, relying upon agency discretion does not look to be a promising path. Nor should different agencies have different stances for deciding what information should be included in the administrative record or is releasable under FOIA.

Transparency requires an affirmative policy that inconvenient facts should not be excluded from outside scrutiny. This transparency posture should be uniform across the government.

Recommendation: The White House adopts a government-wide policy that administrative records must include the whole record, including dissenting opinions; and 2) The White House directs agencies that scientific material, including "draft" studies, shall not be withheld in responding to FOIA requests.

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²⁰ See, for example, <https://www.peer.org/epa-can-keep-formaldehyde-assessment-under-wraps/>