



August 26, 2021

Mr. David S. Ferriero
Archivist of the United States
The National Archives and Records Administration
8601 Adelphi Road
College Park, MD 20740-6001

rmpolicy@nara.gov

RE: Federal Records Act Violations by the U.S. Environmental Protection Agency

Dear Mr. Ferriero:

I am writing you today on behalf of Public Employees for Environmental Responsibility (PEER) to request your intervention to end what appear to be widespread violations of the Federal Records Act (44 U.S.C. § 2101-3501) by the U.S. Environmental Protection Agency (EPA). PEER has discovered that EPA routinely allows the original versions of its internal communications and draft documents to be erased when they are edited. Nor does the agency require any "track changes" function to be activated to display both the change itself and the author.

As detailed below, this practice violates the Federal Records Act by shielding the agency's decision-making process from outside review and retaining only the final version of key documents.

EPA's Interim Records Management Policy (<https://www.epa.gov/records/epa-records-policy-and-guidance>) specifies what is considered an archivable record under the Federal Records Act:

When to archive a record: a) when documenting important agency decision-making processes, including the formulation and execution of basic policies and decisions and the taking of necessary actions, including all substantive decisions and commitments reached orally (person-to-person, by telecommunications, or in conference) or electronically. **b)** records such as correspondence, presentations, meeting minutes, telephone logs, data, spreadsheets, working papers, reports, drafts, annotations and other notes that are needed to document the rationale and relevant supporting data for important final Agency decisions. EPA CIO 2155.4, Pg. 3-4.

Despite this policy, PEER has encountered two classes of communications where EPA is deviating from this policy: 1) Records related to the development of its Waters of the United States (WOTUS) rule; and 2) Alterations of chemical risk assessments within EPA's Office of Chemical Safety and Pollution Prevention (OCSPP).

1) WOTUS Comments

On December 18, 2019, PEER submitted a Freedom of Information Act (FOIA) request (EPA-HQ-2020-001799) seeking “any communications regarding the revised definition of the waters of the U.S., (a.k.a. WOTUS) rulemaking, between and among EPA Headquarters and any of the ten regional EPA offices.” PEER was advised by staff in several regional EPA offices that EPA Headquarters staff solicited comments on the draft rule in SharePoint and that they had provided extensive comments on these versions of the draft rule.

After months of delay, EPA was unable to produce the requested comments because it no longer retained these communications. EPA used Microsoft SharePoint to capture comments and feedback on the draft WOTUS rule. That software was utilized in a manner such that any edits overwrote the original and all prior versions. Thus, EPA haphazardly deleted the draft WOTUS rule that contained comments and feedback from the regional offices.

Under EPA's standards for retention, the record must 1) be an official/approved EPA media source; 2) must pertain to an important agency decision-making process. In light of these facts, EPA appears to have violated its own records management policy and the Federal Records Act.

EPA's records management policy states that a word processing document is considered official EPA media; hence, the draft WOTUS rule's use of a shared word document satisfies the first criteria of what EPA classifies as an archivable record. EPA CIO 2155.4, Pg. 4. The SharePoint document constitutes an “important agency decision-making process.” EPA CIO 2155.4, Pg. 4. Moreover, any regional input on the draft WOTUS rule constituted “substantive comments” that explicitly influenced “agency decisions” pertaining to the finalized WOTUS Rule. EPA CIO 2155.4, Pg. 4.

In addition, these WOTUS draft comments could not be considered a transitory document, which would disqualify it from being a mandatorily archivable record, because the regional comments were solicited under the pretext that they would be factored into the final decision on the WOTUS rule. Therefore, these regional comments have “documentary or evidentiary value.” EPA CIO 2155.4, Pg. 4. According to the EPA's own policy, they were required to preserve the comments from the regional offices to ensure they were properly archiving “annotations and other notes that are needed to document the rationale... for important final Agency decisions.” EPA CIO 2155.4, Pg. 4.

The draft WOTUS rule and its regional comments are clearly an agency policy/decision. §§ 3301(a)(1)(A); 3303a. Since the comments were made by EPA staff with technical expertise on the subject matter, the draft copy of the rule would also fall into the Federal Record Act's mandate to ensure that documents of “administrative, legal[, and] research value” are properly preserved (§ 3303).

Notably, the PEER FOIA request dated in December 2019 should also have put the agency on notice that these were public records that should have been archived. We do not believe that these documents were erased in one fell swoop. Instead, they were routinely deleted or written over as the internal WOTUS decision-making process developed.

Significantly, we understand that this practice of overwriting drafts is ongoing. In our numerous discussions with the EPA on this matter during the past 18 months, agency representatives did not indicate that this record-keeping system has at all been altered.

We further believe this practice is not confined to the WOTUS comments but is applied in every instance the agency uses Microsoft SharePoint.

In sum, by failing to retain these comments, the EPA has violated and appears to continue to violate the Federal Records Act and their own records management policy.

2) Chemical Risk Assessments

PEER is representing scientists working within EPA's OCSPS who have disclosed deliberate tampering with chemical risk assessments and the deletion of potential health effects without the knowledge or consent of the human health assessors (See https://www.peer.org/wp-content/uploads/2021/07/7_2_21-EPA-Scientists-Transmittal-letter.pdf).

These scientists report numerous instances where their risk assessments were changed by their managers or colleagues in response to direction by management. These changes include deleting language identifying potential adverse effects, including developmental toxicity, neurotoxicity, mutagenicity, and/or carcinogenicity. The changes also include major revisions altering assessment conclusions to indicate no toxicity concerns despite data to the contrary.

Significantly, these alterations were sometimes overwritten onto the draft assessments such that not only is the original draft assessment lost, but the identity of who made the alterations is also not retained.

These draft risk assessments clearly reflect an agency policy/decision within the meaning of the Federal Records Act (§§ 3301(a)(1)(A); 3303a). For example, these assessments are used as the basis for Material Safety Data Sheets containing information vital to prevent harmful exposures, such as proper handling procedures, personal protection needed, accidental release measures, first aid and firefighting measures, etc. In addition, they contain a "Toxicological Information" section, which cautions workers on routes of exposure, symptoms of exposure, and delayed, immediate, or chronic effects from short- and long-term exposure.

Thus, these Federal Record Act violations reflect serious implications for both worker and consumer health.

As you well know, the National Archives and Records Administration (NARA) has oversight powers over the unlawful removal of records. NARA is responsible for "establishing standards [and regulations] for the selective retention of records" (3302(1)(2)(3)).

The Federal Records Act gives NARA the power to notify an agency head of unlawful removal. If the agency takes no action to recover those unlawfully removed files, NARA can request the Attorney General's assistance in recovering and remedying the unlawful destruction of records (§§ 3106(b); 2905(a)).

To those ends, PEER is requesting that you use the powers outlined above. Specifically, we request that you take immediate steps to ensure that EPA establishes safeguards against further unlawful record loss and removal (§ 3104).

If you require any additional information on these matters, please feel free to contact me.

Sincerely,



Timothy Whitehouse
Executive Director

Cc. EPA Office of Inspector General
EPA Administrator Michael Regan
Representative Ro Khanna, Chair Oversight Environment Subcommittee House Committee on Oversight and Reform
Representative Diana DeGette Chair, Subcommittee on Oversight and Investigation House Energy and Commerce Committee