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To: White House Office of Science & Technology Policy (OSTP)
Date: March 29, 2022
RE: Scientific Integrity Framework Suggestions

These comments are submitted on behalf of Public Employees for Environmental Responsibility (PEER) in response to the March 3, 2022, OSTP "Request for Information To Support the Development of a Federal Scientific Integrity Policy Framework."

Our principal concern is that OSTP is repeating the mistakes it made in 2010 by composing a framework full of vague rhetoric.[i] The absence of any clear guidance from OSTP more than a decade ago led to adoption of weak, incomplete, and non-uniform agency scientific integrity policies.[ii] The current flawed policies are what President Biden has directed be reformed.

The failure of these policies was evident during President Obama's tenure, but their fecklessness became undeniable during the Trump tenure.[iii] The principal reason that these agency scientific integrity policies failed was because the standards imposed by OSTP were so vague that agencies had leeway to ignore key components that President Obama specifically directed.[iv]

The current call for comments on developing an OSTP framework appears on its face predestined to meet the same fate as the earlier OSTP effort. Rather than continuing on this pathway, PEER suggests that OSTP adopt specific policies and require agencies to follow suit, much like the Office of Management and Budget guidance on implementing the Information Quality Act requires agencies to adopt largely uniform policies.[v]

Based on the January 2022 report of the Scientific Integrity Task Force it is evident that there is no clear or central focus among the agencies.[vi] As before, allowing the agencies to adopt their own policies under a vague OSTP framework is a recipe for repeated failure.

PEER proposes that OSTP do the following:

1. **Adopt a uniform definition of scientific integrity that each agency shall adopt.** As the Scientific Task Force report points out, the term is defined different ways by different agencies, and some do not define it at all.[vii] The definition of scientific integrity should be uniform throughout the federal government.

2. **Prescribe uniform procedures for investigating allegations of scientific misconduct.** Different agency policies also differ as to the protocol for how allegations of scientific misconduct (i.e., violation of scientific integrity policies) are investigated and adjudicated. Some agencies, notably the Environmental Protection Agency, have no protocols for investigations such allegations.[viii] Nor is there any indication that EPA even investigated a single instance of alleged misconduct in recent years.[ix]

At a minimum these policies should include:

a. Appeal from dismissal

Several agencies, notably the Department of the Interior, have refused to pursue allegations of misconduct by finding that they do not merit investigation.[x] These determinations can, in essence, nullify the agency scientific integrity policy by preventing any review of alleged misconduct. There should be an appeal mechanism to the director of the agency, with a decision that is posted on the agency website, to ensure maximum transparency.

b. Independent scientific integrity officers

To prevent pro-agency bias, scientific integrity officers should not hold other management responsibilities in their agency. The appointment of scientific integrity officers should be for a fixed term, with a preference for reliance upon appointments from academia or retired annuitants so that their professional path is insulated from the consequences of making rulings against their appointing agency.[xi]

c. Independent investigative panels

As with agencies such as the National Oceanic and Atmospheric Administration, non-frivolous complaints are reviewed by independent panels. If agency policies are relatively uniform, these panels could be made up of officials from different agencies.

d. Published findings

The investigative reports of the independent review panels should be published by the agency with minimal redactions to protect the identities of witnesses.

3. Require punishment of violators.

Many of the scientific integrity policies are completely divorced from the civil service disciplinary system. That has meant federal managers who violate scientific integrity polices 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."[xii]

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.

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.[xiii] This gap suggests 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.[xiv]

Some agencies, such as the Department of the Interior, prevent scientific integrity review panels from even recommending discipline for a manager guilty of violations.[xv] 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.

a. Mandatory punishment

OSTP should require agencies to impose penalties for those found to have violated the policy. For example, supervisors found to have retaliated against a whistleblower are punished with a three-day suspension with the possibility of demotion. A second offense is punishable by removal.[xvi]

PEER urges that OSTP adopt these minimum penalties for supervisors who violate the scientific integrity policy and require each agency to incorporate these sanctions into its own table of penalties.

b. Punish 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.

Political appointees, however, 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.

As the White House has issued a statement indicating zero tolerance for acts of incivility, OSTP should require that all agencies adopt a similar zero tolerance policy that any political appointee found guilty of scientific misconduct (or the loss of scientific integrity) should be removed from federal service. Thus, 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. Such reports should be publicly displayed on the agency website.

4. Create protections for scientists.

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.[xvii] This part of Obama's Directive was largely ignored or given lip service.[xviii]

Most 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 to whistleblower protection.[xix]

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.[xx]

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.[xxi]

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.

Protection of whistleblowers required the enactment of a law – the Whistleblower Protection Act (which has been statutorily strengthened in subsequent years to combat agency evasions). 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. OSTP can and should recommend such legislation to Congress.

In the absence of a new statute, OSTP should create 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.)

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. Similarly, with a directive from the White House, OSC could extend protection to scientists.

Thus, OSTP could fill this scientist protection vacuum by requiring that all agency policies explicitly prohibit retaliation based upon the content of scientific research or its implications, or for expressing differing professional opinions.

OSTP could make this jurisdiction even clearer by requiring agencies to include information about this prohibition against scientific retaliation when educating their employees about their whistleblower rights. In addition, OSTP could ask OSC to integrate scientific integrity policy information into its required certification of agencies' WPA training programs.

5. **Ensure adoption of uniform transparency practices.**
The ability of a scientist to publish or to speak with a reporter should not vary from agency to agency. Nor should scientific information be treated as confidential by one agency when another agency considers this same information a public record that may be released upon request or is affirmatively posted.

When President Biden issued an Executive Memo to all agencies on the topic of scientific integrity on January 27th, the White House issued an accompanying "Fact Sheet" claiming that this action sends:

> "a clear message 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."[xxii]

But nothing in the presidential memo guaranteed scientific freedom or transparency. In fact, the agency-by-agency approach the President initiated carries the risks of actually undermining scientific transparency and freedom to research and/or publish.

Every bureaucracy seeks to control the information its employees relay to the outside world. If agencies really valued transparency or a scientist's right to publish, there would be a reduced need for any scientific integrity policies – let alone new, improved policies.

In truth, agency managers become uncomfortable when their staff talk to reporters off the leash, so to speak. Nor do managers like to be surprised by new research authored by agency staff that has not been thoroughly vetted to assure concurrence with the agency's policy agenda.

The experience under the Obama administration in initially adopting scientific integrity policies individually drafted by agency managers underlines the danger presented to transparency and research freedom by this agency-specific approach. 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."[xxiii]

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. Applied broadly, this

restriction is of questionable constitutionality when applied to scientists' work on their own time, outside their official role.[xxiv] For example, 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.[xxv]

It is said that sunlight is the best disinfectant. In this context, greater transparency is a prophylactic to suppression or alteration of scientific information, because this misconduct cannot stay hidden behind closed doors. To that end, PEER urges OSTP to adopt clear and uniform measures in following three areas of scientific freedom and transparency:

a. 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.[xxvi] 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 the 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, NOAA, sends a peculiarly mixed message. On one hand, NOAA's policy encourages outside publication and sets up a review process that purports to prevent agency censorship. On the other hand, this NOAA policy is explicitly made to subject to a policy by its parent agency, the Department of Commerce, which requires official approval of all technical writings and speeches.[xxvii] Nor would Commerce respond to a PEER petition that it its policies be harmonized with that of NOAA or drop its control of research altogether.[xxviii]

On the other hand, the 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." [xxix] 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 to first 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. Why should a Fish and Wildlife Service (Interior) scientist have greater freedom to submit research to a peer-reviewed publication than a scientist from NOAA (Commerce)? All federal civilian scientists should have the same guaranteed right to seek publication of research without being subject to agency pre-approval, with very limited exceptions such as national security concerns.

OSTP should prescribe a uniform freedom to publish standard that applies 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.

b. 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.[xxx] 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)…"[xxxi] 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…"[xxxii]

In early July 2021, 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 greatly downplay risk calculations.[xxxiii] That disclosure has received significant press attention.[xxxiv]

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."

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." [xxxv]

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.

OSTP should require that all civilian agency scientific integrity policies stipulate 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.

c. 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 more and more of its initiatives were challenged in court, federal agencies started purging administrative records to remove evidence that did not support the agency decision or revealed internal dissent or controversy in order to reduce the legal vulnerability of challenged actions.[xxxvi]

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 release of research materials to the public in response to Freedom of Information Act (FOIA) requests.[xxxvii]

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."

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.[xxxviii]

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 government.

OSTP should require that every agency incorporate in its scientific integrity policy stipulations that: 1) Administrative records must include the whole record, including dissenting opinions; and 2) Scientific material, including "draft" studies shall not be withheld in responding to FOIA requests.

Conclusion

Only by adopting clear, mandatory standards for agency scientific integrity policies of the type outlined above will OSTP meet President Biden's charge to it:

> "The Director of the Office of Science and Technology Policy (Director) shall ensure the highest level of integrity in all aspects of executive branch involvement with scientific and technological processes. This responsibility shall include ensuring that executive departments and agencies (agencies) establish and enforce scientific-integrity policies that ban improper political interference in the conduct of scientific research and in the collection of scientific or technological data, and that prevent the suppression or distortion of scientific or technological findings, data, information, conclusions, or technical results."[xxxix]

[i] https://www.peer.org/new-obama-science-integrity-guidance-timid-torn-and-tardy/
[ii] https://www.peer.org/donald-trump-s-postponed-science-test/
[iii] https://peer.org/scientific-integrity-policies-now-dead-letters/
[iv] https://peer.org/federal-scientific-integrity-policies-missing-and-mediocre/
[v] See https://obamawhitehouse.archives.gov/omb/inforeg_agency_info_quality_links
[vi] See https://peer.org/bidens-scientific-integrity-not-up-to-the-task/

[vii] 01-22-Protecting_the_Integrity_of_Government_Science.pdf (whitehouse.gov) at 3.
[viii] https://peer.org/epa-scientific-integrity-policy-stuck-in-utero/
[ix] https://peer.org/epa-science-integrity-program-is-beacon-of-false-hope/
[x] https://peer.org/can-biden-science-task-force-break-old-bad-habits/
[xi] https://peer.org/purged-science-advisor-tests-interiors-integrity-policies/
[xii] https://theintercept.com/2021/04/26/epa-corruption-cleanup/
[xii] See, *e.g.*, https://www.peer.org/scientific-fraud-infests-fish-and-wildlife-service-top-ranks/
[xii] https://thehill.com/homenews/administration/538788-white-house-press-aide-resigns-after-threatening-politico-reporter
[xiii] 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: 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/eeo/docs/DOIManualTableOffensesPenalties.pdf
[xiv]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.
[xv] 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) of its Scientific Integrity Policy.
[xvi] See 5 U.S. Code § 7515
[xvii] Memorandum of March 9, 2009: Scientific Integrity, 74 Fed. Reg. 10,671 (Mar. 11, 2009)
[xviii] See https://www.peer.org/whistleblower-protections-for-scientists-sidelined/
[xix] See https://www.peer.org/whistleblower-protections-for-scientists-sidelined/
[xx] See https://www.peer.org/scientific-whistleblower-complaint-resolved/
[xxi] For example, EPA's SIP Sec. IV declares that the agency "welcomes differing views and opinions on scientific and technical matters…"
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. 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.
[xxii] 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
[xxiii] USDA DR/1074-001, Sec.6(e)1)c1.
[xxiv] https://www.peer.org/usda-sued-to-end-scientific-censorship/
[xxv] https://www.peer.org/usda-scientist-punished-for-pollinator-research/
[xxvi] https://www.peer.org/wp-content/uploads/attachments/12_10_18_PEER_analysis.pdf
[xxvii] 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/
[xxviii] See https://www.peer.org/lift-gag-order-muzzling-noaa-scientists/
[xxix] https://www.epa.gov/sites/production/files/2018-05/documents/best_practices_for_clearance_of_scientific_products_at_epa_final_21may2018.pdf
[xxx] See https://www.peer.org/forest-service-chief-mum-on-why-he-imposed-gag-order/
[xxxi] USDA DR/1074-001, Sec.6(e)1)a.
[xxxii] https://www.epa.gov/sites/production/files/2021-04/documents/regan-messageontransparencyandearningpublictrustinepaoperations-april122021.pdf
[xxxiii] https://www.peer.org/epa-risk-assessments-doctored-to-mask-hazards/

[xxxiv] See, for example, https://thehill.com/policy/energy-environment/561750-epa-employees-allege-changes-to-assessments-that-downplayed

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

[xxxvi] 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

[xxxvii] https://www.peer.org/supreme-court-foia-decision/

[xxxviii] See, for example, https://www.peer.org/epa-can-keep-formaldehyde-assessment-under-wraps/

[xxxix] Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking | The White House