

Before the Department of Commerce

Washington, D.C. 20240

In Re: The Department of Commerce's)
Current "Public Communications")
Department Administrative Order)

To the Secretary of Commerce:

Petition for Rulemaking

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Introduction

The head of each Executive department possesses the power to prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property.¹ The Secretary may prescribe these regulations without subjecting them to the standard rulemaking procedure outlined in the Administrative Procedure Act.² Within the Department of Commerce (“DOC”), Department Administrative Orders document and mandate continuing policies, standards, requirements, and procedures prescribed by the Office of the Secretary for Department-wide application. The Secretary should utilize his power to repeal the “policy review” provisions described in Department Administrative Order 219-1 (“DAO 219-1”) concerning “Public Communications” so that the directive is more amenable to free and open public communication by DOC employees.

Summary

DAO 219-1 limits DOC scientists’ ability to fully express their scientific findings and take positions on matters of public debate involving those findings. The explicit purpose of the “Public Communications” order is to “promote broad public understanding of the work of the Department.” However, DAO 219-1 provides superior DOC officials with review and approval power. The DOC order thus imposes a “policy review” barrier on scientists’ public communications of information related to their research, whether conducted privately or officially. By imposing such an obstacle, DAO

¹ 5 U.S.C. § 301

² 5 U.S.C. § 553(b)(3)(A)

219-1 restricts free speech rights, creates a chilling effect on scientific communications, and undermines both the principles of the “Public Communications” policy and President Obama’s goals for scientific integrity and transparency within Executive branch departments.

In the DOC department-wide plan for “Open Government,” released on April 10, 2010, DOC stated that it would, “[d]evelop additional guidance explaining how employees should respond to common questions and what types of communications require approval under Department Administrative Order 219-1, “Public Communications.” Accordingly, the Secretary of Commerce should follow through on the department’s promise and provide its scientists the freedom they deserve. The Secretary should eliminate the “policy review” provisions of DAO 219-1, so that DOC scientists are no longer inhibited in the same way governmental scientists were under the Bush Administration. Such an action is necessary to ensure that the Department’s scientific and technological processes attain the utmost level of integrity and transparency and that the public is able to stay informed about the work of DOC scientists.

Petition for Rulemaking

Pursuant to the Administrative Procedure Act, 16 U.S.C. § 553(e), Public Employees for Environmental Responsibility (“PEER”) hereby petitions the Department of Commerce (“DOC”) to repeal the “policy review” provisions (§ 7.01 and §11.01b) of Department Administrative Order 219-1 concerning public communications, so as to ensure its scientists’ rights to speak “freely and openly.”

Standing to File

PEER is an IRS 501(c)(3) non-profit organization incorporated under the laws of the District of Columbia. PEER defends and strengthens the legal rights of public employees who speak out about issues concerning natural resource management and environmental protection. As such, PEER is “an interested person” under the Administrative Procedures Act.

Argument in Support of Petition

I. Background

On February 14th, 2006, Conrad Lautenbacher, Under Secretary of Commerce for Oceans and Atmosphere and National Oceanic and Atmospheric Administration (“NOAA”) Administrator, announced an “open science” policy applicable to NOAA employees.³ The message encouraged NOAA scientists to communicate to the public “freely and openly.” Furthermore, Lautenbacher said that, “We ask only that you specify when you are communicating personal views and when you are characterizing your work as part of your specific contribution to NOAA’s mission.”

On March 29, 2007, however, the Bush Administration DOC⁴ explicitly repealed this policy when it issued an administrative order establishing a new public communications policy covering all DOC employees. The current order governing public communications, DAO 219-1, went into effect on April 30, 2008.

The current policy provides only a limited “carve-out” for scientific research communications, which it calls “Fundamental Research Communications.”⁵ With

³ E-Mail from Conrad C. Lautenbacher, Jr., Under Secretary of Commerce for Oceans and Atmosphere and NOAA Administrator (Feb. 14, 2006, 01:44 EST), *available at* http://www.peer.org/docs/noaa/06_15_2_sci_open.pdf.

⁴ NOAA is an Operating unit within DOC.

⁵ Defined as “a Public Communication that relates to the Department’s programs, policies or operations and takes place or is prepared officially...and that deals with the products of basic or applied research in science or engineering, the results of which are ordinarily published and shared broadly within the scientific community, so long as the communication does not contain information that is proprietary, classified, or restricted by federal statute. (6.02). See also Media guidance. (Public Communication prepared as part of your job regarding the products of basic or applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Matters of policy, budget or management are not considered Fundamental Research Communications.)

regards to their “Fundamental Research Communications,” DOC scientists are not required to coordinate with Public Affairs specialists before publicly making these communications. However, DAO 219-1 does not abrogate any internal procedures for handling public communications and/or research communications that are already in place within Department operating units. Thus, for operating units with established review and approval procedures, the new policy still prevents DOC staff from communicating any relevant information, even if prepared and delivered on their own time as private citizens, which has not been reviewed or approved by the official chain-of-command.

Specifically, the order provides that: “Based on the operating unit’s internal procedures,” any “fundamental research communication” must, “before the communication occurs,” be submitted to and approved by the designated “head of the operating unit.”⁶ While the directive states that approval may not be withheld “based on policy, budget, or management implications of the research,” it does not define these terms and limits any appeal to within Commerce.⁷

Furthermore, employees must give the DOC at least two weeks “advance notice” for any prepared written, oral or audiovisual presentation prepared non-officially⁸ if it involves “a matter of official interest to the Department because it relates to Department

⁶ DAO 219-1 § 7.01

⁷ DAO 219-1 § 12

⁸ I.e. a “public communication” that does not meet the requirements of DAO 219-1 § 6.03a. § 6.03a states that an “Official Communication” takes place or is prepared: 1. at the direction of a superior; 2. substantially during the official working hours of the employee; with substantial use of U.S. Government resource(s); or with substantial assistance of U.S. Government employee(s) on official duty.

programs, policies or operations.”⁹ According to guidance issued by NOAA regarding implementation of the order, “The review of Non-Official Communications of Interest is limited to matters of official interest to NOAA that relate to your job or area of expertise or duties as a NOAA employee.”¹⁰ However, Section 12.01 provides that an employee’s immediate supervisor “shall determine the nature of a communication.” As such, an employee’s supervisor may alter the designation of a public communication, subjecting it to a different clearance regime. If the head of the operating unit determines that the communication is a “Fundamental Research Communication,” he then possesses the power to disapprove the communication. And while he may not do so based on “the policy, budget, or management implications of the research,” this limitation is not clearly delineated, and therefore it remains open to misapplication.

The policy markedly impacts NOAA, an agency within the DOC and home to a number of accomplished and highly skilled federal scientists. While the DOC order has not been implemented within the National Weather Service (“NWS”),¹¹ an agency within NOAA, federal scientists in NOAA’s other offices, such as the Office of Oceanic and Atmospheric Research, remain subject to, and stifled by, DAO 219-1.

II. DAO 219-1 Limits Freedom of Speech of Employees on Matters of Public

Concern

⁹ DAO 219-1 at § 11.01b

¹⁰ NAT’L OCEANIC AND ATMOSPHERIC ADMIN., GUIDANCE FOR NOAA EMPLOYEES REGARDING IMPLEMENTATION AND INTERPRETATION OF DAO 219-1 3 (2007), *available at* <http://www.noaa.gov/mediaguidance.htm>.

¹¹ See E-mail from Edward Young, Chief of Technical Services Division, Pacific Region, NOAA to US NWS Pacific Region Offices (Nov. 19, 2008, 11:12:01 PST), *available at* http://www.peer.org/docs/noaa/1_7_09_NOAA_gag_e-mail.pdf.

A. The Rule Places Limits on Speech

By continuing the policy of prior approval of fundamental research communications and establishing a “policy review” of non-official communications of interest, the DOC infringes scientists’ First Amendment rights. The DOC policy on public communications should not preserve operating units’ chain-of-command policies requiring prior approval and should not subject non-official communications to prior review.

It is well established that government workers do not forfeit their First Amendment rights simply by accepting public sector employment.¹² Courts have proclaimed that government restraints on employee speech must balance the interests of employees, as citizens, commenting upon matters of public concern, and the interest of the State, as employer, in promoting the efficiency of the public services it performs through its employees.¹³ So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.¹⁴

Prior review and approval policies, such as DAO 219-1, impose restraints on employee speech that are not necessary for the efficient and effective operation of DOC. In fact, the existence of pre-clearance requirements interferes with efficient and effective operation by raising the specter of self-censorship, even among those who ultimately receive permission to speak.¹⁵ DAO 219-1 restrains DOC employee speech by giving officials review and approval authority over employee communications, thereby

¹² *Wernsing v. Thompson*, 423 F.3d 732, 750 (7th Cir. 2005).

¹³ *See, e.g., Crue v. Aiken*, 137 F.Supp.2d 1076, 1085 (D. Ill. 2001).

¹⁴ *See, e.g., Connick v. Myers*, 461 U.S. 138, 150 (1983).

¹⁵ *See Wernsing, supra* note 12, at n. 4.

discouraging employees with dissenting or controversial, but still scientifically sound, views from speaking publicly about such information. Furthermore, the policy's appeals process is restrictive and the policy lacks unambiguous standards to limit the discretion of agency decision-makers. While the DOC has an interest in maintaining a public communications policy that promotes efficiency in fulfilling its mission, the policy at hand is not narrowly tailored to serve this interest.¹⁶

B. The Rule Deters Communication Regarding Matters of Public Concern

DAO 219-1 preserves barriers that impede vital scientific information from reaching the public. NOAA's response to the Deepwater Horizon oil spill demonstrates the consequences of the current policy. After the drilling rig explosion on April 20, 2010, resulted in a sea floor oil gusher, NOAA initially issued a 5,000 barrel-a-day flow rate estimate on April 28, 2010, a startlingly small estimate that minimized the troubling calculations of scientists within the agency.¹⁷ One scientist funded by NOAA released a figure much higher than the government's initial estimate, and found himself being pressured to retract it by officials at the agency.¹⁸ NOAA's scientists' initial worst-case scenario calculation pegged the estimated flow within the range of 64,000 to 110,000 barrels per day.¹⁹ The most recent official government estimate is 35,000 to 65,000

¹⁶ The test for a constitutional speech restriction is whether the restriction is narrowly tailored to serve a proven compelling governmental interest. See, e.g. *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 104 S.Ct. 2839, 2849, 81 L.Ed.2d 786 (1984); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 637, 100 S.Ct. 826, 836, 63 L.Ed.2d 73 (1980); *Organization for a Better Austin v. Keefe*, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577, 29 L.Ed.2d 1 (1971) (governmental interest must be proved in the record).

¹⁷ Tom Dickinson, *The Spill, The Scandal, and The President*, ROLLING STONE, June 8, 2010, at 5-6, available at http://www.rollingstone.com/politics/news/17390/111965?RS_show_page=0

¹⁸ *Id.* at 8.

¹⁹ *Id.* at 6.

barrels per day.²⁰ Presumably, NOAA scientists were stifled by their superiors from going public with their stark, but scientifically accurate, assessment.

NOAA's public communications regarding sub-surface oil plumes were also likely affected by its chain-of-command policy. A NOAA-commissioned research cruise, the *Jack Fitz*, took extensive samples up and down the water column near the Deepwater Horizon spill site the week of May 10, 2010, but NOAA officials did not publicly disclose any information related to their findings despite processing and logging the samples with incident command.²¹ NOAA-sponsored scientists onboard *The Pelican* discovered and tracked a subsurface plume, and were later rebuked by NOAA Director Jane Lubchenco for blogging "misleading, premature and, in some cases, inaccurate" information.²²

According to reports, NOAA officials also presented conclusive data regarding sub-surface oil at a closed-door meeting with scientists in Baton Rouge, Louisiana. In public, however, NOAA and Lubchenco balked at detailing these findings on sub-surface plumes.²³

Because of the internal procedures left in place at NOAA, the public, including non-NOAA scientists, has been deprived of critical scientific information related to an urgent environmental matter. Under The Supreme Court's First Amendment

²⁰ *Oil estimate raised to 35,000 to 60,000 a day*, CNN, June 15, 2010, <http://www.cnn.com/2010/US/06/15/oil.spill.disaster/index.html?hpt=T1&iref=BN>.

²¹ Dan Froomkin, *NOAA Director Toes BP Line; Won't Confirm Sub-Surface Oil Despite Evidence*, HUFFINGTON POST, June 6th, 2010, http://www.huffingtonpost.com/2010/06/02/noaa-director-toes-bp-lin_n_598461.html.

²² *Id.*

²³ *Id.*

jurisprudence, a listener's interest enjoys protection, just as the speaker's interest does.²⁴

The DOC must repeal the “policy review” barriers of DAO 219-1 so as to protect the public’s right to valuable scientific information and ensure that DOC scientists are able to communicate this information to the public in the future.

III. The Rule Provides Conflicting Directives for DOC Employees

The Secretary should eliminate “policy review” from the current order because the order does not provide DOC employees with clear guidelines on which to base their behavior. The order instructs employees that if they are unsure whether a scientific conclusion within a fundamental research communication has been officially approved “then the researcher must make clear that he or she is representing his or her individual conclusion.”²⁵ Yet, the order also states that non-official communications “may not take place or be prepared during working hours.”²⁶ This conflict means that every scientist who answers an unexpected question at a conference puts his or her career at risk by giving an honest answer. The result will be a chilling effect on free and open public communications by DOC scientists.

While the Department stated in its FAQ related to the order that, “This policy

²⁴ See *Moore v. City of Kilgore*, 877 F.2d 364, 370-1(5th Cir. 1989) (citing *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S.Ct. 1817, 1822-23, 48 L.Ed.2d 346 (1976) (citizens have a right to receive advertising information); *Kleindienst v. Mandel*, 408 U.S. 753, 758, 762-65, 92 S.Ct. 2576, 2579, 2581-83, 33 L.Ed.2d 683 (1972) (citizens' right to hear alien's speech); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 386, 89 S.Ct. 1794, 1804, 23 L.Ed.2d 371 (1969) (purpose of First Amendment is to preserve an uninhibited marketplace of ideas in which truth ultimately will prevail; thus, the public must be able to hear the ideas and experiences to be able to participate); *Thomas v. Collins*, 323 U.S. 516, 534, 65 S.Ct. 315, 324, 89 L.Ed. 430 (1945) (right of workers to hear what labor organizer had to say abridged by state law requiring organizers to register before soliciting union membership); *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S.Ct. 862, 863, 87 L.Ed. 1313 (1943) (freedom of speech necessarily protects the right of citizens to receive information)).

²⁵ DAO 219-1 § 7.03

²⁶ DAO 219-1 § 11.03

provides clear guidance as to what kinds of public communications [employees] can engage in using taxpayer-funded resources,” the line between what constitutes a “scientific conclusion” and a “personal opinion” is ambiguous. The DOC policy thus adds conflicting directives that make routine media communications confusing and burdensome.

Furthermore, agency communication restrictions are covered by collective bargaining agreements which set working conditions. This leaves an odd situation where climate scientists can speak, as NWS has not implemented DAO 219-1, but marine scientists and oceanographers need permission in advance before answering even basic questions. This approach needlessly complicates matters for DOC scientists and provides some with more freedom of expression than others. The DOC must eliminate “policy review” and streamline its policy so as to provide all of its federal scientists with the confidence to perform their jobs and publicly transmit their conclusions without the fear of reprisal.

IV. Current Requirements Undermine DOC Objectives and Limit Transparency and Scientific Integrity

A. The Substantive Effect of DAO 219-1 Conflicts with the Order’s Enumerated Principles.

In issuing DAO 219-1, the DOC stated that the objective of the order is to support the public policy goals of the Department and promote *broad* public understanding of the work of the Department.²⁷ It then included several principles underlying the order. For

²⁷ DAO 219-1, § 4.01 (emphasis added).

example, § 4.01c of the order states that “Scientific progress relies on the broad and open dissemination of research results. An open exchange of scientific ideas, information, and research achieves the Department’s vision for an informed society that uses objective and factual information to make the best decisions.” Section 4.01d of the order says, “In support of a culture of openness...Department employees may...freely and openly discuss scientific and technical ideas, approaches, findings and conclusions based on their official work.”

DAO 219-1, however, fails to advance these principles. Operating units within the Department that had already established prior approval procedures for public communications still constrain the ability of DOC scientists to “freely and openly” discuss their research and conclusions without the blessing of their superiors. Furthermore, scientists who conduct research in their own time are ensnared by this regime if their work is determined to be “of interest” to the department. Thus, the current order disrupts, rather than promotes, the open dissemination of scientific ideas, approaches and findings. Eliminating the “policy review” provisions of DAO 219-1 will provide a “free” and “open” communications policy and fully advance the explicit principles set out in § 4 of the order.

B. DAO 219-1’s Current Requirements Harm DOC Scientific Integrity and Transparency, Key Goals of the Obama Administration.

The current policy is at odds with President Obama’s objectives concerning scientific integrity and transparency. On March 9, 2009, President Obama issued an Executive Memorandum to all federal departments and agencies declaring his intent to

adopt policies that protect scientific integrity.²⁸ For example, the memo states, “Political officials should not suppress or alter scientific or technological findings and conclusions. If scientific and technological information is developed and used by the Federal Government, it should ordinarily be made available to the public. To the extent permitted by law, there should be transparency in the preparation, identification, and use of technological information in policymaking.”²⁹

The memo directed its recipients to develop recommendations for Presidential action designed to guarantee scientific integrity throughout the Executive branch. These recommendations were supposed to be based on certain principles, including: each agency should have appropriate rules and procedures to ensure the integrity of the scientific process within the agency; each agency should make available to the public the scientific or technological findings or conclusions considered or relied on in policy decisions; each agency should have in place procedures to identify and address instances in which the scientific process or the integrity of scientific and technological information may be compromised.³⁰

The DOC, however, still retains Bush Administration policies that compromise scientific integrity and obscure the scientific process. By retaining and imposing barriers that prevent scientists from communicating with the public, DAO 219-1 limits the effectiveness of the Department’s scientists, thus weakening the important role that these scientists play in understanding the issues that impact our Nation’s economic, social, and

²⁸ Memorandum from Barack Obama, President, to The Heads of Executive Departments and Agencies 1 (Mar. 9, 2009), *available at* http://www.peer.org/docs/dc/09_12_05_obama_science_integrity_memo.pdf.

²⁹ *Id.*

³⁰ *Id.* at 2.

environmental needs. In order to advance the objectives laid out in President Obama's memo, the DOC must eliminate this Bush-era "policy review" artifact.

V. A Public Disclaimer Policy Serves DOC Interests and Promotes Free Speech.

The Fish and Wildlife Service's (FWS) policy concerning public communications is sensible and the DOC should implement a similar policy. Articles and papers by FWS scientists are not required to undergo "policy review" by agency management prior to being submitted for publication either inside or outside the Service. Furthermore, studies not officially endorsed by the Service must bear a simple one-sentence disclaimer: "*The findings and conclusions in this article are those of the author(s) and do not necessarily represent the views of the U.S. Fish and Wildlife Service.*" The policy covers employees' published scientific information that is written during official duty hours, based primarily on knowledge an employee acquires during duty hours, or based on scientific activities that the Service funded in whole or in part.

In announcing its policies, FWS noted that it sought to extricate its scientist employees from, "an ill-defined, cumbersome, and potentially stifling process of 'policy review.'" While empowering scientists, the FWS policy still allows for the agency to effectively manage its official communications through the retention of a disclaimer policy. DOC should follow suit. According to NOAA scientists, "It is sufficient that employees be instructed that any non-official communication shall not contain classified or restricted material; violate applicable ethical standards; or improperly attribute the personal views of the employee to the Department. The requirement of a disclaimer

(Section 11.01c) is a reasonable requirement and not inconsistent with an employee's First Amendment rights."³¹

The DOC should provide its own scientists with a reasonable and permissive public communications policy that encourages them to broadly disseminate the fruits of their work. To do this, it should eliminate the "policy review" provisions of DAO 219-1 and incorporate a disclaimer policy for public communications. This will not only eliminate the burdensome and bureaucratic "prior review" regime currently in place, thereby streamlining DOC procedures, but it will also encourage scientists to express themselves more freely without having to compromise their work or fear of reprisal.

³¹ Objections from National Weather Service Employees Organization, *available at* http://www.peer.org/docs/doc/07_02_04_nwseo_objections.pdf. (parenthetical added)

Conclusion

The current order prohibiting DOC employees from engaging in public communications without prior review and approval is inconsistent with the First Amendment, the goals of the DOC, and the President's objectives of transparency and integrity in the Federal scientific process. It also creates a chilling effect on scientists who fear the threat of reprisal because of the conflicting directives the order provides. Without a repeal of the "policy review" provisions, scientists within the DOC will continue to work under a *de facto* gag order for fear of putting their careers in jeopardy. The net effect of the constraints posed by the DOC order is that dialogue among scientists, both within and outside government, is stunted.

The Secretary should eliminate the "policy review" gag order and allow federal scientists to freely communicate and argue about science, both on the job and off, thus embracing openness and cooperation among federal scientists and specialists. The role that DOC scientists play in understanding and predicting changes in Earth's environment and conserving and managing coastal and marine resources to meet our Nation's economic, social, and environmental needs is crucial. The right to speak or write should not vary from agency to agency - DOC scientists deserve a policy that respects and champions their important voice.

Accordingly, PEER petitions the DOC to eliminate the “policy review” provisions of DAO 219-1 §§ 7 and 11 and return to an “open science” posture.

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