



PUBLIC EMPLOYEES FOR ENVIRONMENTAL RESPONSIBILITY

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August 16, 2023

U.S. Department of Health and Human Services
Office of the Assistant Secretary for Planning and Evaluation
Office of Science and Data Policy
Attn: Scientific Integrity Comments
200 Independence Avenue SW, Room 429E
Washington, DC 20201

Email: scientificintegrity@hhs.gov

RE: PEER Comments on draft Scientific Integrity Policy of the U.S. Department of Health and Human Services

I am writing on behalf of Public Employees for Environmental Responsibility (PEER) to express our profound disappointment with the provisions of the draft Scientific Integrity Policy of the U.S. Department of Health and Human Services (HHS) now available for public comment.

PEER has provided legal representation to federal scientist struggling with scientific integrity issues for more than 30 years. Our work help lay the foundation for the 2009 Obama Directive on Scientific Integrity.¹ During the Obama presidency, PEER filed more complaints on behalf of scientists for violations of agency scientific integrity policies than any other organization.

Based upon this experience, PEER has provided the White House Office of Science & Technology Policy (OSTP) extensive feedback in its development of its Model Policy Framework. However, both the OSTP Model Policy and HHS draft policy exhibit the same fundamental weaknesses that led Since President Biden to issue his January 2021 Memorandum on Restoring Trust in Government through Scientific Integrity and Evidence Based Policymaking.²

PEER's comments address five principal reasons that this draft policy will fail to meet President Biden's goal of restoring public trust in federal government science:

- I. Dangerous New Restrictions on Scientist Communications
- II. Complete Absence of Independent Review of Misconduct Allegations
- III. Lack of Safeguards Against Research Suppression
- IV. Missing Protections Against Retaliation
- V. Unspecified Sanctions for Violations

¹ [Memorandum for the Heads of Executive Departments and Agencies 3-9-09 | whitehouse.gov \(archives.gov\)](#)

² [Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking | The White House](#)

Turning to each of these concerns in order:

I. Dangerous New Restrictions on Scientist Communications

In the draft HHS policy section entitled “Ensuring the Free Flow of Scientific Information” is this provision:

“4. Allow, subject to limitations of government ethics rules, HHS scientists to express their personal views and opinions with appropriate written or oral disclaimers, including on social media. **HHS scientists** may name HHS as their employer in the context of biographical information but **shall refrain from making or publishing statements that could be construed as being judgments of, or recommendations on, HHS or any other Federal Government policy**, including the use of HHS or other U.S. Government seals or logos, **unless they have secured appropriate prior approval to do so.**” (Emphasis added)

In PEER’s view, the underlined language has no place in any agency scientific policy. Moreover, HHS does not identify what public policy is served by this poorly written sweeping restriction on scientist speech.

The fundamental sentiment behind this provision seems to be that federal scientific research is fine so long as it does not ruffle any political feathers. HHS apparently fails to recognize that scientific research that carries policy implications is at the greatest risk of suppression or political manipulation – for precisely that reason – and, therefore, is in greater need for protection – again, for precisely that reason.

Our concerns with this provision are further heightened by the following issues –

A. Contradictory Language

On one hand, the HHS draft declares that scientists may “express their personal views and opinions” but, on the other hand, states that scientists may not make or publish any “statements that could be construed as being judgments of, or recommendations on, HHS or any other Federal Government policy” without permission of that agency.

The draft policy makes no attempt to reconcile these two seemingly conflicting statements. Moreover, the reference to adherence to unspecified “government ethics rules” as a predicate to expressing personal views suggests that the expression of personal opinions would also be subordinate to an official agency scientific integrity policy containing a restriction about even a comment upon a federal policy, let alone a recommendation, is prohibited.

At the very least, HHS should clarify this apparent contradiction. As argued below, HHS should completely discard this misguided prohibition against statements that “could be construed” as comments or recommendations on federal policies.

B. Similar Provision Abused by U.S. Department of Agriculture

This provision is apparently based upon a similar provision in the U.S. Department of

Agriculture’s scientific integrity policy.³ On July 14, 2021, PEER wrote to OSTP specifically warning about this provision in the USDA policy.⁴ Unfortunately, our warning to OSTP fell on deaf ears as it included this language in its “Model Scientific Integrity Policy” released this past January.⁵ Nor did OSTP respond to a letter sent this past April by PEER and more than a dozen public interest groups urging the removal of this language from the OSTP Model.⁶

Among the reasons for these warnings was that USDA had used this provision as the basis for ordering a staff entomologist represented by PEER to remove his name from a peer-reviewed journal article on how monoculture farming reduces diversity in insect populations, limiting beneficial pollinators. This same provision of the USDA policy was also cited as the basis for barring this scientist from speaking at a conference about effects on pollinators from genetically modified crops and the insecticides used to treat them. He later resigned in frustration, convinced that he could no longer conduct meaningful research while employed at USDA.

Beyond our entomologist client, PEER received reports from other USDA scientists that managers had initiated –

- Directives not to publish data on certain topics of particular sensitivity to industrial agricultural interests, such as pesticide manufacturers;
- Orders to rewrite scientific articles already accepted for publication in a peer-reviewed journal to remove sections which could provoke industry objections; and
- Inordinate, sometimes indefinite, delays in approving submission for publication of scientific papers that may be controversial with agricultural interests.

In short, this provision that HHS proposes to adopt was used, and is still being used, to pressure USDA scientists working on topics with direct relevance to industry interests not to do anything to upset important “stakeholders.”

These concerns were highlighted in a USDA Office of Inspector General “Survey of USDA Scientists Regarding Scientific Integrity” released on April 13, 2017. The IG polled scientists from four branches of the agency: Agricultural Research Service, Forest Service, Economic Research Service and Natural Resources Conservation Service and found –

- Nearly a tenth of respondents (more than 120 scientists) reported their research findings have “been altered or suppressed for reasons other than technical merit.” However, not one filed a Scientific Integrity complaint;
- The vast majority felt USDA’s Scientific Integrity Policy made no difference in their work. Of those who saw a difference more said it made matters worse rather than better; and

³ See USDA DR/1074-001, Sec.6(e)1)c1

⁴ https://peer.org/wp-content/uploads/2021/07/7_14_21-SI-Should-Not-Vary-from-Agency-to-Agency.pdf

⁵ <https://peer.org/ostp-slips-gag-rule-into-model-scientific-integrity-policy/>

⁶ https://peer.org/wp-content/uploads/2023/04/Organization_Letter_Scientific_Integrity_Framework.pdf

- A majority did not think that USDA strongly promotes scientific integrity or refused to venture an opinion.⁷

Comments from individual USDA scientist were illustrative, including statements on USDA’s scientific integrity policy, such as –

“...seems like it is designed to protect the agency only not a code for individual scientist interacting with other scientists.”

“Some topics that are interpreted as highly controversial are closely monitored and any interaction with media for instance is either discouraged or highly scrutinized before being allowed to speak.”

“Nothing has really changed, because the SIP still provides managers with the ability to stop communication of anything they want. The wording has changed and sounds better, but reality has not changed.”⁸

HHS should be aware that its adoption of such a far-reaching restriction is bound to create a chilling effect among scientists, just as it did at USDA. Rather than encouraging sharing of information by federal scientists it has – and continues to have – the opposite effect of constraining it.

C. Broad Chilling Effect – Dickey Amendment on Steroids

In the 1997 federal omnibus spending bill, the Congress inserted a rider, called The Dickey Amendment (named after its author Rep. Jay Dickey (R-AR) that provided “none of the funds made available for injury prevention and control at the Centers for Disease Control and Prevention & Prevention (CDC) may be used to advocate or promote gun control.”⁹

Although the Dickey Amendment did not explicitly prohibit research on gun violence, for nearly two decades the CDC avoided all research on gun violence for fear it would be financially penalized. Such research finally resumed after Congress narrowed the language and earmarked funding for gun violence research in the federal omnibus spending bill for FY2020.¹⁰

The Dickey Amendment language was not nearly as broad as the language HHS proposes to insert in its Scientific Integrity Policy. The former language banned activity “to advocate or promote...” By contrast, the HHS draft language outlaws any statement “that may be construed as a judgment of, or recommendation on” any policy by any federal agency (not just HHS agencies) – a far more nebulous and potentially wide-ranging prohibition.

If the Dickey bar against blatant advocacy and promotion worked to effectively stifle research, our concern is that this more far-reaching HHS language could have a similar but far more extensive chilling effect on research across an array of controversial subjects studied by HHS agencies. Under the broad draft HHS language, it is not difficult to imagine many scenarios in

⁷ See USDA Office of Inspector General “Survey of USDA Scientists Regarding Scientific Integrity” April 13, 2017 [16-010-01.pdf](https://www.usda.gov/inspector-general/reports-and-testimony/16-010-01.pdf) (peer.org)

⁸ See [4 20 17 USDA Scientists in Their Own Words.pdf](https://www.usda.gov/inspector-general/reports-and-testimony/16-010-01.pdf) (peer.org)

⁹ <https://www.govinfo.gov/content/pkg/PLAW-104publ208/pdf/PLAW-104publ208.pdf>

¹⁰ <https://www.nature.com/articles/d41586-019-03882-w>

which this provision could be used to threaten public scientists or stifle controversial research across a wide range of topics. For example –

- CDC research detailing differing COVID-19 infection rates by state *could be construed* as a judgment on the need for, or merits of, greater masking or quarantine practices in states with lower infection rates;
- Food and Drug Administration on the health effects of “morning-after” pills *could be construed as* a recommendation against restrictions to access; and
- Publicizing medical breakthroughs achieved in National Institutes of Health funded research using fetal tissues *could be construed as* a recommendation for HHS Secretary Becerra’s recent actions to resume federal funding for research using fetal tissues.¹¹

Further, it is also quite possible the HHS language could spur self-imposed restrictions on gun violence research to avoid statements that *could be construed* as judgments on weak federal gun control policies.

D. Restriction Subject to Abuse – Especially with Change of Administration

While current HHS leadership may have no intention of applying this language in ways suggested above, it has no control over how a succeeding administration may use this prohibition. In other words, HHS should have had second thoughts about adopting language that a Trump or DeSantis administration could use to stifle research – all while claiming with a straight face that they are simply enforcing a Biden scientific integrity protection.

Consider the case of Dr. George Luber, an epidemiologist, who served as Chief of the Climate and Health Program at CDC. He had been the very public face of climate science at CDC, frequently appearing on TV news and speaking at professional conferences. He is the lead author for the Fourth National Climate Assessment’s Chapter on Human Health, released last month, and was also the lead author for a report the U.S. Supreme Court cited in its seminal 2007 ruling that greenhouse gases should be regulated under the Clean Air Act.

In February 2017, shortly after the Trump inauguration, CDC cancelled, over his objections, a symposium Dr. Luber was slated to host featuring Al Gore. He was then directed to stop using the phrase “climate change” and forbidden from responding to any further media or congressional inquiries.

In March 2018, CDC revoked his badge, phone, and credentials, placing him on a BOLO (be on the lookout) list as a security risk, barring him from entering the facility except under armed guard and with prior approval, and then only to retrieve materials. Every time he went to his office, Dr. Luber and his car were thoroughly searched in front of his colleagues.¹²

¹¹ <https://www.npr.org/2021/04/16/988221424/heres-what-you-should-know-about-bidens-new-rules-for-fetal-tissue-research>

¹² <https://peer.org/persecution-of-top-federal-climate-scientist/>

In a letter dated October 22, 2018, CDC Environmental Health Center Director Patrick Breysse (the same official who ordered Dr. Luber to stop using the term “climate change”) proposed his removal based upon an alleged failure to obtain permission to author a 2015 book, give lectures at Emory University, and more than 30 other charges. Had the HHS policy been in place, Dr. Luber could also have been charged with lectures and writing that could easily be construed as judgments on the effects of several federal policies, including those related to the release of greenhouse gases.

This proposed action was withdrawn after a reporter for the *New York Times* called to inquire about it. PEER later successfully negotiated an outplacement for Dr. Luber so that he is able to continue his research free from the constraints CDC wished to impose. The point of this episode is to underline how quickly political strictures can be placed upon scientists, even those within agencies such as CDC.

The many other attempts to stifle science during the Trump tenure need not be recounted here¹³, except to note that they were the basis for President Biden declaring that the Obama-era scientific integrity policies obviously did not work to prevent these abuses and must be strengthened. Above all, HHS must act to strengthen its Scientific Integrity Policy, not weaken it.

We urge HHS leadership to consider very carefully how this language, if finalized, could be used in a DeSantis or a second Trump presidency. It would be most unfortunate if these potential future administrations would have an additional tool to suppress unwelcome scientific research that was supplied to them by the Biden administration.

E. Unconstitutional As Applied to Scientists’ Personal Statements

Finally, OSP should recognize that this policy would be unconstitutional as applied to government scientists speaking or writing as private citizens. On their own time, government scientists retain the free speech rights of any citizen.

This provision could be used to violate a government scientist’s First Amendment right to speak freely in their capacity as citizens on matters of public concern.¹⁴ In addition, this provision can be used to prevent agency scientists, as well as private scientists collaborating with or contracting with a federal agency, from even discussing the policy implications of vital research.

The First Amendment is not absolute, however, and courts apply a balancing test that weighs the public importance of the speech versus any potential disruption of efficient government operations.¹⁵ In all likelihood, such a calculus should weigh heavily in favor of the public interest value of research conducted by a federal government scientist against potential embarrassment to a government agency.

¹³ <https://www.scientificamerican.com/article/what-you-know-about-trumps-assault-on-science-was-just-the-tip-of-the-iceberg/>

¹⁴ See <https://peer.org/usda-sued-to-end-scientific-censorship/>

¹⁵ See *Pickering v. Board of Education*, 391 U.S. 563 (1968)

Significantly, one of the stated aims of the HHS draft policy is to promote a free and open exchange of scientific information. Yet, this poorly worded, overly broad provision clearly does the opposite.

II. Complete Absence of Independent Review of Misconduct Allegations

Under the HHS draft policy, the key official reviewing allegations of scientific misconduct or lack of integrity will be an official known as the Scientific Integrity Officer or SIO. Among the SIO functions are --

- “complete an initial assessment of each reported concern and determine whether to request additional information from the complainant or others and to determine whether a formal investigation is warranted”
- “Once the investigation is complete and a report has been submitted to the HHS SIO, the SIO will determine whether scientific integrity was lost, and if so, what corrective scientific actions are recommended.”
- Draft procedures for how the HHS policies will be implemented in each HHS agency,

A. No Independence

The draft HHS policy stipulates that the SIO must be “a senior career employee.” There is no effort made to ensure that the SIO is independent of his or her chain-of-command. In PEER’s experience, mid-career civil servants are often concerned about taking actions that will hinder their later career success. Acting to confirm a scandal within agency ranks or leadership is usually not a path for career advancement.

It is not publicly credible for a system designed to ensure integrity to depend almost entirely on an official designated by the top officials he is supposed to investigate.

An example of the type of political interference that can hinder an SIO’s work can be found in PEER’s representation of an SIO who was removed after pursuing a complaint against the staff of the Secretary of Interior.¹⁶ In a partial recognition of this concern, the HHS draft includes this curious provision:

“Scientific Integrity Officials at HHS are protected by all applicable employee rights as required by law. Consistent with applicable law, an SIO or other scientific integrity staff may not be terminated or reassigned without good cause or legitimate organizational reason. Possible good cause reasons include, but are not limited to, consistent poor performance, inefficiency, neglect of duty, malfeasance, conviction of a felony, conduct involving moral turpitude, knowing violation of a law, rule, or regulation, gross mismanagement, gross waste of funds, and abuse of authority.”

¹⁶ <https://peer.org/scientific-whistleblower-complaint-resolved/>

While it is of scant comfort that HHS will accord its designated SIOs “all applicable employee rights as required by law,” that is hardly an assurance that they are independent or will exercise judgment independent of their superiors, particularly on matters of political sensitivity. Further, the notion that an SIO may be removed for an unspecified “legitimate organizational reason” apart from good cause underlines the political vulnerability of the occupants of this pivotal post.

More importantly, this supposed safeguard overlooks the greater likelihood that SIOs will act to do anything possible to make official reprisal less likely. In PEER’s experience, we have seen several examples of SIOs dismissing valid complaints, declining to investigate complaints restricting the scope of investigations when they occur, or shielding political appointees.¹⁷

B. Murky Path to Appeal

Under current scientific integrity policies, when an SIO arbitrarily dismisses or derails a complaint, there is little recourse provided. The HHS draft policy declares that--

“The complainant and respondent will be given the opportunity to appeal a finding or any corrective scientific actions taken.”

But the draft does not indicate who will hear that appeal or the standard to be used to decide this adjudication. Nor is it clear whether findings that no investigation is warranted will be appealable.

The HHS draft does indicate that some oversight for SIOs would reside in “a Scientific Integrity Council (Council) comprising one senior career employee from each relevant HHS OpDiv/StaffDiv and the directors of the HHS Offices of Research Integrity and Human Research Protections.” It is not clear why these officials would be expected to be objective or act in a way to bring potential dishonor to the very programs they oversee.

One of the Council’s functions is to ensure that –

“the HHS SIO, together with other OpDiv/StaffDiv scientific integrity officials, as applicable, draft procedures to respond to allegations of loss of scientific integrity in a timely, objective, and thorough manner. These procedures shall include an initial assessment and review, a fact-finding process, an adjudication or determination including description of remedies and preventative measures to safeguard the science, an appeals process, follow-up to track implementation of remedies, and reporting.”

This language suggests that there may or may not be an avenue for independent appeal of an SIO or Council decision since those “procedures” have yet to be drafted in the more than two years since the original Biden directive. Nor is there a firm timetable for the promulgation of these procedures. Further, it appears that these procedures will be developed without any further input or review from the public, employee unions, or anyone else.

Despite claiming that these eventual procedures will ensure the redress of deviations from scientific integrity will occur “in a timely, objective, and thorough manner” the genesis of this draft policy does not bode well for the timeliness or thoroughness of the promised final rule.

¹⁷ <https://peer.org/can-biden-science-task-force-break-old-bad-habits/>

Since the final HHS rules are a largely unfinished work in progress, their own ultimate objectivity and integrity remain to be seen.

C. No Transparency

The draft policy charges the Council with overseeing investigations, while providing little detail on these investigations will function. The pertinent provision of the draft policy reads:

“Should an investigation be opened, an investigation committee consisting of the HHS SIO and at least two other Scientific Integrity Council members, or their delegates, will be convened. The committee will develop a factual record by exploring the allegation(s) in detail and consulting with subject matter experts, interviewing witnesses, and reviewing documentation as needed. This record will be documented in a report from the committee to the SIO.”

There is no provision that this report of investigation be made publicly available. To the contrary, the draft policy suggests that HHS will take steps to cloak the specifics of cases from public view:

“HHS shall publish an annual report on the number and outcomes of investigations and appeals involving allegations of loss of scientific integrity. To the extent possible, all descriptions of investigations and appeals will be anonymized.” (Emphasis added)

It is not clear on what basis such a report could be withheld from release under the Freedom of Information Act. In the past, PEER has successfully used to FOIA to force release of such reports over agency objections.¹⁸

More significantly, President Biden’s directive that started this process had the words “Restoring Trust in Government Through Scientific Integrity” in its title. It is hard to argue that releasing only after-the-fact summaries that have been “anonymized” will restore public trust in the integrity of federal science. Public credibility in the integrity of federal science requires a degree of transparency that this draft policy sorely lacks.

III. Lack of Safeguards Against Research Suppression

The HHS draft declares that one of its objectives is to “Ensure that scientific findings and products are not unduly suppressed, delayed, or altered for political purposes and are not subjected to inappropriate influence.” To that end it promises to “Require that technical review and clearance processes include provisions for timely clearance and expressly forbid censorship, unreasonable delay, and suppression of objective communication of data and results without scientific, legal, or security justification.”

Finally, the HHS draft provides –

“It is the policy of HHS to: 1. Encourage timely publication of research such as in peer-reviewed, professional, scholarly journals, HHS technical reports and publications or

¹⁸ See <https://peer.org/senior-officials-skewed-science-to-benefit-xl-pipeline/>

other appropriate outlets. 2. Encourage the sharing of scientific activities, findings, and materials through appropriate avenues including digital repositories.”

Yet, the draft policy does not –

- Define what is meant by “timely clearance” or what constitutes impermissible delay:
- Specify what is a legitimate basis for “technical review”; or
- Indicate if there is any avenue of appeal to speed up an untimely clearance process.

As outlined above, the HHS policy appears to invite agencies to screen potential publications to ensure that they contain no statements that can be construed as judgements on or recommendations about any federal policy. Depending on the topic, such a review may take weeks and involve considerable internal debate.

The draft policy further indicates that “Violations of clearance policies that result in suppression, delay, or alteration of scientific and technological information without scientific, legal, or security justification constitute violations of the HHS Scientific Integrity Policy and may be reported under the Procedures for Addressing Scientific Integrity Concerns.”

However, since clearance policies are not specified, it is unclear what constitutes a “Violation of clearance policies.” Moreover, this remedy requires a formal complaint that may ultimately be referred for resolution back to the very officials who are obstructing its clearance for publication in the first place.

Thus, despite all the rhetoric in the HHS draft about promoting “timely publication” and “sharing” of scientific data, there is nothing the policy that ensures those goals are met or that victimized scientists have any realistic recourse.

IV. Missing Protections Against Retaliation

The HHS draft contains some language suggesting that scientists should not be subject to retaliation, but the language is vague and extremely limited. The key provision of the draft posits a goal to --

“Protect from reprisal those individuals who report allegations of loss of scientific integrity in good faith. Efforts will also be made to protect from inappropriate actions those covered individuals alleged to have compromised scientific integrity.”

First, it is curious that the HHS drafters are equally concerned about those accused of scientific misconduct as it is about protecting those who disclose the misconduct. Nor are the promised protections for the accused delineated.

Second, the purported protection from reprisal is limited to those “who report allegations of loss of scientific integrity in good faith.” However, those who file these reports already have legal protection through the Whistleblower Protection Act (WPA). The WPA covers employee disclosures of any violation of agency rules, and a scientific integrity policy would be such a

rule. 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.¹⁹

However, 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 service²⁰ -- and is not addressed at all in the HHS draft.

The WPA does not protect 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 shield scientists who face blowback after expressing a differing professional opinion – an option explicitly endorsed by the HHS draft policy.²¹ Notably the HHS draft makes no mention of any protections for those who file differing professional opinions, let alone indicate what these protections will be and who would implement them.²²

In short, President Obama’s promise of “additional” protections for scientists who face reprisals due to the substance or context of their research findings will remain unfulfilled by the proposed HHS policy.

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).²³ 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.²⁴

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:

¹⁹ See <https://www.peer.org/scientific-whistleblower-complaint-resolved/>

²⁰ See <https://www.peer.org/whistleblower-protections-for-scientists-sidelined/>

²¹ For example, EPA’s SIP Sec. IV declares that the agency “welcomes differing views and opinions on scientific and technical matters...”

²² 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.

²³ <https://docs.house.gov/meetings/GO/GO24/20170201/105513/HHRG-115-GO24-Wstate-DevineT-20170201.pdf>

²⁴ 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/>

“(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.²⁵ Similarly, OSC could extend protection to scientists if they were covered by an executive directive to that effect, or a directive from a Cabinet Secretary, such as the HHS Secretary.

PEER urges that HHS policy be amended to fill this scientist protection vacuum so that its scientists have some legal protection from official reprisal due to the content of their research or the unwelcome implications flowing from it. Safeguarding these emerging inconvenient truths should be ventral to any scientific integrity policy.

V. Unspecified Sanctions for Violations

The HHS draft provides that the cure to the loss of scientific integrity would be a “corrective action” which it defines as follows:

“Corrective scientific action refers to actions taken to restore the accuracy of the scientific record after a loss of scientific integrity has been determined, consistent with this policy, such as correction or retraction of published materials. In addition to scientific actions, administrative actions may also be taken in response to substantiated violations of this policy.”

Administrative action appears to be synonymous with disciplinary action, such as demotion, suspension, involuntary transfer, up to termination.

The draft specifies that the sole responsibility rests with the HHS Secretary whose role is described as ensuring “that violations of this policy are investigated to the full extent that is described herein, and that appropriate corrective scientific and/or administrative actions are taken as a result of such investigations.”

A. *No Assurance of Consistency in Penalties*

The draft could, but does not, specify what penalty applies to what type of violation or a repeat violation. Thus, there is no guiderail to assure consistent application of sanctions.

Further, there is no provision for any corrective action should the Secretary fail to act. PEER has seen cases where a presidential appointee has failed to take any action despite review panels who have found a favored manager guilty of serious and deliberate misconduct.²⁶

²⁵ <https://www.eeoc.gov/mou/memorandum-understanding-between-us-office-special-counsel-and-equal-employment-opportunity>

²⁶ See <https://peer.org/fish-and-wildlife-service-sued-over-scientific-fraud-documents/>

B. No Punishment for Political Appointees

A 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.²⁷

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.

In 2021, when a member of the White House staff was reported to have engaged in threatening behavior, President Biden immediately had that official removed.²⁸ The White House also issued a statement indicating zero tolerance for acts of incivility by its staff.

The HHS draft lacks 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. Further, when an SIO or review panel determines that a political appointee has engaged in scientific misconduct or caused the loss of scientific integrity, the policy should provide the identity of that official should be reported by the Secretary to the White House and that report should be publicly displayed on the agency website.

Conclusion

For the reasons articulated above, PEER believes that the draft HHS scientific integrity policy fails to meet the standards that President Biden laid out in his Memorandum on Restoring Trust in Government Through Scientific Integrity and Evidence-Based Policymaking of January 27, 2021. We urge that HHS withdraw this draft and rework it to include --

- A guarantee that scientists may freely discuss and write about the possible implications of their research;
- Transparent procedures for independent investigation of allegations, as well as public review of investigatory results and corrective action decisions;
- Clear written policies delineating any clearance procedures for scientists to publish, lecture, or communicate with the media and public about their areas of expertise, including practical and timely enforcement of those guarantees;
- Protections for scientists from retaliation for the content or implications of their research and for scientists who express scientific dissent; and
- Rule providing for consistent penalties for those who violate scientific integrity prohibitions, including provisions for holding political appointees accountable.

²⁷ See, e.g., <https://www.peer.org/scientific-fraud-infests-fish-and-wildlife-service-top-ranks/>

²⁸ <https://thehill.com/homenews/administration/538788-white-house-press-aide-resigns-after-threatening-politico-reporter>

We believe that these elements should be the bedrock of any federal scientific integrity policy, but unfortunately, they are largely absent from this HHS draft.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Ruch". The signature is fluid and cursive, with the first name "Jeff" being more prominent than the last name "Ruch".

Jeff Ruch
Pacific Director
Public Employees for Environmental Responsibility (PEER)

Cc. Secretary Becerra