Public Employees for Environmental Responsibility
Protecting Employees Who Protect The Environment
2000 P Street, NW • Suite 240 • Washington, D.C. 20036
Tel.: 202-265-PEER (7337) • Fax: 202-265-4192
e-mail: info@peer.org • website: http://www.peer.org

Testimony of Jeff Ruch
PEER Executive Director
"*Endangered Species Act Implementation: Science or Politics*?"
The House Natural Resources Committee
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Good morning. My name is Jeff Ruch and I am the Executive Director of Public Employees for Environmental Responsibility (PEER).

PEER is a service organization dedicated to protecting those who protect our environment. PEER provides legal defense to federal, state, local and tribal employees dedicated to ecologically responsible management against the sometimes onerous repercussions of merely doing their jobs. In addition, PEER serves as a safe, collective and credible voice for expressing the viewpoints otherwise cloistered within the cubicles. Headquartered in Washington, D.C., PEER has a network of ten state and regional offices. Most of our staff and board members are themselves former public employees.

On a daily basis, public employees in crisis contact PEER. In our D.C. office alone, we average five "intakes" per day. A typical intake involves a scientist or other specialist who is asked to shade or distort the truth in order to reach a pre-determined result, such as a favorable recommendation on a project. It is in this context that PEER hears from scientists working within the U.S. Fish & Wildlife Services (FWS), as well as the National Marine Fisheries Service (NMFS). My remarks reflect the input we have received from these scientists who feel unable to openly voice their concerns.

In this morning's testimony, I will 1) describe how official manipulation and distortion of Endangered Species Act (ESA) science has become pervasive; 2) explain how scientists are often caught in the political crosshairs of their own agency management with little recourse; and 3) suggest how Congress can ameliorate this state of affairs.

I. Official Manipulation and Distortion of ESA Science Is Pervasive

I do not mean to suggest that the type of political interference described in this testimony originated with the present administration. The ESA has been plagued by politics since its inception.

In December 1997 PEER published a white paper entitled *War of Attrition: Sabotage of the Endangered Species Act by the U.S. Department of Interior*. In that white paper we detailed political intervention by then-Interior Secretary Bruce Babbitt and his top aides to reverse the findings of agency scientists in eight high-profile ESA cases. In each case, environmental groups successfully sued Interior and forced the listing or other action the political intervention was intended to prevent.

The principal difference in the intervening decade is that what was an occasional event during the Clinton administration is now a daily occurrence. The handful of cases PEER cited during the Clinton years is dwarfed by the scores of such cases being reported under the current Bush administration. The cases under Clinton where politics trumped science appear to have been triggered by complaints from state governors or other high-profile dynamics. By contrast, under the current Administration, political intervention has become a matter of routine.

One of the unique aspects of the ESA is the status it accords to the role "the best scientific and commercial data available" as either the sole or principal guide for the Secretary to make determinations relative to the Act [see, for example, 16 U.S.C. § 1533 (b) (1) (A) and 16 U.S.C. § 1536].

From the earliest days of the current Administration, however, there has been a profound tension between the facts reported to it by civil servants and its political goals. For example, after promising during her confirmation hearings to faithfully report the scientific findings of agency specialists, five months later, on July 11, 2001, then-Interior Secretary Gale Norton provided the Congress with a letter that substantially altered biological findings from FWS concerning effects of oil development in the Arctic National Wildlife Refuge. All 17 of the major changes made in the FWS evaluation by the Secretary or her immediate staff (as no other member of her leadership team had yet been confirmed) pointed in one direction—to minimize the biological impacts of oil drilling. When questioned about the changes Ms. Norton ascribed them to typographical errors.

This willingness to rewrite scientific and technical findings to serve political aims has continued unabated and, by some measures, has accelerated. In 2002, following a PowerPoint presentation by presidential counselor Karl Rove to Interior political staff, the scientific determination of water levels needed to support threatened coho salmon in the Klamath River was suddenly cut in half without any biological analysis, in violation of the ESA. At the behest of Bureau of Reclamation officials, the conclusion of a draft biological opinion prepared by a NMFS team was altered to lower the minimal in-stream flow levels below what the fisheries scientists believed necessary for the survival of coho salmon in the Klamath River. Late that summer, the Klamath experienced the largest fish kill in the history of the Pacific Northwest.

In the ensuing years, the political rewrite of ESA scientific documents has become a routine practice. Last fall, for example, the conclusion of a scientific assessment on whether the Gunnison's prairie dog should be listed under the ESA was changed under orders by a political appointee – Interior Deputy Assistant Secretary Julie MacDonald, an engineer by training, who has been quite energetic in rewriting biological opinions. In this case, a draft opinion which found listing of the Gunnison's prairie dog to be scientifically warranted sparked this terse e-mailed directive:

> "Per Julie please make pd finding negative. Thanks"

In other words, all of the scientific analysis would remain unchanged, only the conclusion (the positive recommendation) would change. This suggests a blatant, almost casual, approach to political interference with ESA science.

At the same time, PEER has received scores of complaints from FWS and NMFS scientists about similar acts of manipulation. To find out how widespread this experience was, in 2005, PEER in partnership with the Union of Concerned Scientists (UCS) surveyed more than 1,400 FWS biologists, ecologists and botanists working in field offices across the country to obtain their perceptions of scientific integrity within the agency. The survey had a 30% rate of return and produced some of the following results:

- Nearly half of all respondents whose work is related to endangered species scientific findings (44%) reported that they "have been directed, for non-scientific reasons, to refrain from making jeopardy or other findings that are protective of species." One in five agency scientists said they have been "directed to inappropriately exclude or alter technical information from a FWS scientific document";

- More than half of all respondents (56%) cited cases where "commercial interests have inappropriately induced the reversal or withdrawal of scientific conclusions or decisions through political intervention"; and

- More than a third (42%) said they could not openly express "concerns about the biological needs of species and habitats without fear of retaliation" in public while nearly a third (30%) felt they could not do so even inside the confines of the agency. Almost a third (32%) felt they are not allowed to do their jobs as scientists.

In essays submitted on the topic of how to improve integrity at FWS, many biologists cited Julie MacDonald by name. Most essays, however, were couched in more general terms:

- "We are not allowed to be honest and forthright, we are expected to rubber stamp everything. I have 20 years of federal service in this and this is the worst it has ever been."

- "I have never seen so many findings and recommendations by the field be turned around at the regional and Washington level. All we can do at the field level is ensure that our administration record is complete and hope we get sued by an environmental or conservation organization."

- "Recently, [Interior] officials have forced changes in Service documents, and worse, they have forced upper-level managers to say things that are incorrect…It's one thing for the Department to dismiss our recommendations, it's quite another to be forced (under veiled threat of removal) to say something that is counter our best professional judgment."

Later that year, the two groups surveyed 460 NMFS scientists charged with administering the ESA. More than a quarter (27%) of the scientists returned the surveys with even more disturbing results:

- An even stronger majority (58%) knew of cases in which high-level Commerce Department appointees or managers "have inappropriately altered [NMFS] determinations;"

- More than one third (37%) have "been directed, for non-scientific reasons, to refrain from making findings that are protective" of marine life; and

- Nearly one in four (24%) of those conducting such work reported being "directed to inappropriately exclude or alter technical information from a … scientific document."

In essays submitted on the topic of how to improve the integrity of scientific work at the agency, the predominant concern raised by the NMFS scientists was political interference:

- "It seems that we are encouraged to think too much about the consequences and how to get around them, rather than just basing our recommendations on the best available data."

- "[I]t is not uncommon to be directed to not communicate debates in writing. I have also seen written documents that include internal discussions/debate purposefully omitted from administrative records with no valid reasoning."

- "Removing the implication that an ESA Section 7 Jeopardy determination is never or almost never justified – this view is frequently held and expressed by managers. A huge problem is that a Sec. 7 consultation for ESA, whether the science is good or bad, that does not cause problems for an action agency is not heartily scrutinized. But a determination that results in more protection for the species and restricts an agency action or lengthens their timeline is always scrutinized and pressure may be applied to change the determination even if valid."

Not every manipulation of ESA science is blatant. Some are subtle, involving re-interpretations or technical guidance that on their face appear neutral but are, in fact, designed to skew scientific results. For example, in January 2005, Dale Hall, the then-FWS Southwest Regional Director, issued a new

policy forbidding biologists from using wildlife genetics to protect or aid recovery of endangered and threatened species. As a result, agency biologists are prohibited from even considering unique genetic lineages in protecting or recovering wildlife in danger of extinction.

By prohibiting consideration of individual or unique populations, Hall's policy allows FWS to declare wildlife species secure based on the status of any single population (even a population in captivity, such as within a zoo). This means the agency could pronounce species recovered even if a majority of populations were on the brink of extinction or permit approval of development projects that extirpate whole populations.

While seemingly neutral on its face, the policy was timed to block the ESA listing of the Lesser Prairie-Chicken, as well as to water down the recovery plans for the Mexican Spotted Owl and the Southwest Willow Flycatcher as well as a number of desert fish species, among other species.

This policy even provoked a rare, though fruitless, internal protest. Then-Mountain-Prairie Regional Director Ralph Morgenweck, attacked the new policy, citing several examples where genetic diversity has been critical to species' survival because it allows wildlife to adapt to emerging threats, diseases and changing conditions. In his memo of protest, Morgenweck stated:

> "I have concerns that the policy could run counter to the purpose of the Endangered Species Act to recover the ecosystems upon which endangered and threatened species depend. It also may contradict our direction to use the best available science in endangered species decisions in some cases."

Mr. Morgenweck's protest was ignored. Shortly thereafter, the author of the policy, Dale Hall, was nominated and confirmed as the Director of the FWS.

Lastly in this regard, one important measure of the pervasiveness of official scientific fraud and distortion is the high success rate by conservation groups in winning ESA lawsuits against the government. In order for these non-profit groups to prevail in court, they must show that the federal government acted in an arbitrary and capricious manner. This is one of the heaviest burdens in civil jurisprudence in that the plaintiffs must show that the government agency had no rational basis for its decision.

The way in which these, often small, groups prevail is by showing that the Secretary of Interior or Commerce ignored their own scientists. In other words, ESA lawsuits against Interior or Commerce are powered almost exclusively by the research generated (and then suppressed or rewritten) by the agency itself.

II. Scientists Are Caught in the Political Crosshairs with Little Recourse

In our experience, biologists in FWS and NMFS typically have little interest in politics; their passion is the resource. It often comes as quite a shock when they find themselves caught up in the political winds blowing out of Washington, DC. In those instances, these specialists are like deer caught in the headlights, not knowing where to run, as a truck barrels down threatening to flatten their careers.

Compounding the risks is the relative delicacy of scientific careers, which may be derailed by agency actions that would not trouble other professionals. In some scientific disciplines (particularly those within FWS and NMFS), the "publish or perish" dynamic means that if an agency prevents the submission of manuscripts to peer reviewed journals the scientist is put at a (sometimes fatal) competitive disadvantage. Being denied permission to attend a professional conference or present a paper at such a conference can cause grievous career harm. When administered as punishments these tactics can be quite devastating, but they do not rise to the legal standard of a "personnel action" within federal civil service law and thus are very difficult to challenge or review.

On the other hand, some agency tactics for punishing scientists who disclose inconvenient truths are far from nuanced:

- One Bureau of Reclamation biologist represented by PEER has been home on paid administrative leave for nine months. His supposed offense was sending e-mails to federal agencies and an environmental group pointing out problems in Bureau filings and reports. The biologist, Charles (Rex) Wahl., was also the agency NEPA (National Environmental Policy Act) coordinator whose job it is to keep stakeholders informed. Originally, Reclamation proposed to fire Wahl for being "subversive" and revealing "administratively controlled information." This January, the Bureau withdrew those charges and instead proposed dismissal on the grounds of causing "embarrassment" for putting the agency in a "negative light." For good measure, the Bureau also dismissed his wife, Cherie, from her temporary clerk-typist position. Meanwhile, Rex Wahl sits at home and collects his pay;

- A FWS biologist who protested diversion of critical habitat found her e-mail privileges "suspended" until the end of the fiscal year; and

- A biologist who raised concerns about growing damage cause by off-road vehicles was abruptly removed from that program and re-assigned to a position with no duties in an office that has no phone or computer.

Unfortunately, wronged federal scientists who seek vindication face steep challenges.

A. Federal Scientists Have Scant Legal Protection

This Congress is currently reviewing legislation to strengthen the distressingly weak Whistleblower Protection Act. I will not reiterate the arguments in that debate except to note that scientists who raise concerns about the quality of studies or the validity of findings often have no legal protection at all.

In the federal civil service, scientists risk their jobs and their careers if they are courageous enough to deliver accurate but politically inconvenient findings. For openers, the practice of "good science" is not recognized as protected activity under the federal Whistleblower Protection Act, unless 1) the scientist is reporting a falsification or other distortion that violates a law or regulation; or 2) the scientific manipulation creates an imminent danger to public health or safety.

Absent those unusual circumstances, a disclosure of a skewed methodology, suppression of key data or the alteration of a data-driven recommendation is treated as if it were a policy dispute, for which the disclosing scientist has no legal protection or standing.

In 2003, nearly half of the federal civilian workforce (in the Departments of Homeland Security and Defense) lost traditional civil service protections. In these agencies, the emerging management regime resembles a private sector, at-will employment system. Scientists in these agencies can easily be fired, de-funded, transferred or otherwise redirected simply because the results of their scientific work cause political displeasure.

On, May 30, 2006, Justice Samuel Alito cast his first deciding vote in Garcetti v. Ceballos (126 S. Ct. 1951) which held that public servants have no First Amendment rights in their role as government employees. The central premise of this ruling is public employees *per se* have no free speech status because their speech is owned by the government.

The court held that civil servants enjoy First Amendment rights only when they act outside their work role and go public. Thus, under the Supreme Court's formulation, telling an inconvenient truth at work allows no constitutional defense against on-the-job retaliation.

The only protection the Court identified for public servants is whistleblower legislation. Unfortunately, the federal Whistleblower Protection Act has been interpreted to exclude disclosures made within the scope of duty. Thus, internal agency communications often lack any legal protection whatsoever – constitutional or statutory.

The only body of law that protects government scientists is the handful of environmental statutes, such as the federal Clean Air Act, that protect disclosures made by any employee, public or private sector, that further the implementation of those acts. The ESA, however, has no such whistleblower provision. Moreover, the Bush administration has recently ruled that all but two of the six environmental laws with such whistleblower provisions are off-limits to federal employees under the doctrine of sovereign immunity—based on the old English common law maxim that "The King Can Do No Wrong."

B. Agencies Reward Scientific Fraud

Compounding this daunting legal climate is the tendency by the agencies to promote or reward the very officials who perpetrate the distortions of scientific work. The reason behind this perverse dynamic seems evident – managers who dissemble to achieve a pre-determined result are simply doing the bidding of the agency's top political appointees. In another context, then-Department of Justice Chief-of-Staff Kyle Sampson expressed the concept when he testified that the distinction between politics and performance was "artificial."

To convey just how widespread this "lie to succeed" culture has become in federal service, consider two recent examples:

- In 2005, a Commerce Office of Inspector General report found that a key NMFS biological opinion on the effects of diverting Sacramento River water from the San Francisco Bay Delta to thirsty Southern California had been improperly altered to find no adverse effects. The responsible party identified by the Inspector General was one James Lecky, a regional official. Shortly thereafter Mr. Lecky was promoted to become the agency's Director of Protected Resources, in which position he oversees production of all the biological opinions on threatened and endangered species; and

- One of the rare instances in which FWS has admitted that it committed scientific fraud involves use of skewed biology in assessing the habitat needs and population of the endangered Florida panther (discussed in the following section). The central figure in this episode was Jay Slack, the Field Supervisor of the FWS South Florida Field Office in Vero Beach. Mr. Slack fired the FWS biologist, Andrew Eller, who had challenged the fraud. Following a whistleblower complaint waged by PEER, Mr. Eller was restored to FWS in a courthouse steps settlement. Shortly thereafter, Mr. Slack received a Meritorious Service Award. Six months later in February 2006, Slack was promoted to serve as Deputy Regional Director of the FWS Mountain-Prairie Region, responsible for the eight-state area of Colorado, Montana, Wyoming, Utah, Nebraska, Kansas and the Dakotas.

C. Profiles in Biological Courage

From reports that PEER has received there are regions where political pressure to change scientific findings is particularly acute. This is not meant to suggest that other regions do not have these problems, only that further congressional investigation into this topic would likely find fertile ground in these suppression "hot spots." These hot spots coincide with swelling populations pushing against shrinking wildlife habitats:

Southwest Florida: The challenges facing federal biologists in South Florida are almost beyond description. Attached to my testimony is a letter by Ann Hauck on behalf of the Council of Civic Associations [Attachment I] which conveys how deep-seated the difficulties in that fast-growing region

are.

In that region, FWS biologists are forbidden from issuing ESA "jeopardy letters"— no matter how destructive the development project. As these new developments sprawl across the tattered habitat of the endangered Florida panther, avoiding a finding of jeopardy remains quite a challenge for FWS. The agency had to resort to using scientific fictions to inflate panther population and inaccurately minimize habitat needs. Here are some of the fictions which FWS admitted that it employed, in response to a Data Quality Act challenge filed by PEER and FWS biologist Andy Eller:

- Relying on daytime habitat use patterns (when the panther is at rest) while ignoring nighttime habitat use patterns (when the panther is active);

- Assuming that all known panthers are breeding adults, discounting juvenile, aged and ill animals; and

- Using population estimates, reproductive rates, and kitten survival rates not supported by field data.

Then-FWS Director Steven Williams, who made the formal admission of error in response to the PEER/Eller challenge, resigned the day before it was announced. As it was announced, the FWS Southeastern Regional Office held a press conference in which it declared that not one single decision or biological review would change as a result of the decision.

Pacific Northwest: Fishery biologists in both NMFS and FWS working on issues involving dams and their management, especially within the Federal Columbia River Power System, are being subjected to a severe form of cognitive dissonance. These scientists are being asked to ignore evidence as to the negative effect these structures are having on listed fish populations and to overestimate the salutary effect of various mitigation measures.

One FWS biologist has described an impending "biological train wreck" on the Columbia River, pitting survival of endangered fish populations against rising power rates and threats of artificially manipulated floods, in describing a concerted effort by agency officials to obstruct implementation of the ESA.

Southwest: Booming population growth in the arid Southwest is pushing many species toward extinction but federal recovery plans are tangled in inter-agency and political conflict. For example, FWS scientists find endangered and threatened fish of the Gila River basin in Southern Arizona and Western New Mexico continue to decline because key steps in approved recovery plans are not implemented by their own agency, particularly control of nonnative game fish managed by the state wildlife agencies which are supposed to be assisting in federal recovery plan implementation.

A recovery plan is a basic provision of the Endangered Species Act. It outlines the steps needed to prevent possible extinction of a federally-listed species and to restore a healthy self-sustaining species. The recovery plans are sound but there is no consistent follow-through. The conflicting mandate of the FWS to protect native fish versus the state wildlife agencies' promotion of sport fishing has stalemated effective actions in addressing root causes of the continuing deterioration in the status of the native species.

In all of the above-described settings, scores of federal scientists are struggling mightily to respect their professional ethics while maintaining a career in federal service.

III. Congress Can Restore Scientific Integrity

Congress has the ability to address the deterioration in the integrity of official ESA science. PEER would offer the following recommendations:

A. Insist on Accountability for Political Appointees and Managers
Any progress in this area will be problematic unless those political appointees and managers who perpetrate scientific fraud or manipulation suffer negative career consequences. For example, the Interior Department has yet to condemn the conduct of the recently-resigned Julie MacDonald. The continued silence from Secretary Dirk Kempthorne sends a strong signal that misrepresenting agency scientific research is a practice is endorsed by Interior leadership. The posture of Interior appears to be that unless the interference is publicly exposed in an embarrassing fashion rewriting scientific documents for non-scientific reasons is a "no-harm-no-foul" infraction.

Significantly, the only recent instance in which Interior Department leadership embraced the concept of scientific integrity has been as a tool to punish what it perceived to be scientists with an agenda. In 2002,

The Washington Times cooked up a scandalous hoax in which the central allegation was that several FWS, U.S. Forest Service and Washington State scientists had hatched a plot to close large sections of Western public lands by planting phony samples of fur from the threatened Canada lynx. The *Washington Times* then attempted to sell ad space to PEER and other environmental groups so that the "other side" of this story would be printed in their pages.

Despite repeated internal and external investigations that debunked this hoax (the scientists had sent in outside samples to test the private DNA laboratory but these samples were never part of the lynx habitat survey), members of Congress, abetted by top Interior officials, decried how ESA science had "gotten out of control."

When the furor died down and the scientists were vindicated, a somewhat sheepish Interior Department published a Code of Scientific Ethics, as a face-saving step to show that it had done something to ensure that its scientists would never again go out of control. Although Interior issued a press release with the Code attached, the Code never appeared within any Interior manuals. There remains broad confusion as to its status, meaning and application.

This semi-official Interior Code of Scientific Conduct has among its provisions the following:

- "I will act in the interest of the advancement of science and contribute the best, highest quality scientific information."

- "I will neither hinder the scientific and information gathering activities of others nor engage in dishonesty, fraud, deceit, misrepresentation, or other scientific, research or professional misconduct."

- "I will place quality and objectivity of scientific activities and information ahead of personal gain or allegiance to individuals or organizations."

Interior's Code of Scientific Conduct [the full text can be seen in Attachment II] should be formally promulgated and made explicitly binding on its political appointees and managers.

B. Transparency Will Deter Distortions
Supreme Court Justice Louis Brandeis once said "Sunshine is the best disinfectant," and his prescription has application here.

Congress should require that internal alterations of scientific reports become part of the public record, so that the evolution of official findings can be traced. In particular, alterations by political appointees of FWS and NMFS scientific documents should be reported to the Congress with a mandatory written explanation for the basis of the alteration.

If these changes to scientific conclusions must be explained in the clear light of day, it should deter some of the grosser distortions. Conversely, if Interior or Commerce Department leaders argue that the changes their political appointees make are appropriate, they should not mind sharing that justification with the rest of us.

Retrospectively, the Interior Department has yet to correct the scientific misrepresentations made my Ms. MacDonald that were identified by the Inspector General. The Interior Department should affirmatively correct these errors now, rather than waiting for them to be invalidated one-by-one through court orders produced by ESA challenges.

Moreover, Ms. MacDonald was not acting as a lone rogue. Her actions fit into a pattern of scientific misrepresentations ordered by her former colleagues, including Paul Hoffman and Craig Manson. If Interior is not willing to go back and correct the errors mad by these political appointees, then the Congress should step in and order an independent review of the revisions made by Interior appointees since 2002. This congressionally-chartered scientific "truth commission" would identify the errors that need to be corrected. Correcting the ESA scientific record now would prevent much future litigation, and render several existing lawsuits moot.

C. Stop Suppression of Science by Prohibiting Agency Gag Orders

One of the most disturbing findings of the PEER/UCS surveys was that federal scientists were unsure about what they could or could not say or write to colleagues in academia or other agencies. As a result, the natural give-and-take of scientific development is stunted by politically-inspired public communication policies that require all communications be officially vetted.

PEER believes that the confusion among scientists is the direct result of deliberately vague policies that generally restrain agency scientists from interacting with outsiders. For example, the FWS on May 5, 2004 held an all-staff "Town Meeting" to tout its "scientific excellence." That afternoon, all employees were supposed to take part in an "interactive discussion" via telephone conference, Internet connection or satellite download with then-Director Steve Williams.

At that meeting, Mr. Williams announced that FWS would begin concerted interaction with professional societies. He was then asked by a participant whether he would address the Interior ethics guidelines which still discourage agency scientists from more than passing involvement with associations dedicated to raising and protecting scientific standards. The ethics guidelines classify these professional societies as the sources of potential conflict of interest. Ironically, agency lawyers are free to participate in state bar or legal association activities but scientists have no comparable freedom.

In other instances, agency constraints on scientists are not as subtle. For example, on March 29, 2007, the Commerce Department posted a new administrative order on "Public Communications" requiring that agency climate, weather and marine scientists obtain agency pre-approval to speak or write, whether on or off-duty, concerning any scientific topic deemed "of official interest."

This new order, which becomes effective this month, would repeal a more liberal "open science" policy adopted by the National Oceanic & Atmospheric Administration on February 14, 2006. The agency also rejected a more open policy adopted last year by the National Aeronautics and Space Administration. This new policy also was rushed to print despite an ongoing Commerce Office of Inspector General review of communication policies that was undertaken at congressional request.

Although couched in rhetoric about the need for "broad and open dissemination of research results [and] open exchange of scientific ideas," the new order forbids agency scientists from communicating any relevant information, even if prepared and delivered on their own time as private citizens, which has not been approved by the official chain-of-command:

- Scientists must give the Commerce Department at least two weeks "advance notice" of any written, oral or audiovisual presentation prepared on their own time if it "is a matter of official interest to the Department because it relates to Department programs, policies or operations."

- Any "fundamental research communication" must "before the communication occurs" be submitted to and approved by the designated "head of the operating unit." 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; and

- It is so all-encompassing that the only exception is for National Weather Service employees who may "as part of their routine responsibilities to communicate information about the weather to the public."

While claiming to provide clarity, the new Commerce order gives conflicting directives, on one hand telling scientists that if unsure whether a conclusion has been officially approved "then the researcher must make clear that he or she is representing his or her individual conclusion." Yet, another part of the order states non-official communications "may not take place or be prepared during working hours." 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 rights of non-national security agency scientists should not vary from agency to agency. Congress should ban the Commerce Department and other similar gag orders and allow federal scientists to freely communicate and argue about science.

D. Strengthen Whistleblower Protections and Extend Them to Scientists

The House of Representatives (HR 985) recently passed legislation that extends civil service whistleblower protection to federal scientists who report data manipulation or suppression. Enactment of that legislation would help address many of the problems discussed at this hearing.

In addition to strengthening the scope and application of federal whistleblower statutes, PEER suggests three specific steps that directly address ESA and related science:

1. **Enact a Whistleblower Provision for ESA**. As noted earlier, ESA lacks the type of whistleblower protection that exists in several other environmental statutes. Applying this sort of whistleblower protection to ESA (PEER would also urge application to the National Environmental Policy Act) will mean that federal scientists working on these issues would be able to do their jobs free from the prospect of reprisal for doing their jobs too well on a controversial or politically-charged issue.

2. **Clarify Laws So That Federal Scientists Are Not Barred by Sovereign Immunity.** Most would agree that federal agencies should not be above the law, but executive branch agencies are doing just that with respect to environmental whistleblower laws. The re-emergence of the sovereign immunity doctrine is rooted in the argument that Congress did not explicitly indicate its intent to waive sovereign immunity. Thus, Congress could put this legal shibboleth to flight by affirmatively declaring that these laws apply to the federal government in the same manner as they apply to the private sector.

3. **Legalize Federal Scientist Participation in Professional Societies**. Anything that increases the transparency of agency scientific decision-making, particularly by involving knowledgeable, credible and disinterested outside specialists contributes to the factors safeguarding scientific integrity. Congress should make it explicitly clear that federal employee involvement with professional organizations dedicated to improving the quality of science is not a real or apparent conflict of interest but is just the opposite – an activity which furthers the agency mission.

Congress should revive the stillborn 2005 FWS initiative on professional openness by a) directing agency ethics offices to encourage rather than discourage staff involvement in professional societies; and b) promoting, through resolution, appropriation language or other mechanism, federal participation and partnerships with outside scientific bodies.

E. Put Some Teeth into the Right to Communicate with Congress

Congress itself can also play a direct role in strengthening the scientific integrity within federal service. The threat of disclosure to Congress can deter or reverse informational distortions.

Unfortunately, the ability of federal employees to communicate with Congress is tenuous.

During the past few years there have been many instances where scientists and technical specialists have been constrained from communicating findings directly to Congress. Probably the most prominent example involved Richard Foster, the actuary for the Medicare program, who was prevented from informing Congress the pending prescription drug bill that was ultimately enacted would cost approximately $150 billion or more than had been previously estimated.

In its examination of that case, the Congressional Research Service (CRS) opined that the restraints placed on Mr. Foster forbidding him from revealing the 'true' cost estimates violated prohibitions (the "Lloyd Lafollette Acts") against interference with communications between a federal employee and a member of Congress. Notwithstanding that finding, CRS was silent as to what could or should be done either in that case or to prevent future violations. A review of those prohibitions shows that Congress envisioned the denial of appropriated funds to support such violations but Congress failed to provide a means for invoking that sanction. Without a way to enforce it, the law becomes merely a rhetorical prop.

PEER would suggest that Congress put some teeth in laws that safeguard its right to receive information from federal employees. Authorizing citizen suits to recover appropriated funds misused in restricting communication directly from the salaries paid to officials who violate this law would allow members of Congress to directly enforce these laws. This somewhat personal yet public benefit remedy would allow individual suppressors of information to be judged in the bright light of day.

Conclusion

On the issue of political interference with ESA science, 1) the Science Advisor to the President; 2) the Chief Science Advisor to NMFS) and 3) and the Science Advisor to the Interior Secretary have all been conspicuously silent. Presumably, it is their jobs to take the lead in identifying and rooting out misuse of science but, in actuality, these positions function as cheerleaders and apologists.

It is precisely because political interference has become so ingrained in these two agencies, Interior and Commerce, charged with implementing ESA that a dramatic reversal will be required to purge the political content from ESA scientific findings. The first step toward pursuing this improvement is admitting the problem.

If, however, the current administration does not concede that its political intrusions have obstructed ESA, it is unlikely to seek any remedies—and that job will fall to Congress and the courts.

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