



# Public Employees for Environmental Responsibility

962 Wayne Avenue, Suite 610 • Silver Spring, MD 20910

Phone: (202) 265-PEER • Fax: (202) 265-4192

Email: [info@peer.org](mailto:info@peer.org) • Web: <http://www.peer.org>

## *Narrative of Whistleblower Retaliation Against Dr. George Luber, Pd.D*

George Luber, Pd.D., is one of the nation's preeminent climate scientists, and for years had been the public face of the United States' efforts towards climate and health adaptation, public science diplomacy, and community outreach and partnership with 18 city and state governments to mitigate the most severe impacts of climate change in his capacity as the head of the Climate and Health Program at the U.S. Centers for Disease Control and Prevention ("CDC"). As Co-Chair of the Climate Change and Human Health Interagency Workgroup at the U.S. Global Change Research Program, a Convening Lead Author for the 3<sup>rd</sup> and 4<sup>th</sup> US National Climate Assessment's [Chapter on Human Health](#) impacts from climate change, a member of the American Anthropological Association's Presidential Task Force on Climate Change, and a lead author for the Intergovernmental Panel on Climate Change ("IPCC"), Fifth Assessment Report, Dr. Luber is a climate scientist's climate scientist. Dr. Luber has a 16-year record at CDC with no proposed or actual disciplinary action, official reprimands, or unsatisfactory performance reviews until now. His lowest ever evaluation was a 4.2/5.

In the days after the November 2016 presidential election, the Director of the CDC's National Center on Environmental Health ("NCEH"), under which the Climate and Health program was organized, Dr. Patrick Breyse, and his Policy Lead Pam Protzel-Berman, summoned Dr. Luber to order him to cancel an upcoming event which he had been organizing to be held at CDC in February 2017 about climate change, featuring Former Vice President and climate activist Al Gore as Keynote Speaker. These managers

expressed that they thought it would be politically unwise to have such a high-profile conference about climate change just weeks after the inauguration of President Trump.

When Breysse and Protzel-Berman told Dr. Lubber to call off the Al Gore event, they also asked that he personally sign a letter cancelling the event. Dr. Lubber argued against it. He told them that to about-face so suddenly on an issue he had promoted for years as scientific fact would undermine the scientific integrity of the agency and the public's faith in science generally. Although Dr. Lubber continued to press for the continuation of the meeting, CDC issued an email to participants in December, unsigned and without explanation, announcing the cancellation of the event. Naturally, once the cancellation became public in January 2017, it became a national story overnight.<sup>1</sup> No attempt was made to publicly dispel the impression that the decision to terminate the meeting was a political calculation by a small agency seeking to avoid provoking the ire of the White House.<sup>2</sup>

NCEH executives and its communications staff, however, concluded, incorrectly, that Dr. Lubber must have leaked to the press that the meeting was cancelled for political purposes. He was then told not to speak further with the press. Thereafter, the press calls or requests for comment on various matters he had received for years suddenly ceased in February 2017. He was told by a member of the CDC press office that there was no chance he would ever be cleared to speak to a reporter again.

During this same period, he was also personally instructed by Director Breysse that for any future meetings or public statements he should not use the words "climate change," and should instead use language like "extreme weather."

Meanwhile, a rumor developed within NCEH's scientific staff that Dr. Lubber was the one actually responsible for cancelling the meeting. This undermined his credibility

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<sup>1</sup> See, e.g., Brady Dennis, *CDC abruptly cancels long-planned conference on climate change and health*, WASH. POST (Jan. 23, 2017), <https://www.washingtonpost.com/news/energy-environment/wp/2017/01/23/cdc-abruptly-cancels-long-planned-conference-on-climate-change-and-health>.

<sup>2</sup> Brian Resnick & Julia Belluz, *Sudden changes at the EPA, USDA, and CDC under Trump, explained*, VOX (Jan. 25, 2017) ("Georges Benjamin, executive director at the American Public Health Association, was booked to be one of the keynote speakers at the event. 'This was a preemptive decision on the part of CDC in light of the perspective of the new administration toward climate change,' he told Vox. 'It is unusual to do this, but the incoming administration has been so openly opposed to climate change work that it seemed prudent.'").

among the staff and deflected blame from NCEH's administrators. To many of his co-workers in the office, he had been the popular and public face of climate science. They came to resent him for a retreat he attempted to prevent.

Dr. Luber continued his work as before, and was asked by National Geographic to be a regular guest on their popular new program *Mars*, which presents a fictionalized account of astronauts landing on Mars, featuring interviews with various public figures, scientists, and engineers, such as Elon Musk, Andy Weir, Robert Zubrin, and Neil deGrasse Tyson, about the difficulties that the crew might face on a journey to, and living on, Mars. Dr. Luber was told by the CDC office of communications that there was no way they would ever approve any appearances on the program.

Throughout 2017, Director Breyse implemented a plan to consolidate the eight branches and one "program" (Climate Change and Health) of NCEH under his purview into three branches. One consequence of this reorganization was the merging of the roughly 18-person Climate and Health Program into the 60+ person Asthma branch of NCEH, hiding the very existence of the CDC's work on climate under the newly formed Asthma and Community Health Branch.<sup>3</sup>

Dr. Luber regularly met with the consultants drawing up the merging of his program with Asthma, and told them repeatedly that the \$10 million budget for the climate change program had been explicitly set aside by Congress, and that the merging would inevitably cause those funds to be used for asthma activities since he, as the supervisor, and others who would be team leads, would be dividing their time in managing both Asthma and Climate Change activities. This would go against the express will of Congress.<sup>4</sup> Dr. Luber also raised this concern with NCEH administrators, who did not respond. After the person initially chosen to run the newly merged Asthma and Community Health branch was found to lack the academic qualifications to run the

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<sup>3</sup> The reorganization has yet to be formally approved by the Department of Health and Human Services but is functionally final within NCEH.

<sup>4</sup> See Conference Rep't for H.R. 6157, DEPARTMENT OF DEFENSE FOR THE FISCAL YEAR ENDING SEPTEMBER 30, 2019, AND FOR OTHER PURPOSES, H.R. Rep. 115-952, at 526-27, 115<sup>th</sup> Cong., 2d Sess. (Sept. 13, 2018), <https://www.congress.gov/115/crpt/hrpt952/CRPT-115hrpt952.pdf> (setting aside \$10,000,000 for NCEH climate change program, and \$29,000,000 for asthma, of \$209,350,000 for all NCEH programs).

branch, Dr. Luber was made the new acting branch chief in early March 2018. In this capacity he found that he and many employees formerly handling climate issues had been scattered across the much larger Asthma and Community Health Branch and had to spend more and more time on asthma, even though their salaries were paid by monies appropriated exclusively for climate work.

Dr. Luber would hold that position for less than a month, and later in March, the NCEH administrators called him in once again to inform him that they had recently learned some “troubling” allegations against him and sent him home on administrative leave on March 19, 2018.

In April 2018, Dr. Luber was put on administrative leave from his office and ultimately detailed to another facility handling waterborne diseases, at the National Center for Emerging and Zoonotic Infectious Diseases (NCEZID).<sup>5</sup> His badge, phone, and credentials were revoked. Security personnel at the facility he is permanently assigned to were ordered to place him on the BOLO (be on the lookout) List of dangerous persons who should not be allowed on the grounds without prior approval, and then only after a rigorous and publicly humiliating search. Because his permanent office is in a building he is now prohibited from approaching, let alone entering, he can only retrieve materials or supplies from it under guard escort and with prior approval by Breysse.

Every time he has visited, he and his car have been thoroughly searched for weapons or explosives in front of his colleagues, a degrading and humiliating experience.

On one occasion a rumor spread that he had been sighted on campus, resulting in an accusation by the NCEH that he had improperly snuck onto campus, which he had not. Rumors continue to reach him that the staff now believes he had committed any number of gross improprieties that caused his suspension. His replacement while he is on detail, Josephine Malilay, told his former staff that Dr. Luber was “gone for good”, and that even discussing his case was “toxic.”

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<sup>5</sup> Dr. Luber is still handling climate-related matters there, according to the terms of his detail, but he is unable to perform many of the duties in his position description as a supervising researcher, because there is nobody for him to supervise. As a result, he lacks productive duties to perform, and his upcoming employee evaluations will inevitably suffer, which sets the stage for further collateral consequences from NCEH’s actions.

In October 2018, Dr. Luber received notice of proposed removal (“NPR”) from Director Breysse. No explanation was offered for the six-month long delay between the report of “troubling allegations” and the NPR itself. The actual charges detailed in Dr. Luber’s NPR consist of:

1. Twenty-three Specifications of improper timekeeping related to time off for a class he teaches at Emory University, the vast majority of which are easily disprovable with documentary evidence he has provided, and the remainder of which are tainted by a conflict of interest in the staff member assigned to him that handled timekeeping, who had previously threatened to maliciously alter other employees timesheet records in retaliation for ongoing disciplinary action against her relating to consistently poor performance.
2. Three specifications of failure to obtain approval for outside activities, two of which he did receive actual approval for, and the third was based on barely incomplete auto-filling of a form which was accepted by the departmental ethics official at the time -- because the start and end dates of a course he was teaching, provided in both a “date” field and a narrative description, did not match up. At the time these forms were completed, the reviewing official recommended approval of the outside activity and it was approved by the ethics office. The “date” part of the form that contained the date info was filled out correctly, noting that his class would be taught from fall 2017 through the end of the spring 2018 semester. The narrative box describing the activity, however, said he taught a class at Emory in the fall of 2016 because of an error in the script used by the electronic form.
3. Four specifications of misuse of position, involving a) proper offers he made to junior researchers who were yet-unpublished to co-author educational materials with him for professional development purposes; b) spurious allegations related to classes he did not, in fact, teach; and c) coursework he developed jointly with Yale University, and the approval of his supervisor, in response to a 2015 GAO recommendation that the climate program develop a strategic plan regarding communication pertaining to climate change.

4. Three specifications of conduct unbecoming, based on a) an unfounded allegation that he used government funds on a “fishing trip” in Alaska in 2016 that was actually a site visit for new research facilities, made in the company of a local funded collaborator; b) a related hearsay allegation that he had been “high” on that trip from an anonymous source who could not have had knowledge of such;<sup>6</sup> and c) an allegation that he had passed out after binge drinking in his hotel on a visit to a 2016 conference in Denver and slept through a speech he was supposed to deliver. In fact, he had not been drinking, but had been given an incorrect draft schedule by the organizer of the event which listed his speech as occurring on the next morning. When he was called by his colleague, he arrived at the event within 45 minutes and delivered his address normally.

Dr. Lubner responded thoroughly to each of these allegations through counsel on November 20, 2018. On December 13, 2018, the deciding official, Shaunette Crawford, sent an email to Dr. Lubner and the counsel who prepared his response to the agency’s NPR, stating:

This email is to inform you that I am looking into the matters raised in Mr. Lubner’s response to the proposal to remove him from federal service. I will provide you with any new or additional information I receive from the proposing official. You will be given an opportunity to respond to what is provided to me by the proposing official.

No decision on the proposed termination was ever made, however, because on the evening of December 18, 2018, the day after a reporter made inquiries, Mr. Breyse abruptly rescinded the removal in an email to Dr. Lubner:

This is to inform you that I have received your response dated November 20, 2018 regarding the ‘Proposal to Remove’ memo addressed to you on dated October 22, 2018. After reading your response and thoughtful consideration, I will rescind the ‘proposal for removal’ memo and provide you with a new notice of disciplinary or adverse action in the future.

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<sup>6</sup> The local collaborator, David Driscoll, has submitted a letter attesting to both the purpose of the site visit and to Dr. Lubner’s good conduct on said trip.

### *Dr. Luber Engaged in Multiple Protected Whistleblower Activities*

Dr. Luber made multiple disclosures protected by 5 U.S.C. § 2302(b)(8), for which he was retaliated against by the CDC. It is a prohibited personnel practice to take or threaten to take a personnel action, including firing, detailing, transferal, or demotion, against an employee, because of “any disclosure of information by an employee . . . which the employee or applicant reasonably believes evidences (i) any violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety.” 5 U.S.C. § 2302(b)(8).<sup>7</sup> To establish “reasonable belief,” the employee must only show that the matter disclosed was one which a reasonable person in his position would believe evidenced one of the situations specified. The test, outlined in *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999), *cert. denied*, 528 U.S. 1153 (2000), asks whether a disinterested observer with knowledge of the essential facts readily known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence wrongdoing as defined by the Whistleblower Protection Act. *See also Wojcicki v. Dep’t of the Air Force*, 72 M.S.P.R. 628, 632 (M.S.P.B. 1996) (citing *Special Counsel v. Eidmann*, 49 M.S.P.R. 614 (1991) *aff’d*, 976 F.2d 1400 (Fed. Cir. 1992)) and *Horton v. Dep’t of the Navy*, 66 F.3d 279, 283 (Fed. Cir. 1995), *cert. denied*, 116 S. Ct. 1271 (1996)).

The first such disclosure was immediately following the November 2016 election, when Dr. Luber told superiors within the agency that the cancellation of the Al Gore address would undermine the scientific integrity of the agency. This disclosure was that to

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<sup>7</sup> “disclosure” means a formal or informal communication or transmission, but does not include a communication concerning policy decisions that lawfully exercise discretionary authority unless the employee or applicant providing the disclosure reasonably believes that the disclosure evidences--

**(i)** any violation of any law, rule, or regulation; or

**(ii)** gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(a)(2)(D).

A disclosure shall not be excluded from subsection (b)(8) because--

**(A)** the disclosure was made to a supervisor or to a person who participated in an activity that the employee or applicant reasonably believed to be covered by subsection (b)(8)(A)(i) and (ii);

**(B)** the disclosure revealed information that had been previously disclosed;

**(C)** of the employee's or applicant's motive for making the disclosure;

**(D)** the disclosure was not made in writing. § 2302(f)(1)

cancel the meeting would be in violation of an agency regulation regarding the rights of agency staff to participate in public scientific fora, the CDC Scientific Integrity Policy. Dr. Lubber informed Dr. Patrick Breysse and his Policy Lead Pam Protzel-Berman in their debate over the February 2017 conference that cancelation would undermine the integrity of the agency, its public and scientific reputation, and the agency's own scientific integrity policy. Even if he was not in fact, the agency also perceived him to be a whistleblower because of the assumptions they made that he had told the press that the event was canceled for political reasons which improperly violated the same policy.

His second disclosure is made up of the many various instances in which Dr. Lubber communicated the grave risk to the public posed by climate change, "a substantial and specific danger to public health or safety." § 2302(b)(8)(ii). Those disclosures, which are too numerous to list, included:

- Participation as lead author in the human health section of the 2014 National Climate Assessment. See George Lubber *et al.*, "Chapter 9: Human Health," *Climate Change Impacts in the United States: The Third National Climate Assessment*, U.S. Global Change Research Program, doi:10.7930/J0PN93H5, 2014.
- Participation as federal coordinating lead author in the human health section of the 2018 National Climate Assessment. See George Lubber *et al.*, "Chapter 14: Human Health," *Impacts, Risks, and Adaptation in the United States: Fourth National Climate Assessment, Volume II*. U.S. Global Change Research Program, doi: 10.7930/NCA4.2018.CH14, 2018.
- Public statements in support of CDC's mission to assist state and local governments build resilience against the impacts of climate change. See Kristen Lombardi and Fatima Bhojani, *An Army Of Deer Ticks Carrying Lyme Disease Is Advancing And Here's Why It Will Only Get Worse*, HUFFINGTON POST (Aug. 9, 2018), <https://www.huffingtonpost.com/entry/an-army-of-deer-ticks-carrying-lyme->



[disease-is-advancing-and-heres-why-it-will-only-get-worse\\_us\\_5b69b04fe4b0b15abaa74ea0](https://www.theyearsproject.com/disease-is-advancing-and-heres-why-it-will-only-get-worse_us_5b69b04fe4b0b15abaa74ea0).<sup>8</sup>

- Participation in the Emmy-winning climate change series *Years of Living Dangerously*, in which he appeared as an expert Science Advisor on June 2, 2014 to discuss the human health effects of heatwaves caused by climate change and the need for adaptation, stating “This is a threat that we should take seriously, the one that I think can engage us in decisions so that we’ll help make a better world.”<sup>9</sup>
- Appearing at or the 2017 climate change conference hosted by Al Gore in lieu of the original conference which was cancelled by CDC in February 2017. Dr. Lubber was not made available for comment by Bernadette Burden, a senior press officer with the CDC, despite media requests.<sup>10</sup>

While these activities did not engender retaliation under the last administration, the new administration has a well-known policy of denying the public health implications of climate change and preventing federal employees from speaking out about or working on those issues. This is generally known and evidenced in this case by the direction to Dr. Lubber to not even use the words “climate change.” Therefore, his very public earlier work on the subject contributed to the agency’s motivation to retaliate against him as an act of self-censorship. The public statements made by Dr. Lubber concerning climate change have been cited by outside observers as improper grounds on which he might be retaliated against by CDC. Laura Turner Seydel, an environmentalist who sits on the board of the Turner Foundation, a sponsor of the cancelled 2017 Al Gore climate meeting, stated that

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<sup>8</sup> “The only federal support for state and city health officials on climate change is the CDC’s Building Resilience Against Climate Effects (BRACE) grant program. George Lubber, chief of the CDC’s climate and health program, considers it “cutting-edge thinking for public health.” He intends to expand it to all 50 states, but funding constraints have kept him from doing so.

Republicans in Congress have tried repeatedly to excise BRACE’s \$10 million budget, to no avail. Its average annual award for health departments has remained around \$200,000 for nearly a decade.”

<sup>9</sup> <http://theyearsproject.com/>

<sup>10</sup> Max Blau, *The CDC climate change conference, scrapped after the election, is being resurrected Thursday*, STAT NEWS (Feb. 14, 2017), <https://www.statnews.com/2017/02/15/cdc-climate-change-al-gore/>; see also Anne Polansky, *The Insanity of Self-Censorship: Climate Change, Politics, and Fear-Based Decision-Making*, GOV’T ACCOUNTABILITY PROJECT BLOG (Apr. 4, 2017), <https://www.whistleblower.org/blog/014604-insanity-self-censorship-climate-change-politics-and-fear-based-decision-making> (discussing how CDC’s “self-censorship” of climate scientists and “political interference in the communication of scientific findings crucial to informing policymakers and the public is literally a life-threatening act of betrayal against current and future generations”).

CDC scientists may be “scared by the wrath of Trump.”<sup>11</sup> Reporting on Ms. Seydel’s statements continued:

researchers like George Luber, an epidemiologist who’s participated in the global warming documentary series, *Years of Dangerously Living* [sic], might be deterred from speaking further about issues of climate and health. “George Luber had done a very good job of describing the problem,” Seydel said. “He’s been quiet for the past couple of years as he hangs in there like a loose tooth.”

The third disclosure was the misuse of agency funds specifically appropriated by Congress for climate change work at CDC, which, by being merged into the asthma unit, blurred the lines of appropriations in violation of the express will of Congress, and is both a violation of statute and “a gross waste of funds [and/or] an abuse of authority.” *Id.* His disclosure was made both to the consultants organizing the merging of his program with the Asthma branch and to NCEH management including Director Breyse.

**Dr. Luber was Wrongfully Retaliated Against for His Protected Activities**

Retaliatory motivation may be inferred from a variety of factors, including proximity in time between the employee’s action and the adverse employment action, inconsistencies between the proffered reason and other actions of the employer, disparate treatment of certain employees compared to other employees with similar work records. See *Sheehan v. Dep’t of the Navy*, 240 F.3d 1009, 1014 (Fed. Cir. 2001). Evidence of an employee’s assertions of misconduct by a supervisor can bear upon whether the supervisor has a motivation to retaliate. *Fellhoelter v. Dep’t of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009). In this case, several factors provide circumstantial evidence of retaliatory motive.

While NCEH provided a list of the “troubling allegations” which necessitated Dr. Luber’s removal in the withdrawn NPR, the circumstances of Dr. Luber’s proposed removal suggest that it was pretextual: 1) the long delay between the behavior cited in the NPR and the issuance of that removal; 2) the agency’s marginalization of Dr. Luber before issuing his NPR, including the extreme measures of putting Dr. Luber on the BOLO list and searching his car, only to lead to an NPR alleging time card violations and

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<sup>11</sup> Max Blau, *At a resurrected climate conference, concerns loom that CDC scientists may be silenced*, STAT NEWS (Feb. 16, 2017), <https://www.statnews.com/2017/02/16/climate-conference-cdc-scientists/>.

participation in entirely legal and non-violent activities concerning climate change; 3) the delay between Dr. Luber's detailing and the delivery of the NPR; and 4) the cursory nature of the analysis in the NPR; and 5) its abrupt withdrawal under public scrutiny. The petty and demonstrably false charges were easily rebutted by Dr. Luber. Even if true, they are not of a nature to justify the treatment Dr. Luber received, including as a potentially violent threat who could not safely be allowed in his building and who might bring weapons to work; and cannot justify his removal from federal service.

First, courts have long recognized that conduct which is cited well after the employer was made aware of its occurrence is suggestive that the stated reason for a termination was pretextual. An agency's "delay in addressing its alleged concerns undermines its claim that [the employee's] behavior was unsafe or severe." *Peirick v. Ind. Univ.-Purdue Univ. Indianapolis Ath. Dep't*, 510 F.3d 681, 692-93 (7th Cir. 2007). The agency's "post hoc explanations, delay, exaggeration, and unusual conduct more than enough to create a question of fact concerning the legitimacy of its explanations." *Id.* Here, the agency has relied on allegations of impropriety from more than two years in the past, for which Dr. Luber was never cited, warned about, or otherwise aware of. Their combined resurrection years after the fact suggests that the agency embarked on a fishing expedition for wrongdoing to justify a wrongful termination.

Second, the agency marginalized and diminished Dr. Luber's role in public communications of CDC's mission long before it took the step of detailing him in response to the "troubling allegations" it claimed to have received in March 2018. Dr. Luber had been working diligently as the public face of CDC's research into threats to public health posed by climate change, with numerous public appearances detailed *supra* as well as outreach to universities to help design curricula to address the public health threats of climate change. His outreach to Yale was one of the specifications cited in his NPR. Despite his duty to engage with university researchers the climate change program collaborated with on studies, and his public role in communications about CDC's climate program, he was forbidden from speaking to the press and was not permitted to make any public statements after February 2017. This undermined the center's communications

strategy, developed in concert with outside specialists after the 2015 GAO recommendation to improve public messaging as a key part of the agency's mission.<sup>12</sup> The agency's escalating attempts to silence Dr. Luber from February 2017 through his detailing clearly demonstrate the retaliatory nature of and impermissible political influence upon the personnel actions it took by detailing him and later proposing his removal.

Finally, the long delay between his administrative leave, placement on the BOLO list at the office building his permanent office is in, detailing, and his eventual receipt of a demonstrably shallow NPR is indicative that the agency had to search for every conceivable justification for his removal after it had already decided to remove him. No analysis was conducted by the NPR of the factors identified in *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 305-06 (1981), which are required to determine whether removal is an appropriate penalty. The failure to include those factors, universally included as a matter of good practice by any federal HR office, and necessary to justify the ultimate penalty of removal, suggests that the decision was made without meaningful consultation with NCEH's HR department, and would not be upheld if challenged at the MSPB.

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<sup>12</sup> GOV'T ACCOUNTABILITY OFFICE, HHS COULD TAKE FURTHER STEPS TO ENHANCE UNDERSTANDING OF PUBLIC HEALTH RISKS, GAO-16-122, at 24-25 n.49 (Oct. 2015) (specifically citing Dr. Luber's work on the National Climate Assessment as the kind of communicating through reporting and outreach which should be expanded upon).