# **Monnett OSC Complaint Summary**

**Summary**: Dr. Charles Monnett has received a letter of reprimand, been stripped of a departmental award and prevented from continuing his scientific duties in connection with disclosures of agency malfeasance in violation of federal law. As part of an ongoing effort to shut "leaks", Dr. Monnett has been denied recognition and barred from professional opportunities to continue his work as a senior scientist at the Bureau of Ocean Energy Management (BOEM).

**Background**: Late in the second term of the George W. Bush administration there was a concerted drive to open the Arctic Outer Continental Shelf (OCS) to oil and gas drilling under the rallying cry of "Drill, Baby, Drill." The permitting agency at that time was the Minerals management Service (MMS was broken up in 2010, after the catastrophic BP Gulf of Mexico oil spill).

A number of scientists within the Alaska Regional Office of MMS were concerned that serious environmental consequences were being overlooked by MMS management in order to rush permit approvals under "Findings of No Significant Impact" for purposes of the National Environmental Policy Act (NEPA). These scientists' concerns were reflected in extensive exchanges of internal emails.

During 2007 and 2008, Dr. Monnett had forwarded several of these emails outside of MMS. Many were sent to Professor Rick Steiner, a noted marine conservation specialist then on the faculty of the University of Alaska, Fairbanks. A much larger number of these and similar emails were also later forwarded to Public Employees for Environmental Responsibility (PEER) which featured these heretofore unreleased emails in a series of widely followed press releases from January to May 2008.

At the same time, MMS permits to Royal Dutch Shell for drilling on the Arctic OCS were under legal challenge by conservation and Native Alaskan groups. These emails, however, were improperly withheld from inclusion in the agency's administrative record in that litigation —even their existence was not acknowledged. Similarly, the existence of these emails was also improperly withheld from Freedom of Information Act litigation brought by these same groups against MMS.

Concerned about this flow of incriminating e-mails, Associate Interior Solicitor Arthur Gary wrote to PEER In a letter dated January 29, 2008 –

"...we request that you immediately cease your unauthorized publication of these privileged communications and return them to MMS [Minerals Management Service], along with other MMS communications or documents in your possession that MMS has not authorized for disclosure."

At approximately the same time, the Office of Solicitor asked then MMS Alaska Regional Director John Goll to determine who was providing opposing parties with the protected email communications. Shortly thereafter, MMS did an IT review and apparently determined that it was Dr. Monnett who was the source of the internal emails.

During the ensuing weeks, discussions took place between MMS management, Human Resources, and the Solicitor's Office as to what actions should be taken. According to Regional Director Goll, the Solicitor's Office determined that there was no clear course for disciplinary action.

Later in 2008, the U.S. Court of Appeals for the 9<sup>th</sup> Circuit noted these emails in striking down MMS permits issued to Shell:

"Throughout this time period, a number of agency experts expressed concern about the potentially significant impacts the drilling would have on bowhead whales, polar bears, and the Inupiat subsistence harvest." *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 819 (9th Cir. 2008) opinion withdrawn and vacated, 559 F.3d 916 (9th Cir. 2009) and superseded sub nom. *Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009).

"The contentious nature of the agency's internal communication during the review process demonstrates the controversy surrounding the project. See 40 C.F.R. § 1508.27(b)(4); see also Native Ecosystems Council, 428 F.3d at 1240 (noting that a project is highly controversial if there is a substantial dispute about the effect of an action)." Alaska Wilderness League, 548 F.3d at 833.

The publication of the suppressed MMS emails prompted a congressional call for an investigation by the Government Accountability Office. In early May 2009, the GAO team interviewed Dr. Monnett and his colleagues. In March 2010, GAO issued its report (GAO 1—276) entitled "Additional Guidance Would Help Strengthen the Minerals Management Service's Assessment of Environmental Impacts in the North Aleutian Basin." In this report, GAO concluded that MMS scientists in Alaska had been "hindered their ability to complete sound environmental analyses" in reviewing Alaskan offshore drilling projects and that —

- Management pressure resulted in scientific reviews of the environmental impacts of Alaskan offshore oil drilling that were so incomplete that they have been largely invalidated in court rulings in lawsuits brought by environmentalists; and
- Scientists were under pressure to churn out reviews that omitted important environmental concerns. In reaction, many scientists left the Alaska OCS Office of the Minerals Management Service, the Interior Department agency issuing offshore drilling permits. "From 2003 to 2008, 11 to 50 percent of the analysts in that section left each year," according to the report.

The same month GAO issued its report (March 2010), Deputy Alaska MMS Regional Director Jeffrey Loman contacted the Interior Office of Inspector General (IG) to seek their help in taking action against Dr. Monnett. He further alleged that Dr. Monnett had

engaged in scientific misconduct to further an environmental agenda. The IG subsequently took two actions:

- a) Made a request of the U.S. Attorney in Alaska to prosecute Dr. Monnett. That request for prosecution was declined by the U.S. Attorney;
- b) Undertook a more than two year investigation to seek to show scientific misconduct by Dr. Monnett in order to discredit him. The IG failed at this as well.

During this period, a research project that Dr. Monnett oversaw (the Bowhead Whale Satellite Tracking project contracted to Alaska Department of Fish and Game) was selected to receive the Secretary of Interior's 2010 Cooperative Conservation Award. Dr. Monnett's name was removed from that award citation without explanation, even though he was the Contracting Officer's Technical Representative. His was the only name removed as the names of everyone else on the project team were left on the award.

On July 18, 2011, BOEM suspended Dr. Monnett, citing the IG investigation, from his duties and put him on paid administrative leave. He was taken off administrative leave approximately 6 weeks later, on August  $26^{th}$ . He was not allowed to return to his scientific duties pending the outcome of the IG investigation and was assigned unrelated administrative tasks for the next year.

In fact, the IG investigation, which revolved around polar bear research, attracted both national and international attention. This wide-ranging probe gyrated in several different directions before a draft investigative report was issued to BOEM on June 27, 2012. Significantly, the main allegations about fabricated data and falsified photographs of drowned polar bears proved to be utterly untrue. Instead, the IG asserted that there were irregularities in a research procurement contract.

BOEM, however, rejected any recommendation by the IG that it take any personnel action against Dr. Monnett with respect to any issues having to do with polar bear research. BOEM did, however, decide to issue a letter of reprimand against Dr. Monnett on the basis of five emails he forwarded outside the agency during 2007 and early 2008 (attached). The letter of reprimand, dated September 27, 2012, was issued by BOEM Deputy Director Walter Cruikshank. It warns that "...such conduct will not be tolerated or condoned. You should be aware that any further misconduct on your part may lead to more severe discipline up to and including removal from federal service."

It should be noted that all during this period and up until he was reprimanded, no one from MMS or later BOEM contacted Dr. Monnett or informed him of their official concerns about transmitting internal emails, let alone these five emails out of the hundreds Dr. Monnett had forwarded over the years.

Upon formal conclusion of the IG investigation, Dr. Monnett was returned to his former posting but his previous portfolio of research had long ago been reassigned. Concerned

about the continued hostility of his own chain-of-command which had disrupted his career and had never directly informed him of this stealth campaign against him, Dr. Monnett requested the ability to transfer, take an extended detail or pursue an Intergovernmental Personnel Agreement so that he would no longer report to managers who had tried to ruin him. These requests have not been granted.

### **Corrective Action Requested**

- 1. Rescission of Letter of Reprimand issued 9/27/12 to Dr. Monnett;
- 2. Restoration of Dr. Monnett's name to the Secretary of Interior's 2010 Cooperative Conservation Award for the Bowhead Whale Satellite Tracking project contracted to Alaska Department of Fish and Game on which Dr. Monnett served as Contracting Officer's Technical Representative; and
- 3. Transfer through extended detail or Intergovernmental Personnel Agreement to enable Dr. Monnett to continue scientific work.

#### Disclosures

In a letter of reprimand issued by BOEM Deputy Director Walter Cruikshank dated on September 27, 2012 and received on September 28<sup>th</sup>, Dr. Monnett is accused of "Improper release of government documents." The letter cites five disclosures. As explained below, four of the five disclosures are protected disclosures under the Whistleblower Protection Act because they evidence violations of –

- The National Environmental Policy Act (NEPA)
- The Administrative procedure Act; and
- The Freedom of Information Act.

#### 1. Disclosures Evidence Violations of Law

A. The following three emails directly document official violations of the <u>National</u> Environmental Policy Act (NEPA):

2/8/07 <u>Review of EA for Shell Exploration Plan</u>

1/4/08 Sale 202 Fish and Polar Bear effects sections

1/15/08 Email exchanges regarding internal disputes

The emails detail how significant environmental impacts were being improperly excluded from NEPA documents. As observed in the reprimand letter itself, these communications confirmed these violations of law as cited by the U.S. Court of Appeals for the 9<sup>th</sup> Circuit in ruling that BOEM permits violated NEPA and ESA. (See *Alaska Wilderness League v. Kempthorne* decision. 548 F.3d 815, 846 (9th Cir. 2008)):

#### Disclosure 1: 02/08/2007

MMS did not take the requisite "hard look" at the environmental impact of this project. "There remain substantial questions as to whether Shell's plan may cause significant harm to the people and wildlife of the Beaufort Sea region." *Alaska Wilderness League v. Kempthorne*, 548 F.3d 815, 825 (9th Cir. 2008) opinion withdrawn and vacated, 559 F.3d 916 (9th Cir. 2009) and superseded sub nom. *Alaska Wilderness League v. Salazar*, 571 F.3d 859 (9th Cir. 2009). "MMS's environmental analysis is inadequate because it fails to consider the impacts this specific project will have on bowhead whales and Inupiat subsistence activities. *Alaska Wilderness League*, 548 F.3d at 825 (vacating agency's approval of Shell's exploration, and remanded so that MMS could conduct the "hard look" analysis required by NEPA because significant environmental impacts were being improperly excluded from the NEPA process).

### Disclosure 3: 01/04/2008

"An agency must generally prepare an EIS if the environmental effects of a proposed agency action are highly uncertain. Preparation of an EIS is mandated where uncertainty may be resolved by further collection of data, or where the collection of such data may prevent "speculation on potential ... effects. The purpose of an EIS is to obviate the need for speculation by insuring that available data are gathered and analyzed prior to the implementation of the proposed action." *Nat'l Parks & Conservation Ass'n v. Babbitt*, 241 F.3d 722, 731-32 (9th Cir. 2001). "Agency must consider all relevant factors and provide a convincing statement of reasons to justify its decision." *Envtl. Prot. Info. Ctr. v. U.S. Forest Serv.*, 451 F.3d 1005, 1014 (9th Cir. 2006).

#### Disclosure 4: 01/15/2008

"Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes." 42 U.S.C.A. § 4332.

NEPA prohibits uninformed—rather than unwise—agency action. *Nat'l Audubon Soc'y* v. *Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005).

# B. These same emails documented violations of the <u>Administrative Procedure Act</u> (APA).

As noted in the IG report, these emails were among the 60 emails that "were not in the administrative record" in the 9<sup>th</sup> Circuit case.

Review of claims under NEPA is governed by the APA. 5 U.S.C. § 706. *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 992 (9th Cir.2004).

Exclusion of these records from being part of the record violates the APA, 5 U.S.C.A. § 706. Scope of Review.

o APA, 5 U.S.C.A. § 706(2)(F): "... In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The APA states that judges must review agency actions based on the "whole record." The "whole record" or the administrative record is the paper trail that documents the agency's decision-making process and the basis for the agency's decision. The "whole record" includes all documents and materials directly or indirectly considered by persons involved in the decision-making process. Thus, the administrative record should include all documents that relate to both the substance and procedure of making the decision, including documents that may end up later being redacted or removed from the record on the basis of privilege.

These three emails should have unquestionably been made part of the administrative record. By disclosing the existence of these documents to third parties, Dr. Monnett transmitted evidence that his agency was acting in violation of the APA.

C. These same emails documented violations of the <u>Freedom of Information Act</u> (FOIA).

Similarly, the existence of these emails was not disclosed by the agency in FOIA litigation with conservation groups.

While the agency claims that these emails were both "predecisional" and "deliberative," it bears the burden of proof on this issue which it must meet by describing the record in enough detail to clearly support the exemption claimed. *Coastal States Gas Corp. v. DOE*, 617 F.2d 854, 866 (D.C. Cir. 1980). To do so, agencies often submit a *Vaughn* index. The quality of an agency's *Vaughn* index or record descriptions is crucial to the agency's ability to meet its burden. *Compare, Mo. Coal. for the Env't. Found. v. U.S. Army Corps of Eng'rs*, 542 F.3d 1204, 1211 (8th Cir. 2008).

A *Vaughn* index describes the materials withheld and the justification for non-disclosures. *Miller v. U.S. Dep't of State*, 779 F. 2d 1378, 1383 (8th Cir. 1985); *Vaughn v. Rosen*, 484 F. 2d 820, 828 (D.C. Cir 1973). Although agency use of the *Vaughn* index format is widespread, it is not essential, so long as the agency affidavit is detailed enough to support the claimed exemption. *Minier v. Cent. Intelligence Agency*, 88 F. 3d 796, 803-04 (9th Cir. 1996)."

In this instance, these emails were improperly excluded in their entirety from the agency's *Vaughn* index or record descriptions. By disclosing the existence of these emails, Dr. Monnett transmitted evidence that his agency violated FOIA.

To Whom Disclosure made and when:

1. Dr. Rick Steiner on 1/4/08 and 1/15/08, the dates of the emails.

- 2. Robert Suydam, North Slope Borough Department of Wildlife on 2/8/07, the date of the email.
- 3. Government Accountability Office investigative team (Arvin Wu (206-287-4793), Eric Bachhuber, (206-287-4781) and Stephanie Toby (206-287-4864)) in interview on May 5, 2009.
- 4. Dr. Ralph Morganweck, Department of Interior Scientific Integrity office (now retired) during interview of July 19, 2012.

## 2. Refusal to Follow Illegal Order

#### The 1/31/08 email stated:

"In the past few weeks an organization called the Public Employees for Environmental

Responsibility (PEER) has published several press releases concerning information related

to a number of e-mail messages from former and current MMS managers and staff. Our

attorney/advisors have taken certain measures in regards to these e-mail messages in

ongoing litigation. As such, we have been directed to <u>refrain from discussing the PEER press</u>

releases and the e-mail messages with anyone outside our organization including any

representative with the media." (Emphasis added)

This directive made no exceptions for discussing this matter with members of congress or from making further disclosures that may be protected under the Whistleblower protection Act, among other statues. As such, this directive violated the "anti-gag" provisions of federal appropriations law. See the language from Consolidated Appropriations Act, 2008, Pub. L. No. 110–161, § 719, 121 Stat. 1878 which was in effect when the 2/8/07 Review of EA for Shell Exploration Plan was sent.

SEC. 719. No funds appropriated in this or any other Act may be used to implement or enforce the agreements in Standard Forms 312 and 4414 of the Government or any other nondisclosure policy, form, or agreement if such policy, form, or agreement does not contain the following provisions: "These restrictions are consistent with and do not supersede, conflict with, or otherwise alter the employee obligations, rights, or liabilities created by Executive Order No. 12958; section 7211 of title 5, United States Code (governing disclosures to Congress); section 1034 of title 10, United States Code, as amended by the Military Whistleblower Protection Act (governing disclosure to Congress by members of the military);

section 2302(b)(8) of title 5, United States Code, as amended by the Whistleblower Protection Act (governing disclosures of illegality, waste, fraud, abuse or public health or safety threats); the Intelligence Identities Protection Act of 1982 (50 U.S.C. 421 et seq.) (governing disclosures that could expose confidential Government agents); and the statutes which protect against disclosure that may compromise the national security, including sections 641, 793, 794, 798, and 952 of title 18, United States Code, and section 4(b) of the Subversive Activities Act of 1950 (50 U.S.C. 783(b)). The definitions, requirements, obligations, rights, sanctions, and liabilities created by said Executive order and listed statutes are incorporated into this agreement and are controlling..." (Emphasis added)

Identical appropriations language within the 3rd Continuing Resolution, H.R.J. Res. 102, 109th Cong. (enacted) during the periods when the 1/4/08 Sale 202 Fish and Polar Bear effects sections and 1/15/08 Email exchanges regarding internal disputes emails were sent.

#### To Whom Made

1. Dr. Rick Steiner on dates of email with the expectation he would pass it on to PEER.

#### Nexus

The personnel actions came on account of the protected disclosures, we believe, for the following reasons:

- 1. The Letter of Reprimand cites the protected disclosures as specifications for disciplinary action.
- 2. The cited emails were selected through an agency management-directed IT review.
- 3. The agency took pains to hide the existence of the emails due to their incriminating and inherently embarrassing content. In fact, the agency admits this when it alludes to 9<sup>th</sup> Circuit reference to the emails in a decision declaring agency actions to be illegal.
- 4. Dr. Monnett forwarded scores of emails with agency internal communications to outside individuals from 2007 to present. Yet, of all those communications, the only ones selected by the agency as the basis for discipline are ones to individuals perceived as having connection to environmental groups.
- 5. The agency was aware of Dr. Monnett's interview with:

- A) the GAO because MMS set up the interview and Dr. Monnett debriefed with managers; and
  - B) Dr. Morganweck because the interview was an official interview inside the BOEM office. Dr. Morganweck indicated that he had shared Dr. Monnett's concerns with agency managers to gauge their interactions.
- 6. The stated basis of the reprimand is "for improper release of Government documents." Yet, at no point does the reprimand cite any specific authority or rule violated.
- 7. Other scientists forwarded the same or similar materials yet none have been reprimanded.
- 8. Waiting nearly five years to bring this disciplinary action after reportedly receiving legal advice that there was no basis for this action shows agency bad faith.

At no time prior to this letter of reprimand was Dr. Monnett counseled, warned or directed to curtail forwarding emails to persons outside the agency.