**Before the Department of Agriculture**

Washington, D.C. 20250

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| **In Re:** | **)** |
| **The Department of Agriculture** | **)** |
| **Scientific Integrity Policy** | **)** |
| **OCS Directive 1074-001** | **)** |

*To the Secretary of Agriculture:*

# PETITION FOR RULEMAKING


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**PETITION FOR RULEMAKING**
**UNITED STATES DEPARTMENT OF AGRICULTURE**

## Introduction

In March 2009, President Obama released a memorandum directing the executive department heads to promote new safeguards for scientific integrity within each department.[1] The directive specifically addresses the problem of political interference, charging that "[p]olitical officials should not suppress or alter scientific or technological findings and conclusions."[2] Among other sound principles, the directive requires agencies to create procedures to identify and address compromised information, and to ensure an accurate reflection of scientific information.[3] In 2013, the United States Department of Agriculture ("USDA") released the USDA Scientific Integrity Policy ("the Policy") purporting to "ensure the highest level of integrity" from its employees.[4]

## Summary

Contrary to the intent of this Presidential directive, suppression and alteration of scientific work for political reasons remain common at USDA. In addition, USDA scientists whose work carries with it policy implications that negatively reflect upon USDA corporate stakeholder interests routinely suffer retaliation and harassment.

The stated purpose of USDA's scientific integrity policy is to ensure "the highest level of integrity in all aspects of the executive branch's involvement with scientific and technological processes and analyses."[5] However, the Policy fails to clearly prohibit political suppression and interference. While the Policy defines political suppression and interference, it does not include these acts in its definition of misconduct.[6] The USDA, by its own admission, has yet to develop procedures for handling scientific integrity complaints.

To compound the problem, an overly broad provision within the Policy actively *encourages* USDA to suppress scientific work for political reasons. The provision states that

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[1] Memorandum of March 9, 2009: Scientific Integrity, 74 Fed. Reg. 10,671 (Mar. 11, 2009).

[2] *Id.*

[3] *Id.*

[4] OCS Directive 1074-001, Departmental Regulation: Scientific Integrity (U.S.D.A. 2013).

[5] *Id.*

[6] *Id.*

scientists "should refrain from making statements that could be construed as being judgments of or recommendations on USDA or any other federal government policy, either intentionally or inadvertently."[7] USDA management routinely relies up this vague but expansively worded provision a pretext for suppressing technical work solely because the scientific conclusions expressed draw the ire of USDA corporate stakeholders.

Further, unlike many of its sister federal agencies, the USDA scientific integrity policy lacks any process or mechanism for preventing politically motivated suppression or for challenging it once it occurs.

Moreover, there are no cogent safeguards for whistleblowers in the Policy, which contains no clear process for protecting scientists raising integrity concerns or filing complaints. Instead, the agency punishes scientists for research that the agency deems controversial, and the Policy lacks procedures for these scientists to seek or receive redress.

Finally, matters of scientific integrity within USDA are shrouded in secrecy. USDA has not even posted a website for scientific integrity information, as stated in the 2013 policy.[8]

Through this rule-making petition, PEER urges USDA to revise the Policy by adopting the best practices contained within the scientific integrity policies of USDA's sister federal agencies, so as to –

- Explicitly prohibit political suppression and alteration.
- Broadly protect scientific information from management suppression and alteration except for reasons of technical merit.
- Employ clear and enforceable procedures for conducting scientific misconduct investigations and following through when such investigations uncover misconduct, including procedures for taking disciplinary action against managers and political appointees guilty of scientific misconduct;
- Adopt strong protection for scientists who file misconduct complaints or participate in misconduct investigations, or whose scientific work faces politically motivated interference.
- Assure transparency in the administration of the Policy.

[7] *Id.*

[8] Office of the Chief Scientist Directive 1074-001, Scientific Integrity (U.S.D.A. 2013)

## Petition for Rulemaking

Pursuant to the Administrative Procedure Act, 16 U.S.C. § 553(e), Public Employees for Environmental Responsibility ("PEER") hereby petitions the United States Department of Agriculture ("USDA") to adopt best practices for its scientific integrity policy, including eliminating a provision in the current version of the Policy that prohibits scientists from making statements that can be construed as "judgments of or recommendations on" policies of the USDA or the federal government.

## Standing to File

PEER is an IRS 501(c)(3) non-profit organization incorporated under the laws of the District of Columbia. PEER serves the professional needs of local, state, and federal employees, including scientists, charged with the protection and study of America's environment and natural resources. As such, PEER is "an interested person" under the Administrative Procedures Act.

## Argument in Support of Petition

### I. Background

The USDA Scientific Integrity Policy actively enables agency managers to suppress and alter scientific work products for their policy implications, regardless of their technical merit. It also appears clear that agribusiness interests, such as Monsanto Corporation, have access to top agency managers and are invited to lodge complaints and concerns about the published work of agency scientists. Significantly, the Policy lacks any mechanism to effectively challenge this political manipulation of science. This gap is compounded by the lack of whistleblower protection for scientists. As a result, scientists whose work raises troublesome implications or who have the temerity to file complaints about inappropriate skewing of science face the prospect of official retaliation.

In a growing number of cases, USDA managers are interfering, intimidating, harassing, and in some cases punishing civil service scientists for doing work that has inconvenient implications for industry and could have direct policy/regulatory ramifications. For example, in recent months USDA scientists have been subjected to –

- Directives not to publish data on certain topics of particular sensitivity to industry;

- Orders to rewrite scientific articles already accepted for publication in a peer-reviewed journal to remove sections which could provoke industry objections;

- Summons to meet with Secretary Vilsack in an effort to induce retraction of a paper that drew the ire of industry representatives;

- Orders to retract a paper after it had been accepted for publication in a peer-reviewed journal. The paper could only be published if the USDA scientist removed his authorship thus leaving only the names of authors unassociated with USDA;

- Demotion from supervisory status and a reprimand after the scientist provided testimony before Congress that did not reflect agency preferences;

- Disruptive and lengthy internal investigations to search out any irregularity that could be used for management leverage against the targeted scientist;

- Suspensions without pay and other disciplinary actions for petty matters, such as minor irregularities in travel paperwork;

- Inordinate, sometimes indefinite, delays in approving submission for publication of scientific papers that may be controversial;

- Restrictions on topics that USDA scientists may address in conference presentations; and

- Threats by USDA managers to damage of the careers scientists whose work triggers industry complaints.

USDA scientists working on topics with direct relevance to industry interests are under constant pressure not to do anything to upset these important "stakeholders." Rather than shield staff scientists from industry influence, USDA managers amplify it. In short, the USDA Scientific Integrity Policy lacks meaningful procedures to prevent the very sort of abuses that the Policy is supposed purpose.

## II. Rule Making Petition

PEER petitions USDA to make the following revisions to the Policy, based on good practices that other federal agencies successfully employ to ensure scientific integrity.

*1. Adopt NOAA rule on publication of work-related research*

USDA should adopt National Oceanic and Atmospheric Administration's ("NOAA's") rule regarding publication of work-related research and the Department of Commerce's ("DOC's") policy providing scientist appeal rights if approval for publication is withheld. The USDA's current scientific integrity policy merely encourages USDA scientists to "participate in communications with the media regarding their scientific findings" and to publish their "scientific findings in peer-reviewed, professional, scholarly journals."[9] Even though NOAA's scientific integrity policy contains similar language encouraging its scientists "to engage with their peers in academic, industry, governmental, and non-governmental organizations by … publishing their work in appropriate outlets," NOAA's policy also provides that its scientists "are free to present viewpoints, for example about policy or management matters that extend beyond their scientific findings to incorporate their expert or personal opinions."[10] In such instances, NOAA simply requires its scientists to state clearly that they are presenting their individual opinion, not those of the DOC or NOAA.[11]

An additional protection the USDA policy should include is DOC's scientist appeal rights. DOC grants its employees "the right to appeal the non-approval of that employee's Fundamental Research Communication, and has the right to appeal changes that affect the scientific accuracy of that employee's Official Communication."[12]

*2. Adopt EPA rule against scientific suppression*

The current USDA policy includes contradictory rules about the suppression or alteration of scientific findings. The Policy first promotes "a culture of scientific integrity," proclaiming that "[s]cience, and public trust in science, thrives in an environment that shields scientific data and analyses and their use in policy making from political interference or inappropriate influence." The Policy additionally contains language condemning the suppression and

[9] Office of the Chief Scientist Directive 1074-001, Scientific Integrity (U.S.D.A. 2013).

[10] NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE, NOAA ADMINISTRATIVE ORDER 202-735D, SCIENTIFIC INTEGRITY (2011).

[11] *Id.*

[12] *Id.*

alteration of scientific and technological findings.[13] However, the Policy goes on to prohibit scientists "from making statements that could be construed as being judgments of or recommendations on USDA or any other federal government policy, either intentionally or inadvertently." USDA should immediately rescind this vague, overly broad, and easily (and routinely) misused provision. Instead, USDA should adopt the Environmental Protection Agency's ("EPA's") rule about suppression and alteration of findings, which "prohibits all EPA employees, including scientists, managers, and other Agency leadership, from suppressing, altering, or otherwise impeding the timely release of scientific findings or conclusions."[14]

3. *Adopt NRC process for registering Differing Professional Opinions ("DPOs") and complaint review.*

The USDA should create a specific process for registering differing professional opinions, which would enable it to implement the Policy's promise to "[e]nsure that mechanisms are in place to resolve disputes that arise from instances in which the scientific process or the integrity of scientific and technological information may be compromised."[15] This language lacks any specific procedure for dealing with scientific disputes and limits itself to potential compromises of the scientific process or the integrity of scientific or technological information.

In contrast, the Nuclear Regulatory Commission ("NRC") instituted specific procedures and a timeline to resolve scientific disputes in its Differing Professional Opinions ("DPO") Program Handbook.[16] The DPO receives review by an ad hoc panel, and the NRC policy provides confidentiality protections for submitters.

As a precondition to submitting a DPO, the employee must first discuss the issue with the immediate supervisor or explain why the submitter feels he cannot approach his immediate

[13] "Scientific and technological findings should not be suppressed or altered." Office of the Chief Scientist Directive 1074-001, Scientific Integrity (U.S.D.A. 2013).

[14] OFFICE OF THE SCIENCE ADVISOR, EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY SCIENTIFIC INTEGRITY POLICY (2012).

[15] Office of the Chief Scientist Directive 1074-001, Scientific Integrity (U.S.D.A. 2013).

[16] Another policy USDA should look to for resolving scientific disputes is the Food and Drug Administration's ("FDA's") scientific integrity policy. The FDA's Staff Manual Guide offers many of the same protections as the NRC rule for DPOs, but the FDA's policy is different in that it allows for "interested parties outside the agency to request internal agency review of scientific decisions and their bases." FOOD AND DRUG ADMIN., SMG 9000.1, GENERAL OR MULTIDISCIPLINE SCIENTIFIC INTEGRITY: SCIENTIFIC INTEGRITY AT FDA (2012)

supervisor.[17] Next, the employee submits a written DPO form to the agency summarizing the prevailing staff view, the existing management decision or agency practice in dispute, a description of the submitter's views and how they differ, an assessment of the consequences, the names of three potential ad hoc panel members, and copies of relevant documents listed in the DPO.[18] An employee may submit an unsigned DPO to an NRC manager.[19]

Before the ad hoc panel reviews the DPO, the DPO Program Manager immediately screens the DPO "to determine if the precondition for acceptance as a DPO has been met."[20] If the DPO is accepted, the DPO Program Manager assigns it to the appropriate Office Director or Regional Administrator to elect members of the ad hoc panel.[21] The ad hoc panel conducts a thorough review of the issues.[22] No one in a position of authority over the submitter may be appointed to the ad hoc panel.[23] The panel should not take more than 30 calendar days after the initial meeting with the submitter to make a recommendation on the DPO.[24] The submitter should receive the decision and its rationale within 10 calendar days after receipt of the panel's final recommendation.[25] Each review should be completed within 60 days, unless the DPO involves complex issues in which case the NRC policy allows 120 days for resolution.[26]

A detailed and well thought out process such as this one would assist USDA in dealing with scientific disputes in a constructive manner that promotes scientific integrity.

*4. Adopt State Department policy defining breach of integrity*

USDA's scientific integrity policy defines "research misconduct," which relates to misconduct by scientists themselves, but the Policy does not clearly include "loss of scientific

[17] *Id.*

[18] NUCLEAR REGULATORY COMM'N, HANDBOOK 10.159, THE NRC DIFFERING PROFESSIONAL OPINIONS PROGRAM (2004).

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] *Id.*

[26] *Id.*

integrity" which occurs when an agency makes decisions based on insufficient or flawed science as a form of misconduct. Indeed, it is loss of scientific integrity that was the focus of President Obama's executive order." Instead, the USDA policy defines research misconduct as consisting of only "fabrication, falsification, or plagiarism in proposing, performing, or reviewing research, or in reporting research results."

The Department of State's scientific integrity policy defines a compromise of scientific integrity as:

> (1) Using scientific studies or data to inform the decision making process that are not representative of the current state of scientific knowledge and research (for example because they lack peer review, utilize poor methodology, or contained flawed analyses);
>
> (2) Misrepresenting the underlying assumptions, uncertainties, or probabilities of scientific findings or attempting to suppress or alter scientific or technological findings (including, but not limited to, those performed by U.S. Government scientists) during any step of the decision making process; or
>
> (3) Altering, or misrepresenting scientific or technological findings in public communications.[27]

USDA should add the Department of State's rule to its own definition of research misconduct while making it clear that these breaches of integrity are valid subjects of misconduct complaints which will be thoroughly and impartially investigated.

5. *Adopt EPA's protections for scientists facing retaliation for the content of their work and its protection of whistleblowers and scientists from retaliation*

The current USDA scientific integrity policy limits its protection from retaliatory prohibited personnel practices to "those who uncover and report allegations of research misconduct or other violations of scientific integrity as well as those accused of research misconduct"[28] Yet, the Policy never specifies what those protections are or how they are invoked. Instead, the Policy pledges to comply with the requirements of the Whistleblower Protection Act of 1989 and it expanded protections[29]-- as if it had a choice.

[27] Department of State, Legal and Political Affairs 11 FAM 820, Scientific Integrity (Jun. 13, 2013).

[28] Office of the Chief Scientist Directive 1074-001, Scientific Integrity (U.S.D.A. 2013)

[29] *Id.*

By comparison, the EPA policy maintains similar protections but "[e]xtends whistleblower protections to all EPA employees who uncover or report allegations of scientific and research misconduct, or who express a differing scientific opinion, from retaliation or other punitive actions. . . ."[30]

In addition, the USDA policy should outline the specific mechanisms by which promised whistleblower protection will be invoked. Most directly, retaliation should be added to the definition of misconduct and subject to enforcement in the same manner as the rest of the policy.

## Conclusion

The USDA Scientific Integrity Policy does not meet its stated purposes and is in obvious need of reform. The poor state of this policy and the absence of serious or thorough implementation has damaged the quality of scientific work emanating from USDA and limited its scope to the detriment of the public interest. In addition, it has failed to shield conscientious scientists from career-crippling retaliation from their own management.

PEER is urging that USDA strengthen its policy by adopting "best practices" already adopted by its sister agencies. Borrowing existing provisions already used in practice also allows USDA to benefit from other agencies' experience. Moreover, USDA scientists deserve no less rigorous protection than scientists working within other federal agencies.

Accordingly, PEER petitions the Secretary to transform his agency's Scientific Integrity Policy from a half-finished shambles into a model for others to emulate. Doing so will enhance USDA's scientific reputation and credibility while allowing agency scientists to do their jobs and better serve the public without fear of reprisal.

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[30] OFFICE OF THE SCIENCE ADVISOR, EPA, U.S. ENVIRONMENTAL PROTECTION AGENCY SCIENTIFIC INTEGRITY POLICY (2012).