

Comments on NOAA Draft Scientific Integrity Policy
Administrative Order 202-735D
Submitted by Public Employees for Environmental Responsibility (PEER)
August 10, 2011

In many respects the draft scientific integrity policy by the National Oceanic & Atmospheric Administration (NOAA) are superior to those adopted by the Department of Interior and they are far superior to the draft policy published this month by the Environmental Protection Agency.

There are several gaps in the NOAA draft policy which the agency should remedy before adoption:

1. Dangerously Weak Whistleblower Protections

Sec.5.04 of the draft policy declares “NOAA policy to protect those who uncover and report allegations of scientific and research misconduct...” but nowhere is it explained how this policy is enforced or by whom.

When PEER raised this issue at the July 28, 2011 stakeholders meeting on this policy, the NOAA officials did not appear to want to discuss this problem. Moreover, they were unable to provide a coherent answer to the basic question of who would enforce this whistleblower protection. One even suggested it perhaps should be handed to the Commerce Inspector General even though this office has no power to affect NOAA personnel actions.

Nonetheless, the draft policy commits NOAA to “Provide information to employees on whistleblower protections” (Sec.5.02f) – a tall order if NOAA officials cannot explain what those protections are or how they will be invoked.

In addition, the NOAA draft suggests that protection from adverse action exists only while a complaint is reviewed and may vanish when the investigation is completed. The draft should be clear that no future adverse action may ever be taken in connection with the filing of a misconduct complaint or disclosure of a deviation from scientific integrity policies.

Without a concrete mechanism to enforce whistleblower protections, a scientist who files a scientific misconduct complaint against a superior or a political appointee has no shield against whatever professional retaliation that may follow.

PEER Recommendation: Any prohibition against adverse personnel actions should be integrated into existing Whistleblower Protection Act (WPA) coverage, meaning that these prohibitions will be enforced by the U.S. Office of Special Counsel and the Merit Systems Protection Board as are all other federal civil service whistleblower protections.

By contrast, Sec. 2.04 of the policy declares “This order shall not be interpreted to conflict with the rights of an employee under the law, including...the Whistleblower Protection Act of 1989...” – suggesting that this protection is somehow separate.

This provision should be revised and instead the policy should state that all of the scientific integrity provisions will be considered “rules” for purposes of 5 U.S.C. § 2302 (b) (8) which defines protected speech for purposes of whistleblower protection. Thus, anyone who reports or discloses violations of these rules would be covered by the WPA under operation of law.

2. No Protections for Scientists Who Report Controversial Findings

In our experience, NOAA scientists often face official retaliation for making, or attempting to make, scientific findings on topics such as endangered species which trigger political pressure or backlash against the agency. The NOAA policy ignores this very real dynamic which lies at the very heart of President Obama’s 2009 directive which states:

“Each agency should adopt such additional procedures, including any appropriate whistleblower protections, as are necessary to ensure the integrity of scientific and technological information and processes...”

Nor does the draft policy protect employees from retaliation for upholding the “Principles of Scientific Integrity” (Sec.4).

Further, by encouraging scientists to publish and lecture but failing to provide any protection for those activities, the NOAA policies is setting its own scientists up for unshielded reprisal when these scientists speak or write on topics which incur special interest displeasure or angst. Nor does it protect employees from retaliation for expressing scientific views, pursuing investigations with political or policy implications or speaking to the media.

Protecting scientists for their practice of science and pursuit of knowledge is at the heart of the Obama directive but is utterly missing from the NOAA draft.

PEER Recommendation: As explained above, the policy should make clear that any disclosure of a violation of NOAA Principles of Scientific Integrity (Sec. 4), NOAA Policy on Integrity of Scientific Activities (Sec. 5), the Code of Scientific Conduct (Sec. 6) or the Code of Ethics for Science Supervision and Management (Sec. 8) is also covered by the WPA.

3. Commerce Communications Policy Contradicts and Supersedes NOAA Scientific Integrity Policy

The draft policy makes clear in several places (Sec.2.03a, Sec.4.03 and Sec.7.03) that it is subordinate to the Department of Commerce Public Communications Administrative Order (DAO-219-1). This Bush-era Commerce Order forbids scientists from disclosing information that has not been approved by the chain-of-command, even if they prepare it and deliver it on their own time as private citizens. This order is so all encompassing that

it requires exceptions for innocuous statements such as weather updates and answers to purely factual questions about previously approved reports.

Thus, the new proposed NOAA scientific integrity policy is at odds with the old official pre-review Commerce policy. This means that scientists' right to speak and publish in their field is subject to agency approval (which supposedly may not be withheld due to "the policy, budget or management implications of the research"). One either has the right to publish or one does not.

Our concern is that a scientist may be confused by all of the new NOAA transparency rhetoric and risk discipline for violating Commerce policy for failing to obtain prior chain-of-command sign-off before publishing or speaking.

PEER Recommendation: Given that this new NOAA policy is far more specific than the Commerce DAO, NOAA should be exempted from the more general Commerce policy.

On July 17, 2010, PEER petitioned the Secretary of Commerce to rescind DAO 219-1 but more than a year later Commerce has yet to provide a substantive response to our rulemaking petition [see http://www.peer.org/news/news_id.php?row_id=1372]

4. Dangerously Vague Offense of "Non-Financial Conflict of Interest"

Under the draft policy, Scientific and Research Misconduct (Sec. 8) includes any violation of the NOAA Code of Scientific Conduct (Sec. 6.01) which, in turn, includes this provision that scientists could be faulted for not:

"Disclosing any apparent, potential, or actual conflicts of interest or non-financial conflicts of their own and others" (Sec. 6.01a—Honesty)

The definition of a non-financial conflict is disturbingly broad. Sec. 3 defines it by reference to the CFR regulation on personal relationships of the employee, or anyone with whom the worker has a "covered relationship". This is pretty slippery stuff, especially when the policy (Sec. 3 definition of "Conflict of Interest" covers anything that gives the appearance of a non-financial conflict – sort of an appearance of an appearance.

PEER is concerned that this could be used to go after scientists who have a spouse who works for an environmental advocacy group or corporation which has a tangential connection to the scientists' work.

PEER Recommendation: The policy should not sanction mere appearances, especially based upon familial activities. If there are safeguards on the actual quality of the scientific work, there is less need for a political correctness police to chase the shadows of appearances. These provisions should be significantly tightened or removed altogether.

5. Role of Inspector General

Unlike the Interior scientific integrity policy which sets up an exclusive channel for handling allegations of scientific misconduct and limits the role of its Inspector General (IG) to reports of waste, fraud and abuse, the NOAA policy does not mention the IG. Thus, an employee could file an identical scientific misconduct complaint with a NOAA Determining Official and with the IG, triggering two separate investigations which could reach opposite outcomes.

IG's often lack the expertise to referee technical disputes. In addition, IG investigations have no set process, quality control or transparency.

PEER Recommendation: NOAA should follow the lead of Interior. Its rules should make clear that the policy provides the exclusive means for reviewing complaints of scientific misconduct. The IG should refer any such complaints filed with it to a Determining Official, as spelled out in the Procedural Handbook.

6. Problematic Confidentiality of Complaints

Section 4 of the proposed handbook warns a Complainant to “maintain confidentiality” but does not elaborate on what this warning covers or the consequences if confidentiality is not maintained.

For most scientists, filing a complaint of scientific misconduct will be a last resort, taken only when efforts to remonstrate the problem through the chain-of-command have failed. Thus, it is likely that many of the complaint which reach the formal complaint stage have been aired internally, making confidentiality moot.

PEER Recommendation: NOAA should not place extraneous restraints on complaints of scientific misconduct. It should excise the confidentiality language.

7. Effect on Hiring and Promotion

This policy pledges NOAA to “Ensure that the selection and retention of employees in scientific positions or in positions that rely on the results of scientific activities are based in the candidate’s integrity, knowledge, credentials, and experience relevant to the responsibility of the position.”

If this is different that what NOAA does now, it is not clear what this language means. Moreover, this language does not clearly apply to all managers and supervisors.

PEER Recommendation: The NOAA policy should be stripped of vague bromides that have no practical meaning.

8. Training and Guidance

The policy commits NOAA to provide training and guidance to employees and contractors about “their rights regarding publication of their research, communication with the media and the public, participation in scientific societies, and their responsibility to report waste, fraud and abuse” (Sec. 4.08).

However, there are no clear-cut “rights” in any of these areas. Moreover, as these new rules displace guidance and rules from the Office of Government Ethics (see fn. 2, for example) and Commerce’s Ethics Office, this new guidance will be an opportunity to provide sharper definition and context to some of the language embedded within this policy.

PEER Recommendation: Employee unions and outside stakeholders should be included in providing input on guidance materials to ensure they are complete and accurate.

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