Before the Executive Office of the President

Office of Budget and Management ("OMB")

WASHINGTON, D.C.

In Re	)	
Performance of	)	**Fed. Reg. Doc. No. 02-29472**
Commercial Activities	)	

To the President of the United States
c/o Director, Office of Management and Budget
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Comments of
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(PEER)

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In response to public notice given via the *Federal Register* (67 FR 69769), Public Employees for Environmental Responsibility ("PEER") hereby submits, by and through counsel, its comments regarding the proposed revision to Office of Management and Budget Circular No. A-76, "Performance of Commercial Activities."

PEER is a national service organization for public employees working in a number of environmental fields, including those fields that look to the proper execution of federal environmental law. The nature of this employment is inherently governmental, and the treatment of these positions under the proposed changes to A-76 will adversely impact the monitoring and enforcement of American environmental laws by federal employees.

It would be prudent to remember, at this point, where the U.S. Government is in the trend toward "privatization":

> The intrinsic merit of contracting-out has become increasingly controversial. As some of the early enthusiasm for the outsourcing 'revolution' has worn off, critics argue that the "ostensible cost-savings

> achieved by privatization turned out to be mere cost shifting." Better results may come from enterprise, innovation, and introduction of technological advances within the government rather than simply allowing private contractors to juggle the books and reduce [federal] employee wages and benefits.

Charles Tiefer & Jennifer Ferragut, *Letting Federal Union Protest Improper Contracting-Out*, 10 CORNELL J.L. & PUB. POL'Y 581, 582 (2001) citing Robert Kuttner, Everything for Sale: The Virtues and Limits of Markets 358 (1999). See also, Charles Tiefer, Giving Away the Store: *How Much Can the New Administration Surrender to Contractors?*, LEGAL TIMES, (Mar. 5, 2001) at 36. One must also remember that eight (8) years of federal work force reduction under President William J. Clinton has scaled back the number of employees available to determine when the federal government is exposed to a liability under the Nation's environmental laws and to prevent violation of those laws in those circumstances. Between 1990 and 2000, the federal workforce was reduced from 2.17 million employees to 1.8 million employees. Tiefer & Ferragut, supra, at 599 n.1 citing "A Decade of Shrinking" (table) in Cathy Newman, *Expecting a Government Expansion*, WASH. POST, Sept. 28, 2000 at A29.

With the reduction in the federal workforce already accomplished, general changes to the system of outsourcing are less important than targeted changes. Even the General Accounting Office ("GAO") has indicated that Clinton-era downsizing has achieved all the cost-savings that can be achieved. Cf. General Accounting Office, *Outsourcing DOD Logistics: Savings Achievable by Defense Science Board's Projections are Overstated*, Report No. GAO/NSAID-98-48- (1997). And one area that ought not to be targeted are those functions which deal with federal environmental assessment and law enforcement. As laudable as it is to promote the spirit of free-market competition in the provision of federal services, the contracting out of functions and duties that are essential to the good administration of the Nation's laws will lead to a circumvention of those laws:

> They took me off that assignment and hired a contract biologist for $50 an hour, who rubber stamped their plans," says [Rose] Leach, who eventually

> left the Montana Department of Natural Resources and Conservation to work for western Montana's Confederated Salish and Kootenai Tribes. "I know many ethical contractors, but you can shop around for one to tell you what you want to hear."

Cited in Mark Matthews, *The push is on to privatize federal jobs*, HIGH COUNTRY NEWS (December 9, 2002) at 3. Many of PEER's intakes over the past few years have included similar stories from federal employees in the U.S. Departments of Defense, Interior and Agriculture. With this present rulemaking, OMB has reach that critical point where it must decide whether to promote the violation of the law in order to advance what may be rather speculative gains in federal cost-savings. Within the U.S. Department of Defense, the trend toward law-breaking is accelerating:

> A particularly interesting academic treatment is by Professor Render, who concludes about one combination base closing and contracting out "that high ranking Navy officials are perfectly willing to deal behind the backs of lower level employees and to violate the law to reach a desired result."

Tiefer & Ferragut, supra, 599 n.3 citing Edwin R. Render, *The Privatization of a Military Installation: A Misapplication of the Base Closure and Realignment Act*, 44 NAVAL L. REV. 245, 280 (1997). One reason the economy recognizes the existence of inherently "public goods" is that one values those goods (or services) because of characteristics they would not retain if they were bought and sold as mere chattels. "National defense" is one such 'service'; so is 'environmental assessment and enforcement'. If one continues to privatize these functions, one opens up not only the prospect of continued law-breaking, but also of a corruption of the professional ethics of those one expects to uphold the law. By regulating an incentive to condone violations of the law, OMB will be goading both the professional military corps and our environmental assessment and enforcement professionals to the level of ethics generally associated with corrupt oligarchies in other parts of the world. Privatization is the unethical federal manager's path to avoid fidelity to the environmental laws passed by the United States Congress.

Indeed, where such "outsourcing" to avoid environmental compliance continues – most notably in the area of environmental assessment and review – the enforcement of

federal laws such as the National Environmental Policy Act of 1969 and the Sikes Act of 1949 has already fallen into decline:

> "We could see situations where certain environmental laws won't be enforced, or just ignored by contractors," says Bill Kilroy, an official with the National Federation of Federal Employees, who works at the Forest Service's Missoula Technology and Development Center. "The administration doesn't want anyone overseeing the timber industry or environmental policies. They view current Forest Service employees as a hindrance to what they want to do."

Cited in Mark Matthews, *The push is on to privatize federal jobs*, HIGH COUNTRY NEWS (December 9, 2002) at 3. Whether the Office of Management and Budget actual works to bring such evasion to pass is beyond the point; the actions of local managers seemingly unconnected to the Administration have reinforced the public's worst fear. A-76 reform is not about reengineering the federal government, it is about rewarding a new class of political donors tied to the Republican Party. That Democratic politics would follow the same contour is a debatable proposition. But unless the draft A-76 revision contains provisions to protect the lawful enforcement of federal rule and/or regulation, continued reform of the Circular will simply be seen as pandering to commercial elites with existing ties to any Administration in office, whether Republican or Democratic.

The potential for the draft Circular to exacerbate the current crisis in federal adherence to its own laws will only be compounded by the gaming which will occur as liability for past environmental indiscretion is expanded due to the broadening of the number of potential malefactors. Placing the enforcer of federal law in a contracting relationship with those who may be tempted to violate the law to continue in that relationship increases the incentive to law break. *Cf.* James McAleese, *Confronting Environmental Pitfalls in Industry Downsizing and DoD Outsourcing and Privatization* at http:/www.mcaleese.com/papers/lomc2.htm.

At American law, the federal government has traditionally marked a distinction between those activities which are commercial and which the federal government

nonetheless provides or engages in, and those activities that are central to the federal government's role in executing the missions of the U.S. Constitution. The Circular has traditionally looked toward the concept of 'discretion' as the touchstone of governance; now OMB proposes to generalize the definition and have the departments list the functions of governance without further guidance. To move away from the concept of 'discretion' and move toward a more general, and perhaps more restrictive, definition, is to weaken the federal government as an institution.

To "improve program performance" under the traditional model, one would look to the proper execution of laws passed by the U.S. Congress and enabled through regulations drafted and approved by the President's cabinet and appointees at independent and executive agencies. It would be improper, however, to use the phrase "improve program performance" as code for "avoiding the execution of Congressionally-enacted statutes" through the delegation of that role to private contractors.

Therefore, a revised A-76 Circular should include:

(1) Provisions removing all federal environmental assessment and enforcement positions from the 425,000 positions eligible for outsourcing to private contractors. To that end, the definition of "inherently governmental activity" should include all those functions that inform and shape the decision by a federal agency to take action to enforce a law duly passed by the United States Congress.

(2) Specific provisions debarring contractors with convictions, civil judgments or adverse state or federal administrative findings evidencing violations of environmental statutes, or regulations, labor and occupational safety laws as well as fraud or other financial misconduct;

(3) Removal of provisions providing for direct conversion where an activity is or will be performed by an aggregate of ten (10) or fewer "full-time equivalent" employees (FTEs). As many environmental compliance, land management and wildlife protection

offices are staffed with five (5) or fewer employees (for example, many of our National Wildlife Refuges), the current proposed A-76 redraft will disproportionately shift environmental compliance functions into the private sector.

(4) The addition of provisions requiring contractors to extend by contract effective protection for retaliatory employment action for "whistleblowing." These protections should be equivalent in scope to those protections accorded to federal employees under the Whistleblower Protection Act of 1989, as amended.

(5) Allowance for affected employees to directly bid against potential private contractors so that there is true competition in determining of "best value."

(6) Provisions specifying that the draft Circular does not authorize agencies to contract out their environmental consultation responsibilities with other agencies, as required by regulations promulgated by the Council for Environmental Quality ("CEQ").

Probably the most disconcerting aspect of the revised A-76 is this notion that "competition" is always a positive good. When it comes to the subcontracting out of federal functions such as environmental assessment and compliance, "competition" can vitiate the law. When a subcontractor wants to competitively bid for a proposal for services that he or she is already supplying, the subcontractor will naturally – as a matter of market discipline – want to provide the federal agency with a product which reinforces what the agency thinks it needs. So an agency antagonistic to environmental review will receive services <u>that do not prompt further environmental review</u>. In this market environment, "competition" provides an incentive to violate the law – especially when the institution charged with enforcing the law <u>is the party seeking to avoid its execution</u>.

Respectfully submitted,

_____Dan Meyer_____________________________

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