

**Draft Comments on the National Oceanic and Atmospheric Administration  
proposed scientific integrity policy  
July 29, 2011**

On June 15, 2011, the National Oceanic and Atmospheric Administration (NOAA) released a draft of a new scientific integrity policy. The policy makes strong commitments to protecting the rights of scientists to speak publicly and to the media about their research and establishes a code of conduct for NOAA employees. NOAA deserves special commendation for releasing a draft procedural handbook along with the draft policy, as the details of how the policy will be implemented are critical. Furthermore, the policy adopts important ethics requirements for federal advisory committees and managers and supervisors to limit the opportunity for conflict of interest and political interference.

The policy takes significant, positive steps towards ensuring that policy decisions are fully informed by the best available scientific information, but there is also room for improvement to ensure that the policy can stand the test of time against administrations or individuals who are not well-intentioned. The policy should be strengthened to proactively protect the rights of scientists and whistleblowers, and allow for public accountability by reporting confirmed cases of political interference in science and regularly releasing visitor logs. In addition, the policy should more stringently limit and require disclosure of conflicts of interest and standardize procedures for the release of information and publication of research. In addition, current Department of Commerce (DOC) policy limits the ability of NOAA to fully realize its scientific integrity aspirations.

These comments explore the constraints placed on NOAA by its parent department; emphasize essential components in the draft policy that should be retained; and detail four key areas where the policy should be strengthened. Attachment A is a line-by-line analysis of the policy, where green boxes indicate positive aspects of the policy, yellow boxes indicate places where more elucidation might be necessary, and red boxes indicate significant areas of concern.

**Department of Commerce Limitations**

In 2007, the Department of Commerce released Departmental Administrative Order (DAO) 219-1 which governs the ability of departmental employees to engage in public communications. The policy is not strong enough to curb political interference in science at agencies, and at times directly contradicts statements made by then-NOAA Administrator Conrad Lautenbacher.<sup>1</sup>

DAO 219-1 should be commended for supporting the "open dissemination of research results" and explicitly acknowledging that scientific communications—such as press releases, public speeches and media interviews—are unique and should not be constrained. Unfortunately, the policy itself undermines this commitment by requiring scientists to seek approval from the department's public

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<sup>1</sup> "Message from the Under Secretary – Encouragement of Scientific Debate and Transparency Within NOAA." February 16, 2006, online at [http://www.peer.org/docs/noaa/06\\_15\\_2\\_sci\\_open.pdf](http://www.peer.org/docs/noaa/06_15_2_sci_open.pdf).

affairs office for any scientific communication. Additionally, the policy fails in three significant ways to explicitly affirm basic free speech rights for scientists:

- First, the policy should affirm scientists' rights to speak freely to the media on any topic, provided they make it clear that any views expressed are their own and do not reflect the Commerce Department's official position.
- Second, the policy should give scientists the right of final review of any communication citing their research.
- Third, the policy should guarantee federal employees' rights under the Whistleblower Protection Act and other free speech protections.

Even though in a memorandum dated June 15, 2011 the Department clarified the right of scientists to speak to the media without prior approval, confusion persists. NOAA should pressure the Department of Commerce to rewrite DAO 219-1 to address its shortcomings. Attachment B is a letter from UCS and the Government Accountability Project pointing out problems with DAO 219-1.

### **Essential Draft Policy Components that Should be Retained**

NOAA's draft scientific integrity policy has several components that should be retained relating to safeguarding the rights of scientists and promoting oversight of supervisors and managers.

**A. Safeguarding the rights of scientists:** The NOAA draft policy makes strong commitments to protecting the rights of scientists to speak publicly about their research, establishing a code of conduct and providing accessible materials for scientists to reference.

#### **A.1. The policy explicitly reaffirms freedom of speech rights for government scientists.**

Sections 4.01-4.05 of the proposed policy are sufficiently inclusive. The right of scientists to speak to the public and media is essential to a culture of scientific integrity. This not only protects the rights of scientists but supports whistleblowers who report political interference in science and helps to ensure that accurate data and information are disseminated to the public.

**A.2. NOAA promotes agency awareness of scientific integrity policies and practice.** Policies are only effective if they are fully embraced by the target audience. NOAA promotes this by:

- Committing to ensuring that all NOAA employees and contractors are fully aware of their rights regarding "the publication of their research, communication with the media...and their responsibility to report waste, fraud and abuse" through regular trainings.
- Releasing a draft procedural handbook, which provides necessary details regarding how the policy will be implemented.
- Making the information available in convenient location. The policy notes that all the information regarding NOAA's scientific integrity policy can be accessed on NOAA's website and provides a website link.

**A.3. The policy describes a clear code of scientific conduct.** The code of conduct protects scientists by making them aware of their rights but also their ethical responsibility and the integrity standard to which they will be held. While scientific misconduct often comes from the supervisors and policymakers, it is important to ensure that scientists adhere to scientific integrity as well.

**B. Promoting oversight of supervisors and managers:** The draft policy reinforces important ethics requirements for federal advisory committees and managers and supervisors to limit the opportunity for conflict of interest and political interference.

**B.1. The policy establishes a strong code of ethics.** The code of ethics for science supervision and management is an essential portion of the policy. The policy succeeds by:

- Stating that supervisions must select, promote or retain scientists based solely on their “knowledge, credentials, experience and integrity.” Too often, supervisors have used their authority to attempt to silence scientists or appoint personnel to promote a political agenda.
- Committing to following the established procedures for the selection and use of Federal Advisory Committees. FACs are important bodies in policy-making and should be monitored to prevent political interference. While NOAA’s policy is strong, some reservations about the policy are listed below.
- Reaffirming that supervisors and managers must not interfere with science and confirming that a disobeying this would be in violation of their ethics standards. It states that they must “never suppress, alter or impede the timely release of scientific or technological findings or conclusions” nor “intimidate, coerce employees” to do the same.

**B.2. The policy makes the code of scientific conduct apply to all employees and contractors.** As noted above, the code of scientific conduct is important because it holds NOAAs employees to a set of ethical scientific principles. The policy notes that this code of conduct applies to all employees including supervisors and managers. Supervisors and managers are reminded that they must follow the same principles of scientific honesty, accountability, stewardship and behave professionally.

### **Key Areas where the Policy can be Strengthened**

There are four key areas where the draft policy can be strengthened:

- A. Protecting government scientists**
- B. Making the agency publicly accountable and transparent**
- C. Minimizing and disclosing conflicts of interest**
- D. Standardizing publication policies and the release of research**

**A. Protecting Government Scientists:** The policy makes strong commitments to ensuring that scientists do not experience censorship or misuse of their work. However, there is need to revise the policy to better protect whistleblowers who report political interference in science.

**A.1. The NOAA scientific integrity policy should better protect whistleblowers who report waste, fraud and abuse.** The current policy does not provide details regarding protections for whistleblowers. Whistleblowers should not face intimidation or fear retaliation from other scientists and NOAA managers or supervisors. In order to better protect whistleblowers, the policy should:

- **Clearly state the rights and protections of whistleblowers and the ramifications for violating those rights.** The order should include the following text: “It shall violate agency policy for any individual with authority to recommend or take a personnel action to censor or discriminate in any way because an employee or applicant discloses, is about to disclose, or is associated with the disclosure of research or other information that the employee or applicant reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety, unless the information’s public release is specifically prohibited by statute or specifically designated pursuant under Executive Order to be kept classified in the interest of national defense or the conduct of foreign affairs. There shall be no exceptions to this right, including but not limited to motives for the disclosure; the disclosure being part of job duties; the disclosure having been made previously; whether the disclosure was oral or in writing, whether the disclosure is categorized as Controlled Unclassified Information or Critical, Infrastructure Information; or the amount of time that has passed since events in the disclosure. If disclosure is specifically prohibited by Executive Order or the information is classified, the same rights against censorship and discrimination apply to disclosing the information to the agency head or delegate, the Office of Inspector General, or the U.S. Office of Special Counsel.
- **Explicitly commit to removing roadblocks that may be intentionally set up to impede access to science in policymaking.** Roadblocks can be set up by limiting scientists ability to conduct research and develop reports; assigning scientists unnecessary bureaucratic duties; ignoring or suppressing science in the policymaking process when it is deemed to be inconvenient or in conflict with a political agenda or; retaliating against scientists by reassigning them to new projects or taking away duties.

**A.2. The policy should not violate the Anti-Gag Statute, inhibit communication with Congress, or conflict with other freedom of speech protections.** The draft policy could be strengthened by clearly stating that the policy would not violate the Anti-Gag Statute nor infringe on the rights established by the Lloyd Lafollette Act (5 USC 7211).

**B. Making the Agency More Accountable and Transparent:** The current policy does not give the public adequate access to information about agency proceedings. Public oversight is important to ensure that inappropriate political interference is exposed. The policy should require public disclosure of allegations and confirmed cases of misconduct, as well as visitor logs that allow the public to understand which people and special interests have access to agency officials.

**B.1. The policy should require regular and public reporting of allegations of political interference in science.** The agency should disclose both the aggregate number of misconduct allegations and the specifics of cases where misconduct is confirmed. Otherwise, it would be easy for agency officials to cover-up allegations and make it hard for outside stakeholders to conduct effective oversight.

**B.2. Records of who is meeting with NOAA officials should be made public.** NOAA should follow the lead of the White House and release visitor log reports in a timely manner. This would give public information about what individuals and special interest groups have access to NOAA policymakers. Disclosure should apply to all political appointees, the Senior Executive Service and GS-14 and GS-15 level employees.

**C. Minimizing and Disclosing Conflicts of Interest:** The policy should limit the opportunity for conflicts of interest. While the NOAA policy makes strong commitments to eliminating conflicts of interest among scientists and federal advisory committees (FACs), the policy could be strengthened by:

**C.1. The policy should clarify definitions of what constitutes conflict of interest.** The policy does not distinguish whether a conflict of interest applies only to the individual or whether it extends to spouses or other close relatives of the individual. In addition, the policy does not establish what monetary value could be considered a conflict of interest and how far into the past the policy extends.

**C.2. NOAA should allow public oversight of which federal scientists serve on non-profit boards.** The policy currently adopts the language of the recently released Office of Government Ethics policy which does not limit the involvement of scientists on boards nor require that those board positions be made public. While UCS supports the rights of scientists to serve on the boards of scientific societies, it is imperative that this is disclosed and made publicly available. Corporations and special interests can have large influences on non-profits. It is important that this cannot be used by these entities to gain inappropriate access to federal scientists and policy-makers.

**C.3. The policy should adopt language from December 17, 2010 OSTP memorandum regarding federal advisory committees.** Eliminating conflicts of interest from federal advisory committees is particularly important given the amount of influence FACs have on developing policy. While the NOAA policy commits to strong FAC oversight, it could be made stronger by using the following direct wording from the OSTP memo: "Except when explicitly stated in a prior agreement between an agency and a FAC, all reports, recommendations, and products

produced by FACs should be treated as solely the findings of such committees rather than of the U.S. Government, and thus are not subject to intra- or inter-agency revision.”

**D. Standardizing policies that govern publication and the release of research:** The policy does not provide sufficient guidelines for publication of research.

**D.1. NOAA should provide specifics of the manner in which data, records and research will be made public.** To protect scientific integrity during the interagency review process, purely scientific documents and information should be made public at the same time that they are submitted to other agencies for review. It is essential that the opportunity is eliminated for individuals outside NOAA to censor or distort scientific information prior to its public release.

**D.2. NOAA should create a standardized process for publishing scientific research.** The free flow of scientific information can be infringed upon by intentionally delaying the publication of research that might be politically inconvenient. The current policy does not establish an agency-wide policy or timeline for the review and publication of research. Scientists at NOAA often face confusion and excessive delays when attempting to publish research. The United State Fish and Wildlife Service has an excellent publications policy which can serve as a model for additions to the NOAA policy.

**Appendix A: Line-by-line analysis of NOAA’s draft scientific integrity policy**

**Appendix B: Letter from UCS and the Government Accountability Project detailing problems with the Department of Commerce media policy**

**NOAA Administrative Order 202-735D NATIONAL  
OCEANIC AND ATMOSPHERIC ADMINISTRATION  
SCIENTIFIC INTEGRITY POLICY**

Issued 11/26/90; Effective 11/07/90; Revised xx/xx/2011

**SECTION 1. PURPOSE.**

.01 To promote a continuing culture of scientific excellence and integrity, and establish a policy on the integrity of scientific activities the agency conducts and uses to inform management and policy decisions. This Order also establishes a scientific Code of Conduct and Code of Ethics for Science Supervision and Management for National Oceanic and Atmospheric Administration (NOAA) employees and contractors who conduct, supervise, assess, and/or interpret scientific information for the use of NOAA, the Department of Commerce, and the Nation.

This is excellent. The management of science and the conduct of managers are critical to preserving scientific integrity.

.02 The Procedural Handbook to this Order establishes processes for responding to allegations of misconduct. This handbook has the full force and authority of this NOAA Administrative Order (NAO).

This is also great. It is important to release the procedural handbook concurrently with the actual policy.

.03 Additional information and resources related to scientific integrity and implementation of this NAO is available at: <http://nrc.noaa.gov/scientificintegrity.html>

**SECTION 2. SCOPE.**

.01 This Order applies to:

- a. All NOAA employees, political and career, who are engaged in, supervise, or manage scientific activities, analyze and/or publicly communicate information resulting from scientific activities, or use scientific information or analyses in making bureau or office policy, management, or regulatory decisions; and
- b. All contractors who engage in or assist with activities identified in Section 2.01a.

This is an essential component. The policy must apply to all NOAA employees who could be part of a decision.

.02 This order also addresses applicable policy for NOAA employees and contractors who supervise, manage or otherwise assist in the administration of NOAA financial assistance awards (*i.e.*, grants and/or cooperative agreements) pertaining to NOAA-funded research conducted by external organizations and persons.

NOAA should consult with other agencies with experience in the management of extramural research such as NIH and NSF when determining how this applies to grants and cooperative agreements.

.03 This Order does not alter the requirements applicable to the specific activities, topics, and persons that are explicitly covered by other applicable federal statutes, regulations or policy directives, or by other NOAA or Department of Commerce Orders, such as but not limited to:

- a. Department policy for engaging in public communications, as specified in Departmental Administrative Order (DAO) 219-1.
- b. The Information Quality Act (Section 515 of Public Law 106-554) that may be applicable to any information disseminated by NOAA.
- c. Testimony before Congress or information or written materials provided to Congress that are addressed by DAOs 218-1, "Legislative Activities," 218-2, "Legislative and Intergovernmental Affairs," and 218-3, "Reports to Congress Required by Law," and NOAA Administrative Order 218-1 "The Preparation and Clearance of Congressional Testimony."<sup>1</sup>
- d. Rulemakings, adjudications, or publication in the Federal Register.
- e. Requirements for authorizing the production, printing, and distribution of publications and audiovisuals that are addressed by DAO 219-4.
- f. Department regulations and policies pertaining to financial assistance awards, as specified in 15 C.F.R. Parts 14 and 24 (as applicable), the Department of Commerce Financial Assistance Standard Terms and Conditions (March 2008), and in DAO 203-26, "Department of Commerce Grants Administration," as supplemented by the Department's Grants Manual, as each may be periodically updated.

.04 This Order shall not be interpreted to conflict with the rights of an employee under the law, including the Federal Service Labor-Management Relations Statute (5 U.S.C. Chapter 71); Department Administrative Order (DAO) 202-711, Labor-Management Relations; and various collective bargaining agreements; those provisions of Chapter 75 of Title 5 of United States Code relating to disciplinary action of employees; and, the Whistleblower Protection Act of 1989, Pub. L. No. 101-12. Additionally, this Order shall not be interpreted to conflict with any rights accorded a union representative under the Federal Service Labor-Management Relations Act when communicating as a union representative.

### SECTION 3. DEFINITIONS

#### Allegation

Any written or oral statement or other indication of possible scientific misconduct made to a NOAA employee, contractor, or to an employee of a NOAA research partner.

#### Conflict of Interest

Any financial or non-financial interest which conflicts with the actions or judgments of an individual when conducting scientific activities because it:

1. Could impair the individual's objectivity; or

<sup>1</sup> C.f., Holdren, Memorandum for the Heads of Executive Departments and Agencies on Scientific Integrity (December 17, 2010), Section 5: Implementation, which states "In addition, the Director of the Office of Management and Budget (OMB) will be issuing guidance to OMB staff concerning the review of draft executive branch testimony on scientific issues prepared for presentation to the Congress. That guidance will provide standards that are to be applied during the review of scientific testimony."

Even though, in a June 15, 2011 memorandum, the Department clarified the right of scientists to speak to the media without prior approval, confusion persists. DAO 219-1 should be modified to be consistent with the June 15 memorandum.

The Department should modify these directives to specify that they cannot be interpreted to violate the Lloyd Lafollette Act (5 U.S.C. 7211), which states that "the right of employees... to furnish information to either House of Congress, or to a committee or Member thereof, may not be interfered with or denied."

Furthermore, NOAA and its parent department should push the White House Office of Management and Budget to release guidance on review of congressional testimony as requested in OSTP's December 17, 2010 memorandum.

This passage should explicitly state that the policy would not conflict with the Anti-Gag Statute.

While this is a good start, the definition is too vague. The following questions should be addressed:

- Who does the policy cover? Does it extend to the interests of an employee's spouse, parent, or adult child?
- What amount constitutes a conflict of interest – a cup of coffee or a \$5,000 speaking fee?
- How far back do reporting requirements go? Is it still a conflict of interest if you took money one year ago? Five years ago?

2. Could create an unfair competitive advantage for any person or organization; or
3. Could create the appearance of either (1) or (2).

**Decision-Makers**

Employees who may:

- Develop policies or make determinations about policy or management;
- Make determinations about expenditures of Department of Commerce or NOAA funds;
- Implement or manage activities that involve, or rely on, scientific activities; or
- Supervise employees who engage in scientific activities.

**Fabrication**

Making up data or scientific results and recording or reporting them for the purposes of deception. (Federal Policy on Research Misconduct, 65 FR 76260-76264, December 6, 2000.)

**Falsification**

Manipulating research materials, equipment, or processes; or changing or omitting data or results such that the research is not accurately represented in the research record. (Federal Policy on Research Misconduct, 65 FR 76260-76264, December 6, 2000.)

**Financial Interest**

Any matter affecting a personal financial interest or a financial interest imputed to the individual (including, but not limited to, the individual's spouse and any entity for which the individual serves in a personal capacity as an officer or board member, such as due to fiduciary duties to the organization under state law). See 18 U.S.C. § 208.

NOAA should clarify how this definition applies to scientists who are serving on the boards of scientific societies.

**Fundamental Research Communication**

The complete definition of "Fundamental Research Communication" is found in DAO 219-1 [http://www.osec.doc.gov/omo/dmp/daos/dao219\\_1.html](http://www.osec.doc.gov/omo/dmp/daos/dao219_1.html)

A brief definition is: Public Communication prepared as part of the employee's official work regarding the products of basic or applied research in science and engineering, the results of which ordinarily are published and shared broadly within the scientific community. Matters of policy, budget or management are not considered Fundamental Research Communications.

This is a difficult distinction to make. Scientific papers typically provide discussion sections to help readers understand the implications of the results. It is challenging to provide this context without crossing into what some might consider as policy issues.

**Non-Financial Conflict of Interest**

Individual participation in a matter where one of the parties is or is represented by someone with whom the individual has a covered relationship (including, but not limited to, a spouse's employer and any entity for which the individual is actively involved in a personal capacity). See 5 C.F.R. § 2635.502(b).

### **Plagiarism**

The appropriation of another person's ideas, processes, results, or words without giving appropriate credit. (Federal Policy on Research Misconduct, 65 FR 76260-76264, December 6, 2000.)

### **Research**

Research is the systematic study directed toward fuller scientific knowledge or understanding of the subject studied. (National Science Foundation Survey of Federal Funds for Research and Development, <http://www.nsf.gov/statistics/randdef/fedgov.cfm#gs>)

- Basic research is defined as systematic study directed toward fuller knowledge or understanding of the fundamental aspects of phenomena and of observable facts without specific applications towards processes or products in mind.
- Applied research is defined as systematic study to gain knowledge or understanding necessary to determine the means by which a recognized and specific need may be met.

### **Science**

Knowledge obtained and tested through use of the scientific method. Science may also include the observation and classification of facts with the goal of establishing verifiable knowledge derived through induction and hypothesis.

### **Scientific Activities**

Activities involving inventorying, monitoring, experimentation, study, research, modeling, and scientific assessment.

Scientific activities are conducted in a manner specified by standard protocols and procedures and include any of the physical, biological, or social sciences as well as engineering and mathematics that employ the scientific method. Inspections for regulatory compliance and resulting records are not included because they are covered by separate requirements.

### **Scientific Assessment**

Evaluation of a body of scientific or technical knowledge which typically synthesizes multiple factual inputs, data, models, assumptions, and/or implies best professional judgment to bridge uncertainties in the available information.

### **Scientific Integrity**

The condition resulting from adherence to professional values and practices, when conducting and applying the results of science that ensures objectivity, clarity, reproducibility, and utility and that provides insulation from bias, fabrication, falsification, plagiarism, outside interference, censorship, and inadequate procedural and information security.

### Scientific Method

A method of research in which a problem is identified, relevant data are gathered, a hypothesis is formulated from these data, and the hypothesis is empirically tested.

### Scientific Product

Presentation of the results of scientific activities including the analysis, synthesis, compilation, or translation of scientific information and data into formats for the use of NOAA, the Department of Commerce, and the Nation.

## SECTION 4. NOAA PRINCIPLES OF SCIENTIFIC INTEGRITY

.01 NOAA is an organization based upon science, scientific research, and providing and using scientific advice for decision-making. NOAA's ability to achieve its strategic vision of "healthy ecosystems, communities, and economies that are resilient in the face of change" relies on transparency, traceability, and scientific integrity at all levels. Transparency, traceability, and integrity are, therefore, core values of our organization and the reason for issuing this Order.

.02 NOAA scientists are encouraged to publish data and findings in ways that contribute to the most effective dissemination of NOAA science and that best enhance NOAA's reputation for reliable science, including online in open formats and through peer-reviewed, professional, or scholarly journals. Development and dissemination of scientific and technical products must be consistent with NOAA policies and procedures related to peer review, the Open Government Directive (Office of Management and Budget, 2009b), NOAA's information quality guidelines, and other legislative and policy mandates.

.03 In support of a culture of openness, and consistent with DAO 219-1 (Public Communication) and their official duties, NOAA scientists may freely speak to the media and the public about scientific and technical matters based on their official work, including scientific and technical ideas, approaches, findings, and conclusions based on their official work. Additional guidance for employees is available in DAO 219-1 ([http://www.osec.doc.gov/omo/dmp/daos/dao219\\_1.html](http://www.osec.doc.gov/omo/dmp/daos/dao219_1.html)).

.04 NOAA scientists are free to present viewpoints within their area of professional expertise that extend beyond science to incorporate personal opinion but must make clear they are presenting their individual opinions when doing so – not the views of the Department of Commerce or NOAA.

.05 Scientific leadership is a key component of advancing the mission of government agencies. NOAA scientists are, therefore, encouraged, consistent with Federal ethics laws and regulations, to engage with their peers in academia, industry, government, and non-governmental organizations through presenting their work at scientific meetings, serving on editorial boards and on scientific and technological expert review panels, and actively participating in professional societies and national/international scientific advisory and science assessment bodies.

.06 NOAA supports the election or appointment of its scientists and engineers to fellowships or positions in professional organizations, including as officers and on governing boards, subject to applicable ethics requirements and Department of Commerce policy. Pursuant to

**This is excellent. The right to openly express one's personal opinions is an essential component of a functional democracy.**

Department of Commerce policy, NOAA employees may generally serve in their personal capacity as officers and on governing boards of outside organizations or in their official capacity as a government liaison. Service in an official capacity on a governing board or as an officer of an outside organization is subject to restrictions under ethics laws<sup>2</sup>; an ethics official should be consulted before accepting an appointment on behalf of NOAA to such a position.

**This section is unnecessarily broad. While scientists should have the right to participate on the boards of scientific societies, their involvement could create fiduciary conflicts of interest. What is important here is to require NOAA employees to disclose their affiliations.**

.07 NOAA supports the recognition of the outstanding science conducted by its employees. NOAA scientists should, therefore, be able to accrue the professional benefits of any honors and awards for their research and discoveries, subject to applicable law.

.08 NOAA will make every effort to establish a culture of transparency, integrity, and ethical behavior among its employees through a combination of policy, opportunities for training, and open communications, both internally and with the public. NOAA, therefore, commits to providing regular training to its employees and contractors. NOAA also commits to post information to ensure that its employees, contractors, and grantees are fully aware of their rights regarding publication of their research, communication with the media and the public, participation in professional scientific societies, and their responsibility to report waste, fraud, and abuse.

**This is good. Regular training will ensure that this policy remains effective. In the training, NOAA should consider dedicating time to clearing up any confusion there may be regarding NOAA and DOC policies that may be in conflict.**

## **SECTION 5. NOAA POLICY ON INTEGRITY OF SCIENTIFIC ACTIVITIES**

**Referring to sections where these points are more fully discussed would be helpful.**

.01 NOAA scientists, science managers, and supervisors shall uphold the fundamental Principles of Scientific Integrity, the Code of Scientific Conduct, and the Code of Ethics for Science Supervision and Management outlined in the following sections of this Order.

.02 NOAA recognizes the importance of scientific activity and information as methods for maintaining and enhancing its effectiveness and establishing credibility and value with the public, both nationally and internationally. NOAA is dedicated to preserving the integrity of the scientific activities it conducts, and activities that are conducted on its behalf. It will not tolerate loss of integrity in the performance of scientific activities or in the application of science in decision-making. To that end, NOAA will:

**This section could be improved by addressing scientific monitoring – the collection of information NOAA requires to fulfill its mission. In addition, NOAA should explicitly commit to removing intentional roadblocks to science-based policymaking. These include assigning unnecessary bureaucratic duties that limit a scientist's ability to conduct research, eliminating science from the decision-making process when it conflicts with a policy agenda, or retaliating against specific scientists by reassigning them to new projects or taking away duties.**

a. Facilitate the free flow of scientific information online and in other formats, consistent with privacy and classification standards, and in keeping with the Department of Commerce and NOAA data sharing and management policies. Where appropriate, this information will include data and models underlying regulatory proposals and other policy decisions.

**This is a good start but could use more detail. NOAA should consider adopting The US Fish and Wildlife Service publications policy, which serves as the gold standard.**

b. Document the scientific findings considered in decision making and ensure public access to that information and supporting data through established Department of Commerce and NOAA procedures—except for information and data that are restricted from disclosure under procedures established in accordance with statute, regulation, Executive Order, Presidential Memorandum, or other legal authority.

**Timing is the key to the effectiveness of this provision. Scientific findings considered in decision making are particularly vulnerable to interference when they go out for interagency or OMB review. It is essential that they be protected from undocumented revision by being made public when they leave NOAA. This prevents the White House or other government agencies – which may have political or financial interests at stake – from manipulating science to justify one policy over another.**

<sup>2</sup> The Office of Government Ethics has published a proposed rule (*Federal Register* 76:85, 3 May 2011, p. 24816) that would create a government-wide exemption to 18 U.S.C. § 208. The exemption would permit the appointment of Federal employees to serve on the boards of directors and as officers of nonprofit organizations, including scientific organizations, professional societies, and similar bodies that are actively involved in matters under the jurisdiction of the Department. DOC and NOAA are supportive of this proposed rule. [Paragraph will be updated as appropriate.]

- c. Ensure that the selection and retention of employees in scientific positions or in positions that rely on the results of scientific activities are based on the candidate's integrity, knowledge, credentials, and experience relevant to the responsibility of the position.
- d. Ensure that NOAA and Department of Commerce public communications guidance provides procedures by which scientists may speak to the media and the public about scientific and technical matters based on their official work and areas of expertise. In no circumstance may any NOAA official ask or direct Federal scientists to suppress or alter scientific findings.
- e. Ensure that data and research used to support policy decisions undergo independent peer review by qualified experts, where feasible, appropriate, and consistent with law.

f. Provide information to employees on whistleblower protections.

g. Communicate scientific and technological findings by including, when necessary and appropriate, a clear explication of underlying assumptions; accurate contextualization of uncertainties; and a description of the probabilities associated with both optimistic and pessimistic projections, including best-case and worse case scenarios.

h. Communicate policies for ensuring scientific integrity and responsibilities to employees, contractors, and grantees that assist with developing or applying the results of scientific activities, as appropriate.

i. Encourage the enhancement of scientific integrity through appropriate, cooperative engagement with the communities of practice represented by professional societies and organizations.

j. Examine, track, resolve, and report all reasonable allegations of scientific misconduct while seeking to ensure the rights and privacy of those covered by this policy and ensuring that unwarranted allegations do not result in slander, libel, or other damage to them.

**Whistleblower protections need to be clearly stated and expanded upon so that whistleblowers do not face intimidation nor fear retaliation for exposing misconduct. These rights and protections are not listed here. The policy should specifically describe protections for whistleblowers and should commit to establishing a culture that supports whistleblowing rights. See additional comments about this section below.**

**It is important to make the policy available at the beginning of employment and reinforce it regularly throughout the year through various methods. The policy should be accessible in workplaces and on the public internet.**

**The word "appropriate" is too ambiguous and should be removed or replaced with a more descriptive phrase.**

**While these processes are important, they need external accountability, NOAA should be required to publicly report both the aggregate number of misconduct allegations and those cases where misconduct is confirmed. In addition, the NOAA should provide uncensored details of each case to the NOAA inspector general, the Office of Government Ethics and/or Congress. Without external accountability, under an administration that is hostile to science, the entire policy could be rendered less effective. One method of reporting that could be considered is through 5 USC 1213.**

- k. Facilitate the sharing of best administrative and management practices that promote the integrity of NOAA's scientific activities.

**[While the policy is fairly comprehensive, there is one essential component that is missing]**

.03 As provided in Section M.10 of the Department of Commerce Financial Assistance Standard Terms and Conditions (March 2008) (<http://oam.eas.commerce.gov/docs/GRANTS/DOC%20STCsMAR08Rev.pdf>) and supplemental award terms, as applicable, grantee organizations have the primary responsibility for promptly investigating allegations of scientific or research misconduct under a NOAA award and for promptly notifying the NOAA Grants Officer of allegations of scientific or research misconduct and reporting the results of its investigation for appropriate disposition. NOAA grantees are also required to follow all Codes of Conduct as stated in Section J of the Department of Commerce Financial Assistance Standard Terms and Conditions. NOAA Cooperative and Joint Institutes are further subject to the rules and guidelines stated in the NOAA Cooperative Institute Handbook (<http://www.nrc.noaa.gov/ci/policy/docs/handbook.pdf>).

.04 It is NOAA policy to protect those who uncover and report allegations of scientific and research misconduct, as well as those accused of scientific and research misconduct in the absence of a finding of misconduct, from prohibited personnel practices (as defined in 5 U.S.C. 2302(b)).

L. NOAA should follow the lead of the White House and release its visitor logs in a timely manner so that the public may better understand who is influencing science-based policy decisions. The visitor log policy should apply to political appointees, Senior Executive Service, and GS-14 and GS-15 level employees. As the president made a similar appeal to Congress in his 2011 State of the Union address, there should be White House support for this.

This order should explicitly state: It shall violate agency policy for any individual with authority to recommend or take a personnel action to censor or discriminate in any way because an employee or applicant discloses, is about to disclose, or is associated with the disclosure of research or other information that the employee or applicant reasonably believes is evidence of illegality, gross waste, gross mismanagement, abuse of authority or a substantial and specific danger to public health or safety, unless the information's public release is specifically prohibited by statute or specifically designated pursuant under Executive Order to be kept classified in the interest of national defense or the conduct of foreign affairs. There shall be no exceptions to this right, including but not limited to motives for the disclosure; the disclosure being part of job duties; the disclosure having been made previously; whether the disclosure was oral or in writing, whether the disclosure is categorized as Controlled Unclassified Information or Critical Infrastructure Information; or the amount of time that has passed since events in the disclosure. If disclosure is specifically prohibited by Executive Order or the information is classified, the same rights against censorship and discrimination apply to disclosing the information to the agency head or delegate, the Office of Inspector General, or the U.S. Office of Special Counsel.

## SECTION 6. CODE OF SCIENTIFIC CONDUCT

.01 All NOAA employees and contractors identified in Section 2.01, will to the best of their ability exhibit:

a. **Honesty** in all aspects of scientific effort through:

- Clearly differentiating between facts, personal opinions, assumptions, hypotheses, and professional judgment in reporting the results of scientific activities and characterizing associated uncertainties in using those results for decision making, and in representing those results to other scientists, decision-makers, and the public.
- Preserving the integrity of the data record through adherence to NOAA data management standards and not fabricating or deleting raw data.
- Approaching all scientific activities objectively, and completely and accurately reporting results in a timely manner without allegiance to individuals, organizations, or ideology.
- Disclosing any apparent, potential, or actual conflicts of interest or non-financial conflicts of interest of their own and others.
- Objectively considering conflicting data and/or studies.

b. **Accountability** in the conduct of research and interpretation of research results through:

- Using resources entrusted to them responsibly, including equipment, funds, and employees' time.
- Disclosing all research methods used, available data, and final reports and publications consistent with applicable scientific standards, laws, and policy.
- Providing scientific advice to NOAA as requested to inform management and other decision-making.

c. **Professional courtesy and fairness** in working with others and respect for ideas of others through:

- Neither unfairly hindering the scientific activities of others nor engaging in dishonesty, fraud, deceit, misrepresentation, coercive manipulation, or other scientific or research misconduct.
- Providing constructive, objective, and frank criticism to others on their scientific activities as appropriate for standards of respectful peer review, and accepting constructive criticism from others.
- Contributing to open and respectful scientific discourse that adheres to scientific standards for reporting results and conclusions and respects the

This is excellent. Adherence to this policy would prevent many misunderstandings.

intellectual property rights of others, including acknowledging and crediting prior work.

d. **Good stewardship** of research on behalf of others through:

- Diligently creating, using, preserving, documenting, and maintaining collections and data.
- Adhering to established quality assurance and quality control programs; following Department of Commerce records retention policies, and complying with Federal law and agreements related to use, security, and release of confidential and proprietary data.
- Adhering to the laws and policies related to protection of natural and cultural resources and to research animals while conducting scientific activities.
- Respecting to the fullest extent permitted by law, confidential and proprietary information provided by communities, such as Native American Groupings, and individuals whose interests are studied or affected by scientific activities or the resulting information.
- Immediately reporting any observed, suspected, or apparent Scientific and Research Misconduct through means established in Section 8 and the Procedural Handbook for this Order.

**SECTION 7: CODE OF ETHICS FOR SCIENCE SUPERVISION AND MANAGEMENT**

.01 NOAA science managers and supervisors identified in Section 2.01 will adhere to the guidelines for Scientific Integrity established in the March 9, 2009, *Presidential Memo to Heads of the Executive Departments and Agencies*. Specifically, science managers and supervisors will ensure:

- a. The selection, promotion, and retention of candidates for science and technology positions in NOAA are based on the candidate's knowledge, credentials, experience, and integrity;
- b. Appropriate rules and procedures are in place to preserve the integrity of the scientific process and the dissemination of its scientific products and information;
- c. The establishment and use of Federal Advisory Committees will follow procedures established by the Federal Advisory Committee Act and in accordance with the guidelines enunciated in the Office of Science and Technology Policy memorandum on Scientific Integrity of Dec. 17, 2010.
- d. When scientific or technological information is considered in policy decisions, the information will be subject to well-established scientific processes, including peer review where appropriate, and policy decisions shall appropriately and accurately reflect the best available science in compliance with relevant statutory standards;
- e. Except for information that is properly restricted from disclosure under procedures established in accordance with statute, regulation, patent/trademark,

← This is an important commitment.

← Strong scientific integrity standards for NOAA's advisory and stakeholder committees are essential. This section could be better if it used direct wording from the OSTP memorandum most importantly that:

“Except when explicitly stated in a prior agreement between an agency and a FAC, all reports, recommendations, and products produced by FACs should be treated as solely the findings of such committees rather than of the U.S. Government, and thus are not subject to intra- or inter-agency revision.”

Executive Order, Presidential Memorandum, or other legal authority, the scientific or technological findings or conclusions considered or relied on in policy decisions shall be made available to the public in a timely fashion;

Again, timing is critical to effectiveness of this provision. Please see comments in 5.02.b.

f. Procedures are in place to identify and address instances in which the scientific process or the integrity of scientific and technological information may be compromised; and

g. Additional procedures are adopted, including any appropriate whistleblower protections, as are necessary to ensure the integrity of scientific and technological information and processes on which the agency relies in its decision making or otherwise uses or prepares.

This is very important as highlighted earlier.

.02 NOAA science managers and supervisors, political and career, must never suppress, alter, or otherwise impede the timely release of scientific or technological findings or conclusions, unless explicitly required by department or government-wide regulation, law, Executive Order, or other legal authority. Further, managers and supervisors will not intimidate or coerce employees, contractors, grantees or others to alter or censor scientific findings. Nor shall they implement institutional barriers to cooperation and the timely communication of scientific findings or technology. Any such interference will be considered a violation of this section: NOAA's Code of Ethics for Science Supervision and Management.

This is an excellent section. It is important to reaffirm that science must never be suppressed by scientists or their supervisors.

03. Decisions by NOAA science managers and supervisors to approve or not approve a written or audiovisual Fundamental Research Communication must be based only on whether the work is scientifically meritorious: specifically, the methods used are clear and appropriate, the presentation of results and conclusions is impartial, and there are no apparent, actual, or potential conflicts of interest. Consistent with DAO 219-1, the approval or non-approval of Fundamental Research Communications cannot be based on policy, budget, or management implications of the research.

It is great to reinforce the importance of scientific merit.

Also, it is a challenge to separate scientific findings from personal opinion. It is acceptable for employees to share personal opinions as long they make clear that what is being expressed is a personal opinion.

04. The NOAA Research Council shall develop a NOAA-wide framework for review and approval of written and audiovisual materials constituting Fundamental Research Communications consistent with the criteria in 7.03. Each Line Office shall develop and document procedures for review and approval consistent with the Research Council's framework. The procedures must include time limits for review and approval, and procedures for redress if the time limits are not met.

These procedures should be standardized across the agency and released. The US Fish and Wildlife Service has an excellent policy which NOAA should reference when developing its policy.

05. NOAA science managers and supervisors will immediately report suspected cases of scientific or research misconduct through means established under Section 8 and the handbook for this Order.

## **SECTION 8. SCIENTIFIC AND RESEARCH MISCONDUCT AND RESPONDING TO ALLEGATIONS**

.01 Scientific and Research Misconduct is defined as fabrication, falsification, or plagiarism in proposing, performing, or reviewing scientific and research activities, or in the products or reporting of these activities. Scientific and Research Misconduct specifically includes (a) intentional circumvention of the integrity of the science and research process by violation of NOAA's Code of Ethics for Science Supervision and Management, and (b) actions that compromise the scientific process by violating NOAA's Code of Scientific Conduct. Scientific and Research Misconduct does not include honest error or differences of opinion.

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.02 Procedures for lodging and responding to allegations of misconduct are provided in the Procedural Handbook to this Order.

## **SECTION 9. AUTHORITIES**

### **.01 Statutes, Regulations, and Policies**

- a. 5 U.S.C. § 301 allows the head of an executive department to prescribe regulations for the conduct of its employees.
- b. Standards of Ethical Conduct for Employees of the Executive Branch, 5 C.F.R. § 2635 and Conflict of Interest, 18 U.S.C. § 208, and related rulings by the Office of Government Ethics.
- c. Federal Policy on Research Misconduct (Dec. 6, 2000), available at [http://nrc.noaa.gov/plans\\_docs/fed\\_research\\_misconduct\\_dec\\_2000.pdf](http://nrc.noaa.gov/plans_docs/fed_research_misconduct_dec_2000.pdf).
- d. Presidential Memo to Heads of the Executive Departments and Agencies (March 9, 2009), available at [http://www.whitehouse.gov/the\\_press\\_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/](http://www.whitehouse.gov/the_press_office/Memorandum-for-the-Heads-of-Executive-Departments-and-Agencies-3-9-09/)
- e. Office of Science and Technology Policy Memorandum on Scientific Integrity (Dec., 17, 2010), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/scientific-integrity-memo-12172010.pdf> .

## **SECTION 10: COMMUNICATION OF POLICY**

.01 As part of the responsibility to prevent and detect misconduct, NOAA will communicate its scientific integrity policies and procedures both internally to NOAA employees and contractors, and to NOAA partners, grantees, and others involved in external research. A general statement of the integrity policy is posted on the NOAA Research Council's Scientific Integrity Commons website at <http://nrc.noaa.gov/scientificintegrity.html>, and will also be referenced in financial assistance award solicitations and in requests for proposals. A specific effort will be made to communicate the NOAA Scientific Integrity Policy to the individuals involved in peer review panels evaluating proposals to NOAA grants programs and cooperative agreements, or evaluating internal NOAA scientific programs and activities.

← It is good that this will be publicly available and accessible in one location.

## **SECTION 11. EFFECT ON OTHER ISSUANCES.**

This document supersedes NAO 202-735D Scientific Misconduct, effective November 7, 1990.

An electronic copy of this Order will be posted in place of the superseded Order on the NOAA Office of the Chief Administrative Officer website under the NOAA Administrative Issuances Section. <http://www.corporateservices.noaa.gov/~ocao/index.html>

NOAA Working Draft  
Current: June 15, 2011

Chief Administrative Officer  
**Or**  
Under Secretary of Commerce  
for Oceans and Atmosphere

Offices of Primary Interest:  
Office of the Assistant Secretary  
Office of General Counsel (GC)

**URGENT**

April 23, 2007

Honorable Carlos M. Gutierrez  
Secretary of Commerce  
U.S. Department of Commerce  
1401 Constitution Ave., NW  
Washington, DC 20230

**Re: Department Administrative Order 219-1**

Dear Secretary Gutierrez:

We are writing to comment on the March 29, 2007 Department of Commerce (“DOC”) release of a new public communication policy, Department Administrative Order 219-1 (“DOC policy”), and an accompanying document of frequently asked questions (“FAQ’s”).<sup>1</sup> According to a statement the same day by National Oceanic and Atmospheric Administration (NOAA) Administrator Conrad C. Lautenbacher, the DOC policy will replace NOAA’s standing media policy within 45 days.<sup>2</sup> NOAA will also be developing a set of implementation guidelines to accompany the policy. The interim period offers an opportunity to correct mistakes prior to implementation, and to clarify areas of ambiguity. These comments and questions are offered to facilitate a final policy whose text reflects its laudable mandate for scientific freedom and openness. It reinforces an earlier, March 8, 2007 offer to Vice Admiral Lautenbacher to help improve NOAA’s media policy.<sup>3</sup>

The March 29 FAQ’s contain the initiative’s goal of establishing “a consistent, easy-to-understand policy” for media communications, particularly on scientific research. Unfortunately, the eight-page DOC policy delivers contradictory, ambiguous, and confusing messages to agency employees. While there is a flawless rhetorical mandate for scientific openness, the policy then creates a system of blanket prior restraint that will create just the opposite. The fundamental “personal views” right is only referenced indirectly or in a limited context. While there is recognition of the Whistleblower Protection Act (WPA), that qualifier only is incorporated by reference in passing, without explanation what it means. We are very concerned that the message of control will drown out the message of freedom. If that occurs, the policy’s net impact will be to chill scientific communications.

The bottom line is equally simple for every category of communication, whether official or non-official, Fundamental Research Conclusion or otherwise: agency employees must submit for prior review and approval any public communications that “relate to Department programs,

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<sup>1</sup> Both available at [http://www.commerce.gov/opa/press/Secretary\\_Gutierrez/press\\_releases.htm](http://www.commerce.gov/opa/press/Secretary_Gutierrez/press_releases.htm).

<sup>2</sup> Message from the Undersecretary, available at <http://www.communications.noaa.gov/mediapolicy.htm>.

<sup>3</sup> Available at [http://whistleblower.org/doc/0100\\_001.pdf](http://whistleblower.org/doc/0100_001.pdf).

policies or operations....” *That means government scientists must ask for permission to communicate virtually anything relevant to their professional expertise to anybody.* While numerous reasonable exceptions exist, their relevance depends on the arbitrary judgments of reviewers who do not have to explain themselves -- even in the appeals process to challenge any restraints they impose. Prior restraint is mandatory even for the personal views exception. The explanation is that unrestrained free speech somehow must be canceled even in that context *to prevent its being misused.*

This is not just a matter of excessive red tape. Systematic prior restraint is the infrastructure for Official Secrets Acts, which Congress and the courts always have rejected as unconstitutional, except in dire emergencies. This policy does not attempt to justify prior restraint as an emergency measure. Rather, it somehow is presented as promoting freedom of speech.

The policy as written flatly reverses Vice Admiral Lautenbacher’s February 14, 2006 reassurance: “I encourage our scientists to speak freely and openly. Dozens of you every day are talking to the media and providing the results of peer reviewed science across a wide variety of NOAA topics. *We ask only that you specify when you are communicating personal views and when you are characterizing your work as part of your specific contribution to NOAA’s mission.*” (emphasis supplied) This retreat is surprising, in light of four congressional oversight hearings this year on political interference with federal climate scientists and last month’s 331-94 House passage of stronger scientific freedom rights in H.R. 985, the Whistleblower Protection Enhancement Act.

In terms of immediate impact, we are most concerned that for a 45 day period the Department will be conducting a training program to teach employees of a new policy whose restrictions with regard to almost all forms of speech are unconstitutional and unnecessarily overbroad. We request that the Department suspend training in any new communication policy until after completion of the ongoing General Accountability Office (GAO) review on this same matter. The review should assess this extraordinary proposal for prior notice and approval of scientific communication, rather than be faced with an already-implemented fait accompli.

### **Interests of our Organizations**

GAP and UCS take an active interest in the government policies and practices that regulate the communication of publicly-funded scientific research. Last year, prompted by concerns of political interference with climate science, GAP conducted an investigation of these policies and practices at NOAA, the National Aeronautics and Space Administration (NASA), and other relevant agencies. At the same time, UCS measured the experiences and perceptions of political interference with federal climate research through an inter-agency survey of hundreds of climate scientists. The results of these efforts can be found in the joint UCS-GAP report *Atmosphere of Pressure*<sup>4</sup> and the GAP investigative report *Redacting the Science of Climate Change*.<sup>5</sup> These reports document increasingly restrictive communication policies and practices

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<sup>4</sup> Available at [http://www.ucsusa.org/scientific\\_integrity/interference/atmosphere-of-pressure.html](http://www.ucsusa.org/scientific_integrity/interference/atmosphere-of-pressure.html).

<sup>5</sup> Available at <http://whistleblower.org/doc/2007/Final%203.28%20Redacting%20Climate%20Science%20Report.pdf>.

as well as widespread and incidents and perceptions of inappropriate interference with scientific communications. Aiming to solve the problems identified in the investigation and survey, the reports lay out a series of overlapping recommendations that rest upon a legal analysis of relevant statutory and constitutional law, as well as the input of numerous scientists and government officials.<sup>6</sup>

The primary recommendations of the UCS and GAP reports were as follows:

- Implement a clear and transparent “notice and recap” media policy in which only a prior notification to public affairs and a subsequent follow-up are required. Correspondingly, eliminate mandatory pre-approval for media contacts, selective routing of media requests, drafting of anticipated questions and answers by scientists prior to interviews, and monitoring of media communications.
- Reaffirm and educate federal employees about their first amendment right to speak on any unclassified subject so long as they make clear that they are expressing their personal views and do not use government time and resources – with the important proviso that no restrictions apply when federal employees are exercising their whistleblower rights to disclose unclassified information that is reasonably believed to evidence illegality, gross waste, gross mismanagement, abuse of power, or substantial and specific danger to public health or safety.
- Reaffirm and educate federal employees on their right to review any final draft that is to be published under their name or that substantially references their research.
- Bring media policies into compliance with the Anti-Gag Statute, the Whistleblower Protection Act, the Lloyd-Lafollette Act for communications with Congress, and related provisions.
- Ensure the timely and pro-active coordination of press releases and media contacts so as to promote rather than limit the flow of information.
- Ensure that content editing and scientific quality control remain with qualified scientists and the peer-review process.
- Establish accountability procedures that increase transparency and provide for internal reporting of undue interference with science.
- Investigate and correct inappropriate policies, practices, and incidents such as those described in this report.

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<sup>6</sup> On March 8, 2007, GAP delivered a letter to DOC and NOAA laying out a number of these recommendations. Available at [http://whistleblower.org/doc/0100\\_001.pdf](http://whistleblower.org/doc/0100_001.pdf).

### Positives

Credit must be given where due. The policy would not be so sharply contradictory if it did not contain positive dimensions as well. Notably, the policy --

- In principle, provides a strong rhetorical mandate that “Department employees may speak to the media and the public about their official work and freely and openly discuss scientific and technical ideas, approaches, findings, and conclusions based on their official work.” (Section 4.01.d).
- Proscribes public affairs pre-approval, routing, mandatory monitoring, and content editing in fundamental research communication – including public speeches, media interviews, web postings, articles, and lectures – that are the products of basic or applied research in science or engineering. (Section 7.02)
- Properly recognizes the role of the public affairs office in facilitating, and not restricting, public communication. (Sections 5.02 and 7.02)
- Unequivocally recognizes the statutory free speech rights of employees and union representatives, including the following clear limitation: “This Order does not apply and shall not be interpreted to conflict with the rights of an employee under law, including an employee under the Whistleblower Protection Act....” (Section 2.01)
- Unlike the National Aeronautics and Space Administration (NASA) rules, does not override scientific freedom policies through hybrid secrecy categories such as Unclassified But Sensitive.

### Negatives

In its failure to incorporate a number of our most pressing recommendations, the DOC policy suffers from serious drawbacks. Few of its restrictions can coexist with the Whistleblower Protection Act. Under this policy most of the abuses documented in our joint report could continue, albeit sometimes through modified channels. Most prominently, the policy --

- Fails to grant employees’ their constitutional right to a “personal views exception” for all communications made explicitly in their private capacity.
- Does not institutionalize the right of last review for scientists to read what is published under their names. (Secs. 7.01-11.01)
- Imposes blanket prior restraint by head of the operating unit or Secretarial office for any type of communication, including the two primary settings for scientific freedom -- fundamental research communications (Section 7.03) and nonofficial public communications [Section 11.01(b)].

- Permits arbitrary secrecy by not requiring the agency to explain why communications are restricted after prior review, again whether fundamental research, official or nonofficial communications. (Sections 7.01-11.01),
- Through this lack of transparency, disqualifies the appeals process to challenge secrecy from being functional. Employees will have to rebut secret justifications for secrecy. (Section 12)
- Establishes a “carve out” for fundamental research communication that is both too narrow as it relates to scientific conclusions outside a scientist’s direct line of research, and too ambiguous as it relates to information with policy, management, or budgetary implications. (Sections 7.01, 7.03)
- Constructs confusing communication categories, inconsistent procedures for restraint, undefined time deadlines, and unknown enforcement authority.
- Offers little beyond passing reference to employees’ relevant statutory free speech rights in the Whistleblower Protection Act, while spelling out speech restrictions in intricate detail.
- Does not commit to honoring the legal requirement of the Lloyd Lafollette Act to permit unrestricted employee communications with Congress, which must be addressed in a separate policy.
- Fails to comply with the legally-mandated free speech addendum required in appropriations law the last 18 years by the Anti-Gag Statute.

## **Specific Comments**

### Section 2. Scope

1. The disclaimer recognizing rights such as under the Whistleblower Protection Act is laudable, but it is referenced only in passing without further explanation This brief credit is bound to be overlooked or not understood by employees, considering the overwhelming detail in which the policy lays out restrictions on the flow of information. Furthermore, legally-required references to the Lloyd-Lafayette Act and the addendum of the Anti-Gag Statute are missing. As such, the provision of these rights should be included in the policy directive and distributed to all employees. To avoid a chilling effect, there must be a clear boundary when they are free to speak without restraint. Consistent with your Whistleblower Protection Act duties in 5 USC 2302(c), you should assure that training emphasizes and covers these rights in detail -- not just the policy’s disclosure restrictions.

2. The Department should specifically clarify in Section 1.02 that “[t]his Order does not apply “to the personal views of Department of Commerce employees and shall not be interpreted to conflict with the rights of an employee under law ....” (Suggested language underlined) The “personal views” exception is the cornerstone for a media policy that passes constitutional muster. In terms of creating an environment that strengthens scientific freedom, it also communicates a widely-understood and recognized message of openness. Unfortunately, the

term “personal views” is only mentioned in limited settings, like for Fundamental Research Communications (Sec. 7.03), or in the negative as justification for prior restraint reviews to check for misuse. [Sec.11.01.b.3] This cornerstone should be established immediately as the constitutional counterpart of the WPA boundary that governs the entire policy.

3. Section 2.02 says the policy does not apply to communications with Congress. The relevant directives, DAOs 218-1, 218-2 and 218-3, also should be modified to specify that they cannot be interpreted to violate the Lloyd Lafollette Act (5 USC 7211) and that all the scientific freedom provisions of this policy apply to those communications as well.

#### Section 4. Principles

4. In Section 4.01 the commitments to open communication and scientific integrity are commendable.

5. The Department should clarify that in Section 4.02, “subject to the personal views exception, the Whistleblower Protection Act and Anti-Gag Statute, this Order does not authorize disclosure of information that is exempt from disclosure under the Freedom of Information Act or otherwise restricted by ... regulation, Executive Order, or other Executive Branch, Department or Operating Unit policy.” (suggested language underlined)

There is no question that constitutional speech generally, and/or the WPA specifically, *permit* release of otherwise-protected information exempt from the FOIA or (unclassified) information whose release is barred by (non foreign policy) Executive Order, or agency regulation or policy. Even FOIA exemptions are permissive, not mandatory.

Unfortunately, the language that the Order “does not *authorize*” creates chilling ambiguity. It leaves unanswered whether “unauthorized” disclosures subject the scientist to termination for making an “unauthorized” release. That is frequently the term used as a hook for discipline. The ambiguity must be eliminated.

#### Section 5. Responsibilities of the Office of Public Affairs

6. Sections 5.01 - .03 help delineate the proper role of the public affairs offices. Here are additional suggestions for the implementation guidelines:

- Set an expected response time for media requests, i.e. 30min.
- Always know the reporter’s deadline to ensure timely response
- Public affairs specialists should provide their cell phone or home telephone number/s on their office voice mail system so they can respond quickly to media call after hours, on weekends, and holidays.
- A public affairs specialist away from the office on travel or leave, must be reachable by cell phone, or prior to the absence, must designate a backup public affairs specialist to respond to media inquiries or requests from line office leadership.

- Public affairs specialists are encourage to draft regional and national news releases whenever warranted. This includes news releases about new science, new DOC products/services/initiatives or management approaches.

## Section 6. Departmental Public Communications

7. This section introduces new categories public communication: fundamental research communication, official communication, non-official communication with interest, and a hybrid category of official communication dealing with fundamental research. We congratulate DOC for identifying fundamental research communications as a specially protected class of speech.

Nonetheless, one potential problem with this scheme is that paragraph 7.03 and FAQ #9 suggest that only scientific information relating directly to the researcher's own work is placed in the protective fundamental research category. Considering the narrow scope of many scientists' research, this is highly restrictive. Scientists are typically qualified to speak about and interpret the findings of other scientists in their primary research area, also often are well-read in many subjects not directly related to their primary research and should be able to speak about them, though a disclosure of their primary research area is normally given.

8. Another problem is that once fundamental research includes matters of policy, management, or budget it is at the best demoted to the hybrid category. In this case, it is protected by Section 6.03.b from alteration by public affairs, but is made subject to the pre-approval and monitoring requirements of sections 8 and 9 (both of which lack a personal views exception). At the same time, Section 7.01 suggests that information with policy implications can still be fundamental research communications. This confusion surrounding the hybrid category needs to be addressed. Definitions of "policy," "management," and "budget" should be specified. FAQ #14 attempts to offer a justification for the restrictions regarding policy, budget, or management issues by stating that "only designated officials may officially speak for the Department" on these issues. However this is not a logical justification for prior restraint of personal views speech, which by definition is independent of the Department's voice. .

9. With respect to Section 6.03 the FAQ #6 incorrectly states that the "carve out" applies to news releases dealing with fundamental research communication. As detailed in Section 7 of the policy, the "carve out" relieves communications from pre-approval by the office of public affairs. News releases, on the other hand, explicitly require pre-approval from public affairs.

Although pre-approval based on non-scientific grounds is acceptable in limited contexts, a press release clearance process needs to require a short (five-day or less) turn over and protect a scientist's right of last review. Clearance should never be based on scientific content, provided that it has undergone reasonable peer review. Any other reasons for disapproval or delay should be documented and available to the scientist and local public affairs. Where there is a disagreement between scientists and public affairs, the policy should clearly communicate that the scientists may communicate independently through the personal views exception. They should be trained that if they honor legitimate rules – not using government resources, and providing clear notice they are speaking only for themselves as private citizens – they are free to communicate with the public through non government channels, including a press release.

## Section 7. Fundamental Research Communication

10. Although the FAQ's take credit for removing authority from the Public Affairs Offices, Section 7.01 just shifts that prior restraint authority to the operating unit head for "all" materials in connection with a Fundamental Research Communication. To be sure, operating unit heads are far more qualified than public affairs officers. Without further assurances, however, merely switching offices with authority to restrain materials does little to restore scientific openness. This provision would not be objectionable if the policy clarified that it only reaffirms the normal supervisory duty to make sure government science meets government standards for distribution. As currently written, however, it would require a scientist to ask for permission to honor each request for a copy of his or her published work.

11. The policy is far too incomplete for implementation. Section 7.01 does not provide researchers the right to know the grounds for non-approval by the operating unit head. The policy does not specify what criteria will be considered, other than policy, budget, and management implications. There are no definitions for those standards, which could be broadly interpreted to significantly restrict the flow of scientific information. The policy can lead to open-ended delays, since the only guidance is that approval be "timely." Researchers do not have an explicit "right of last review" for any materials that are published in their names. Penalties for communicating despite active or passive non-approval are unspecified. Even if prior restraint were an acceptable model, every one of these omissions is fundamental. All must be responsibly addressed for a credible, coherent procedure.

12. Section 7.02 is a good clarification of the public affairs office's facilitative relationship towards researchers.

## Section 8. Official Communication with the Media

13. In Section 8.01, researchers should have the right to know the grounds for non-approval. There should be recognition of the "right of last review" and "personal views exception" not requiring pre-approval for an employees' opinion on policy, management, and budget matters.

14. Monitoring in section 8.02 should not be mandatory, as this has a chilling effect on speech.

## Section 9. Non Media Official Communication.

15. We have the same concerns as above on non-approval, right of last review, and the personal views exception.

## Section 11. Non Official Communication of Interest

16. In Section 11.01(b), what is the Department's justification to institutionalize a mandatory review period of up to two weeks for "Non-Official Public [personal views]"

Communications”? The blanket provision restricts “any” unrestrained, non-official communications that “relates to Department programs, policies or operations.” The extraordinary procedure will routinely impede the flow of scientific information, contrary to the Order’s stated purpose. It is justified to permit assessments for classified information, violation of ethics rules, and misuse of the personal views exception. *But that excuse applies to almost any information generated by the Executive branch.* What is the specific basis for a restraint that institutionalizes delays, ends anonymous communications, and threatens the timeliness of personal views? For these communications of “private information,” the normal civilian Executive branch rules should be sufficient at the Department of Commerce: employees are trained about the relevant rules concerning classified information, ethics regulations, statutes, and asked to consult public affairs if they have any uncertainty.

17. It is unclear whether Section 9.01(b) of the Order permits control of the content in communications, as well as mandatory review? For example, is an employee subject to discipline *per se* for not complying with the results of a review?

18. We also have the same concerns on grounds for non-approval, right of last review, and the personal views exception needed as above

19. In Section 11.03 the Department should clarify that otherwise-permissible communications may not take place or be prepared in a material way during official working hours; using any U.S. Government resource ....” (suggested language underlined) A blanket prohibition on the use of any government time and resources can render the personal views exception meaningless in cases where journalists, members of Congress, or other audiences are only available during normal business hours.

Employees sometimes passively receive a call or email on their government computer, need to communicate a scheduling change due to developments on the job, or engage in other inadvertent petty uses of government resources or time. Most agencies, if not all, routinely permit that level exception to the ban against personal business on the government’s nickel. But these type technicalities are the nuts and bolts for pretextual attacks against whistleblowers. Repeatedly they have been used successfully to push whistleblowers out of the government. A policy that seeks to reassure those nervous about a safe atmosphere for scientific freedom should make this commitment to flexible norms, rather than maintaining a zero tolerance policy against technicalities.

20. One reason that prior review is only permissible in extraordinary circumstances is that it creates an inherently chilling effect by depriving employees of their free speech right to make confidential disclosures. That is a significant component of statutory protections. *See* Joint Explanatory Statement for the Whistleblower Protection Act when it was initially passed with a unanimous congressional mandate. “It is unrealistic to expect whistleblowers to help in the struggle against waste if they risk exposure of their names and possible retaliation.” 135 *Cong. Rec.* 5033 (1989). To achieve the policy’s goals of open scientific communications, its system of blanket prior restraint must be trimmed to necessities. Training should explicitly reaffirm employees’ right to confidential communications, including the Whistleblower Protection Act right under 5 USC 1213 for anonymous disclosures to the Office of Special Counsel.

## Section 12. Nature of Communication; Employees' Appeal Rights

21. Although we commend DOC's grant of scientific appeal rights, as mentioned above it will be a meaningless exercise in frustration unless the scientist is entitled to know the grounds for disapproval that are being appealed.

22. Once scientists are entitled to know what they are challenging, the appeal procedure should be transparent. We recommend that the Department supplement section 12.05 by maintaining a public record of appeals results, including the required decisions; and with the employee's consent the appeal and supporting arguments redacted as necessary by law, as well as any comments the employee chooses to include in the public file on the final decision.

Like any grievance system, section 12.05 merely sets up an elaborate process to do what an employee could anyway: write a protest asking the institution to change its mind. As a result, unless modified this provision will merely be a diversionary process that allows Commerce to be seen as perfecting its grounds for restraining any given communication.

If transparent, however, the internal appeal system could have value by creating a responsible public record of the dispute, and whether the employee is satisfied with the resolution. This addition could make the appeals system a good weathervane for how well the Order is being implemented in good faith.

23. If the appeal system becomes legitimate, it could contribute significantly more to scientific freedom by offering a reporting channel for whistleblowers, as well. Here are some key elements for the implementation of any such reporting system.

1. *Communication*: An employee has a right to disclose lawfully whatever information supports a reasonable belief of misconduct.
2. *Protection from Retaliation*. Legal rights must not only exist on paper, but be effectively assimilated through regular, organization-wide communications and training.
3. *Fair Procedures free from conflict of interest*: An employee has a right to fair and objective procedures for redressing, investigating, and resolving complaints, disputes, and allegations of retaliation by an organization independent of both parties, that do not require her to waive her legal rights in order to participate in them.
4. *Participation*: An employer has a duty to elicit, retain, and evaluate fully and objectively all concerns raised by employees. Consequently, a competent investigation should involve keeping a well-preserved record and giving complainants multiple opportunities to access, respond, and contribute to it.

5. *Confidentiality*: An employee has a right to privacy and anonymity in the whistleblower process. NOAA must secure the confidentiality of the information flows related to this process.
6. *Corrective Action*: The results should be transparent, along with the whistleblower's evaluation of the resolution, for outside scrutiny and audit.
7. *Notice*: An employee has a right to know about their rights, what complaint systems are at their disposal, and how to use them. NOAA should disseminate this information broadly through annual reports, employment contracts, workplace posters, employee handbooks, and special trainings. Similarly, managers should be made aware and trained in dealing with complaints appropriately.
8. *Transparency*: There must be a public record of information that lawfully can be disclosed, to disclose the nature of initial concerns, the record from subsequent fact finding, confirmation of any relevant laws or rules that were violated, whether any and what corrective action is taken for confirmed misconduct, including disciplinary sanctions; the employee's assessment whether the resolution is adequate, and agency leadership's formal responsibility for the outcome. These are the Whistleblower Protection Act requirements in 5 USC 1213 for the Office of Special Counsel to administer the government's central whistleblower reporting channel.

The most significant factor to transform this policy's rhetorical promise into reality will be visible, organizational leadership. That means your personal emphasis communicating to employees and training them in both their scientific freedom rights and responsibilities, not just the latter. That is required anyway for all department heads under the Whistleblower Protection Act. *See* 5 USC 2302(c).

The Department could send an extremely significant message to employee by acting proactively on emerging legislative reform to protect scientific freedom, instead of waiting for Congress to further force the issue. Two weeks ago the House approved H.R. 985, the Whistleblower Protection Enhancement Act by a 331-94 vote. In Section 13(a), the legislation defines "abuse of authority" to include --

- (1) any action that compromises the validity or accuracy of federally-funded research or analysis;
- (2) the dissemination of false or misleading scientific, medical or technical information; [and]
- (3) any action that restricts or prevents an employee or any person performing federally funded research or analysis from publishing in peer-reviewed journals or other scientific publications or making oral presentations at professional society meetings or other meetings of their peers....

It would send a powerful message for the Department to supplement its media policy with these principles, without waiting for ultimate congressional passage. Our commitment to freedom of speech is basic to all of our organizational missions. We hope it is possible to work constructively with your staff to perfect a media policy whose provisions match its rhetorical promise to achieve that goal.

Respectfully,

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