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A challenge for the Obama team

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A Challenge for the Obama Team: Put Science and Federal Scientists to Better Use

*Holly Doremus**

INTRODUCTION

It's no secret that the outgoing George W. Bush administration has been hostile to environmental interests. By all accounts the Obama administration will be different on that score (as on many others).

Before it can concentrate on its own new environmental priorities, though, the new administration will have to root out the counterproductive work of its predecessor. To some extent that's just politics as usual and expected. Some degree of "policy whiplash" legitimately accompanies every presidential transition.

But this transition will be more complicated than usual. As it works to reverse a large number of specific Bush administration decisions, the Obama environmental team will also be battling a systemic problem at key federal environmental agencies. Career federal environmental scientists at both regulatory and research agencies are thoroughly demoralized, and a wide range of observers agree that science is not being used effectively in environmental policy decisions. The morale problem will be helped by case-by-case reversal of some of the most extreme Bush-era anti-environmental actions, but morale will not be fully restored until institutional systems are in place to make better use of scientific evidence and scientific personnel. That sounds easy, but it will take more than simply declaring a commitment to scientific integrity.

I. A CHALLENGING TRANSITION

Every president legitimately seeks to implement his or her policy vision. And every time the presidency turns over, the transition includes

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efforts to find and reverse policy decisions by the preceding administration that are inconsistent with the new vision. George W. Bush launched his administration by calling a highly public halt to Clinton-era regulatory actions that remained in the pipeline.¹ The Obama administration will surely come in with plans to push back against Bush-era actions. That's par for the course.

In the environmental context, this transition will be especially challenging because of the depth and breadth of the outgoing administration's hostility to the environment. The incoming Obama administration will have its work cut out for it trying to turn the bureaucratic ship back toward a more environmentally-friendly course. I see two sets of challenges, only one of which seems to be widely recognized.

The first challenge is to find and reverse individual environmentally-damaging decisions. This is the conventional work of transitions. It is conceptually straightforward, albeit practically daunting. It's just a matter of identifying offending decisions and mustering the political will and agency resources to turn them around. The tools are well known—regulations that are in the pipeline but not finalized by inauguration day can be stayed, reviewed, and as necessary withdrawn; informal interpretations and policy guidance can be revised; new rulemakings can address entrenched anti-environmental regulations; and litigation can be settled with the withdrawal of unlawful measures.²

The President-elect and his team are well aware of this challenge. They have already targeted some anti-environmental decisions as high priorities for reversal,³ and they are being bombarded with wish lists by environmental interests.

The second challenge is qualitatively different. The Bush administration has been accused by scientific organizations, environmental groups, and key Democrats in Congress of misusing science in regulatory decisions.⁴ Substantial numbers of scientists at key

1. Memorandum for the Heads and Acting Heads of Executive Departments and Agencies, 66 Fed. Reg. 7702 (Jan. 24, 2001), available at <http://www.fmcsa.dot.gov/rules-regulations/administration/rulemakings/012401n2.htm>.

2. This strategy, which environmentalists criticized as unprincipled in the last administration, should be used with care.

3. For example, President-elect Obama had said during his campaign that EPA should have approved California's request for a waiver of preemption under the Clean Air Act to allow it to regulate greenhouse gas emissions from cars and trucks. It is widely expected that his administration will reverse that decision as quickly as possible. See, e.g., Zachary Coile, *Emission Rules – State is Hopeful*, S.F. CHRON., Nov. 11, 2008, at A1, available at www.sfgate.com/c/acrobat/2008/11/11/Chronicle.11-11-2008.ALL.A.1.MainNews.5star-dot.pdf.

4. See, e.g., DEMOCRATIC STAFF, H. COMM. ON RES., WEIRD SCIENCE: THE INTERIOR DEPARTMENT'S MANIPULATION OF SCIENCE FOR POLITICAL PURPOSES, 3 (Dec. 17, 2002); MINORITY STAFF, SPECIAL INVESTIGATIONS DIV., H. COMM. ON GOV'T REFORM, POLITICS AND SCIENCE IN THE BUSH ADMINISTRATION (Aug. 2003, Updated Nov. 13, 2003), available at <http://oversight.house.gov/documents/20080130103545.pdf>; UNION OF CONCERNED SCIENTISTS,

environmental regulatory agencies agree. The Union of Concerned Scientists surveyed scientists at key environmental regulatory agencies between 2005 and 2007 and found many convinced that their work is ignored, misused, and improperly overridden.⁵ Not surprisingly, many agency scientists are disheartened.⁶

Although the transition team is surely aware of this problem, so far it has not articulated a plan to address it. Reversing individual Bush administration actions will not be enough. That will help the morale problem, which surely stems partly from the (accurate) perception among career scientists that the Bush administration is hostile to the conservation aims of the laws their agencies are charged with implementing. But there is also a very real institutional problem with the use of science. That problem requires an institutional solution.

II. THE INSTITUTIONAL SCIENCE PROBLEM

The essence of the institutional science problem is that federal environmental agencies have done a poor job of highlighting and dealing with the complex mix of scientific and political elements that go into environmental policy choices. This problem did not start with the Bush

SCIENTIFIC INTEGRITY IN POLICYMAKING: AN INVESTIGATION INTO THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE (Mar. 2004), *available at* http://www.ucsusa.org/scientific_integrity/abuses_of_science/case_studies_and_evidence/scientific_integrity-in.html; UNION OF CONCERNED SCIENTISTS, SCIENTIFIC INTEGRITY IN POLICY MAKING: FURTHER INVESTIGATION OF THE BUSH ADMINISTRATION'S MISUSE OF SCIENCE (Jul. 2004), *available at* www.ucsusa.org/assets/documents/scientific_integrity/scientific_integrity_in_policy_making_july_2004_1.pdf; NATURAL RESOURCES DEFENSE COUNCIL, REWRITING THE RULES, 3RD ANNUAL EDITION: THE BUSH ADMINISTRATION'S ASSAULT ON THE ENVIRONMENT 6-12 (Apr. 2004), *available at* [http://www.nrdc.org/legislation/rollbacks/rollbacksinx.asp;_H.COMM.ON.OVERSIGHT.AND.GOV'T.REFORM,110TH.CONG.,POLITICAL.INTERFERENCE.WITH.CLIMATE.CHANGE.SCIENCE.UNDER.THE.BUSH.ADMINISTRATION\(2007\),availableathttp://www.bespacific.com/mt/archives/014345.html#014345](http://www.nrdc.org/legislation/rollbacks/rollbacksinx.asp;_H.COMM.ON.OVERSIGHT.AND.GOV'T.REFORM,110TH.CONG.,POLITICAL.INTERFERENCE.WITH.CLIMATE.CHANGE.SCIENCE.UNDER.THE.BUSH.ADMINISTRATION(2007),availableathttp://www.bespacific.com/mt/archives/014345.html#014345); CHRIS MOONEY, THE REPUBLICAN WAR ON SCIENCE (2005), *available at* <http://www.waronscience.com/home.php>; SETH SHULMAN, UNDERMINING SCIENCE: SUPPRESSION AND DISTORTION IN THE BUSH ADMINISTRATION (2007), *available at* <http://www.ucpress.edu/books/pages/10546.php>; Kathleen M. Rest & Michael H. Halpern, *Politics and the Erosion of Federal Scientific Capacity: Restoring Scientific Capacity to Public Health Science*, 97 AM. J. PUB. HEALTH 1939 (2007), *available at* <http://www.ajph.org/cgi/content/abstract/97/11/1939>.

5. Surveys covered the EPA, the Department of Interior's U.S. Fish and Wildlife Service, the Commerce Department's National Marine Fisheries Service, the Food and Drug Administration and federal climate scientists across agencies. For the results, *see* Union of Concerned Scientists, Voices of Federal Scientists, http://www.ucsusa.org/scientific_integrity/abuses_of_science/voices-of-federal-scientists.html. Given the relatively low response rates, the potential for self-selection, and the drafting of the survey questions by a group with a pre-existing agenda, the surveys should not be given too much weight, but they are at least indicators of discontent.

6. In the Union of Concerned Scientists surveys, between twenty-five and fifty percent, depending on the agency, reported that morale in their unit was poor or extremely poor. *Id.*

administration,⁷ although it has been exacerbated by that administration's hostility to environmental protection. Installation of the next administration will not automatically solve it.

A confluence of circumstances produces the science problem.⁸ First, environmental policy decisions typically have both scientific and non-scientific elements. They require both the best possible understanding of the relevant facts about the natural world—the realm of science—and judgments about goals, priorities and distribution of costs—the realm of politics.

Second, those elements are difficult to separate. Data are often remarkably thin in the context of environmental conflict, which means that scientific conclusions may be influenced by the scientists' underlying political views. In addition, environmental laws often call for policy decisions that require both types of judgments without highlighting the distinction. For example, a team of scientists developing a recovery plan for an endangered species may be asked to identify a "recovered" population size, which requires that they decide how secure the species needs to be (a political judgment) as well as how many individuals are needed to reach that level of security (a scientific judgment). Limited public sophistication about the scientific issues can exacerbate the potential for confusion.

Third, a slew of actors inside and outside government agencies have incentives to blur the distinction between science and politics. Sometimes the people who should be making political decisions—the politically-appointed leadership of a regulatory agency—want to fob those choices

7. For examples of earlier complaints about "politicized science," see, e.g., TODD WILKINSON, *SCIENCE UNDER SIEGE: THE POLITICIANS' WAR ON NATURE AND TRUTH* (1998), available at <http://www.amazon.com/Science-Under-Siege-Politicians-Nature/dp/1555662110>; PAUL W. HIRT, *A CONSPIRACY OF OPTIMISM: MANAGEMENT OF THE NATIONAL FORESTS SINCE WORLD WAR TWO* (1994), available at [http://books.google.com/books?id=q-ykwjYL6c4C&dq=PAUL+W.+HIRT,+A+CONSPIRACY+OF+OPTIMISM:+MANAGEMENT+OF+THE+NATIONAL+FORESTS+SINCE+WORLD+WAR+TWO+\(1994\)&source=gbs_summary_s&cad=0](http://books.google.com/books?id=q-ykwjYL6c4C&dq=PAUL+W.+HIRT,+A+CONSPIRACY+OF+OPTIMISM:+MANAGEMENT+OF+THE+NATIONAL+FORESTS+SINCE+WORLD+WAR+TWO+(1994)&source=gbs_summary_s&cad=0); JEANNE NIENABER CLARKE & DANIEL MCCOOL, *STAKING OUT THE TERRAIN: POWER AND PERFORMANCE AMONG NATURAL RESOURCES AGENCIES* 63 (1996); ASHLEY L. SCHIFF, *FIRE AND WATER: SCIENTIFIC HERESY IN THE FOREST* (1962), available at http://www.abebooks.com/servlet/BookDetailsPL?bi=1043674237&searchurl=pfxid%3Da_47470965%26tn%3DFire%2Band%2BWater%253A%2BScientific%2BHersey%2Bin%2Bthe%2BForest%2BService.

8. For more in-depth discussion of the relationship between science and politics in environmental policy, see, e.g., Holly Doremus, *Science Plays Defense: Natural Resource Management in the Bush Administration*, 32 *ECOLOGY L.Q.* 249 (2005) [hereinafter Doremus, *Science Plays Defense*], available at http://heinonline.org/HOL/Page?handle=hein.journals/eclawq32&men_hide=false&men_tab=citnav&collection=journals&page=249; Holly Doremus & A. Dan Tarlock, *Science, Judgment, and Controversy in Natural Resource Regulation*, 26 *PUB. LAND & RESOURCES L. REV.* 1 (2005), available at <http://heinonline.org/HOL/Page?handle=hein.journals/publan26&id=1&size=2&collection=journals&index=journals/publan>; Holly Doremus, *Scientific and Political Integrity in Environmental Policy*, 86 *TEX. L. REV.* 1601 (2008), available at <http://www.utexas.edu/law/journals/tlr/assets/current/doremus.pdf>.

off on agency scientists or scientific advisors.⁹ Sometimes political actors want scientific cover for their political choices.¹⁰ Scientists may play along with this “science charade,” assuming that doing so will increase their influence.¹¹

Finally, the scientific and political judgments inherent in environmental policy decisions ought to be made by different persons and overseen in different ways. Judgments about the facts of the natural world are best made by people with expertise in the relevant science. Scientific training and reputational interests constrain those judgments to some extent, but oversight may be needed to limit the role of scientists’ political preferences and other biases. Political judgments are legitimately made by the legislature, the president, and the political appointees who run agencies on the president’s behalf. But agency decisions are legitimate only if they both stay within existing statutory boundaries and are publicly acknowledged so that Congress, the president, and the voters can react.

The combination of these factors can produce an opaque mixture of scientific and political judgments, both of which are removed from effective oversight. That’s the essence of the science problem.

III. INSTITUTIONALIZING BETTER USE OF SCIENCE

The science problem, writ broadly, has been much in the news over the last eight years. The Obama transition team is aware of it, and has floated the idea of an early executive order on scientific integrity.¹² That’s a good idea, but it’s not likely to be enough.

Federal agencies have routinely acknowledged the importance of scientific integrity throughout the modern environmental era.¹³ To my knowledge, no federal official has ever endorsed the use of bad science in policy. Official invocations of scientific integrity are common, but

9. See Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 COLUM. L. REV. 1613 (1995).

10. See OFFICE OF INSPECTOR GENERAL, DEP’T OF THE INTERIOR, INVESTIGATIVE REPORT: ON ALLEGATIONS AGAINST JULIE MACDONALD, DEPUTY ASSISTANT SECRETARY, FISH, WILDLIFE AND PARKS [hereinafter MACDONALD REPORT] (2007); Doremus, *Science Plays Defense*, *supra* note 9, at 255–57.

11. Doremus, *Science Plays Defense*, *supra* note 9, at 259–60.

12. That suggestion is found in a book issued in November by the Center for American Progress, the nonprofit group run by John Podesta, who is heading the Obama transition team. Neal Lane, *Office of Science and Technology Policy*, in CHANGE FOR AMERICA: A PROGRESSIVE BLUEPRINT FOR THE 44TH PRESIDENT 50, 54 (Mark Green & Michelle Jolin, eds., forthcoming 2009) (selected chapters available for download at <http://www.americanprogressaction.org/issues/2008/changeforamerica/bookchapters.html>).

13. The initial guidelines issued by the Council on Environmental Quality for implementation of the National Environmental Policy Act, for example, included a requirement that federal agencies insure the scientific integrity of the information in environmental impact statements. 40 C.F.R. § 1502.24 (2008).

typically do not have much effect on agency practice.¹⁴ An executive order would elevate the concern to the highest possible executive level, but could well suffer the same fate as its predecessors at lower levels.

The executive order proposed by transition officials calls for a statement that “all federal policy and information provided to the public by the federal government will be based on the best scientific evidence.”¹⁵ That’s already the law. Many environmental laws explicitly invoke the best science standard. For science-intensive decisions, it’s likely implicit in the general Administrative Procedure Act requirement that agency action not be arbitrary or capricious.¹⁶ Furthermore, a Clinton-era Executive Order which remains in effect already requires that agencies base their decisions “on the best reasonably obtainable scientific, technical, economic, and other information.”¹⁷ And the Data Quality Act already calls for government-wide guidelines for “ensuring and maximizing the quality, objectivity, utility, and integrity” of federally-disseminated information.¹⁸

Of course, if the next administration is more committed than the last one to scientific integrity, it could accomplish more with the same tools. But the executive order approach will inevitably come up short. It will not be possible for even the most committed administration to directly oversee every decision by every agency. Systematic institutional changes will be needed to ensure broad-spectrum improvements. Beyond calling for use of the best science, the next administration needs to articulate what that means and adjust agency structures and procedures to encourage it.

I recommend tackling the problem on three key fronts.

First, agencies should be directed to clarify, to the extent possible and in public, the scientific and political elements of their environmental policy decisions, and to more clearly define role boundaries for agency personnel. It will not always be possible to cleanly separate science from politics, but acknowledging that the two are intertwined will help raise awareness of the role distinction. Providing training for agency actors, both career scientists and political appointees, should further work to cabin the actions of each group within their appropriate role. An

14. The Bush Interior Department, for example, routinely stressed the importance of using the best available science and emphasized scientific excellence in decision-making, even while scientific and environmental groups were excoriating its alleged abuses of science. Doremus, *Science Plays Defense*, *supra* note 9, at 256-57.

15. Lane, *supra* note 13, at 54.

16. Holly Doremus, *The Purposes, Effects, and Future of the Endangered Species Act’s Best Available Science Mandate*, 34 ENVTL. L. 397, 421-26 (2004).

17. Exec. Order 12,866, § 1(b)(7), 58 Fed. Reg. 51735, 51736 (Oct. 4, 1993).

18. Pub. L. No. 106-554, § 515(a), 114 Stat. 2763, 2763A-154 (2000); Office of Mgmt. & Budget, Guidelines for Ensuring and Maximizing the Quality, Objectivity, Utility, and Integrity of Information Disseminated by Federal Agencies, 67 Fed. Reg. 8452 (Feb. 22, 2002).

executive order should mandate these steps, and should require that agencies report periodically on implementation.

Second, improved institutional separation is needed between political appointees and career scientists. The biggest scientific scandal of the Bush administration was the way that Julie MacDonald, Deputy Assistant Secretary of Interior for Fish, Wildlife and Parks, repeatedly injected herself into the scientific elements of endangered species policy decisions. An investigation by the Interior Department's Inspector General found that MacDonald routinely called agency scientists directly and tried to bully them into reaching her favored conclusions.¹⁹ Even more troubling, the investigation concluded that MacDonald's boorish behavior did not violate any laws or department regulations. Again, better training could help. So could key personnel decisions. The president and agency heads could make sure that political appointees understand the need for role separation and are committed to it. They could put high-level career scientists with the stature to resist improper political interference in key science advisory positions, or create a scientific ombudsperson position to provide an avenue for agency scientists to complain about political interference. An executive order could require that agencies issue procedural regulations detailing the role of political and career staff in key decisions.

Third, increased transparency is needed to allow effective oversight of role separation. The MacDonald Report gave the Bush administration a high-profile black eye, and even encouraged a federal court to set aside a decision tainted by political interference.²⁰ But MacDonald's meddling, although widely known within the Interior Department, only came to public light through the Inspector General's decision to investigate. Even the courts have been reluctant to require that the details of agency scientific recommendations be revealed in litigation, with some ruling that the deliberative process privilege shields those details.²¹ New mechanisms are needed to reveal when political appointees overstep their bounds. An executive order could require that agencies disclose the unvarnished recommendations of agency scientists that feed into policy decisions, and could explicitly and generally waive the deliberative process privilege for such recommendations.

CONCLUSION

The incoming Obama administration seems genuinely committed to improving environmental policy. It knows it will have to start by reversing a number of Bush-era decisions, but it may be less aware that it

19. MACDONALD REPORT, *supra* note 11, at 4.

20. *W. Watersheds Project v. U.S. Forest Serv.*, 535 F. Supp. 1173, 1187-88 (D. Idaho 2007).

21. *See, e.g., Ctr. for Biological Diversity v. Norton*, 336 F. Supp. 2d 1155, 1161 (D. N.M. 2004).

needs to change agency cultures to improve the use of science in environmental decisions. That is not an easy task. It cannot be accomplished by the stroke of a pen, although the right pen strokes would provide a very good start. The transition team should draft a more detailed and substantive executive order on scientific integrity, highlighting the roles of science and politics in policy decisions and providing institutional mechanisms for increasing role recognition and separation. That order should be followed with the institution of ongoing personnel training, oversight of boundary recognition, and appointments that reinforce effective role separation.