



August 26, 2020

VIA ELECTRONIC MAIL

Dr. Cynthia Decker
NOAA Scientific Integrity Officer
Office of the NOAA Deputy Under Secretary for Operations (DUS/O)
1401 Constitution Avenue N.W.
Washington, DC 20230

Dr. Decker:

We write in response to your July 29, 2020 email, notifying us of the Scientific Integrity Committee’s decision to postpone its inquiry into our complaint alleging potentially improper political interference in conservation measures aimed at protecting the endangered right whale from seismic blasting in the Atlantic Ocean. You state that the postponement is due to ongoing litigation against NOAA and will continue until those “legal matters are settled.” We do not believe that the pending federal court litigation has any bearing on our investigatory complaint before the Scientific Integrity Committee. We therefore request that the Committee reconsider its decision, resume the inquiry in the manner set forth by the Procedural Handbook for NAO 202-735D: Scientific Integrity (“Handbook”), and release a final inquiry report to Democracy Forward.

As you know, on April 27, 2020, the Committee notified us that our complaint would proceed to a scientific integrity “inquiry,” the step immediately preceding an investigation. *See* Handbook §4.04. The Inquiry Team, once formed, had 90 days from that date to collect and evaluate evidence, and prepare a final inquiry report containing (1) a description of the allegation(s), (2) a summary of the process used by the Team, (3) a list of records reviewed, (4) summaries of interviews, and (5) a recommendation for the Committee to investigate, dismiss, or for a specific action to restore scientific integrity. *Id* at § 4.04(a), (f). Under the express terms of the Handbook, the Inquiry Team was to share the inquiry report with us on or around July 26, 2020. *Id*.

Instead of providing us with the inquiry report, you instead notified us on July 29th that, in consultation with NOAA’s General Counsel, the Committee decided to postpone the inquiry due to ongoing litigation relating to seismic permitting in the North Atlantic. This was the Committee’s first mention of such litigation in its correspondence with Democracy Forward.

To begin, there is no procedure in the Handbook that allows the Committee to postpone an inquiry because of pending litigation. On its face, therefore, the Committee’s delay is unauthorized and unjustified.

In any event, resolution of our scientific integrity complaint is in no way dependent on the outcome of the litigation. Our scientific integrity complaint and the litigation have different purposes and are not mutually exclusive. The purpose of litigation is generally to determine whether a substantive law has been violated and to remedy any harm. The Committee and the Scientific Integrity Policy exist for a different purpose: to “strengthen widespread confidence – from scientists, to decision-makers, to the general public – in the quality, validity, and reliability of NOAA science” (see NAO 202-735D). That there is overlap between the subject matters of the litigation and our complaint is not a valid basis for halting the inquiry of the Committee. Nothing in the Scientific Integrity Policy permits the sidelining of an inquiry into potential political interference in NOAA science for the benefit of a litigation position even if political interference is a component of the litigation. There is no reason the two actions cannot proceed concurrently, especially since they have different scopes.

For instance, the ongoing litigation seeks relief unrelated to that available from the Scientific Integrity Committee. In 2018, various environmental plaintiffs brought a federal lawsuit challenging the issuance of Incidental Harassment Authorizations (IHAs) to five companies allowing seismic surveys off the Atlantic Coast. Along with the authorizations, plaintiffs also challenged the related biological opinion, environmental assessment, and finding of no significant impact under the Administrative Procedure Act as arbitrary and capricious and contrary to the Marine Mammal Protection Act, the Endangered Species Act, and the National Environmental Policy Act. See *S. Carolina Coastal Conservation League v. Ross*, No. 2:18-cv-3326-RMG (D.S.C. Dec. 11, 2018) (Compl., ECF No. 1). Plaintiffs seek an order vacating the IHAs and related agency actions, and the litigation is still pending.

Democracy Forward’s complaint, on the other hand, does not seek vacatur of the IHA and related agency actions, but instead seeks that the Committee investigate whether political interference occurred in connection with the drafting, political review, and implementation of the biological opinion and whether any relevant statutes were violated in connection with this activity; and recommend steps NOAA should adopt to rectify any legal violations or improper conduct and to prevent recurrences. At the inquiry stage, these goals are even narrower: the agency need only assess “whether an allegation sufficiently specifies scientific misconduct or loss of scientific integrity.” Handbook § 4.04. These goals are independent from the task of a reviewing court in civil litigation, rendering litigation an improper consideration during the scientific integrity inquiry.

Moreover, postponing further review into the agency’s scientific integrity will seriously burden the public’s rights to understand whether NOAA has substituted political considerations for the sound application of its technical expertise.¹ The litigation has been active for a year and

¹ See e.g., Nat’l Academy of Pub. Admin., *An Independent Assessment of Allegations of Scientific Misconduct filed under NOAA Scientific Integrity Policy*, Mar. 2020, available at https://nrc.noaa.gov/Portals/0/SIC/NOAA%20Final%20Report_scanned_061220.pdf?ver=2020-06-15-074029-673

half and is nowhere near concluding. For the past year, the parties have been locked in an administrative record dispute over the inclusion and redaction of agency documents related to the decisions to issue IHAs and related agency actions. *See* ECF Nos. 347, 437 (Mots. to Compel). Any resolution of this lawsuit is likely many months or years away. Postponing the inquiry until the “legal matters are settled” runs counter to the Committee’s responsibility to “resolve each allegation of scientific misconduct or loss of scientific integrity as quickly as possible,” Handbook § 4.01, and is another reason to continue assessing the allegations in our complaint.

The Committee’s decision to postpone the inquiry risks undermining the public’s confidence in the quality, validity, and reliability of NOAA science. We therefore request that the Committee resume the inquiry into our complaint and provide us with the final inquiry report at your earliest convenience. If no final report yet exists, we request that you detail the steps the Inquiry Team has taken to assess the allegations in our complaint. Democracy Forward is prepared to take any and all legal actions necessary to ensure that the Committee abides by its obligations under the Handbook, the Information Quality Act, the Administrative Procedure Act, and other sources of law.

Please do not hesitate to contact us at mmartinez@democracyforward.org if we may provide anything further.

Sincerely,

/s/ Anne Harkavy

Anne Harkavy
Executive Director
Democracy Forward Foundation

/s/ Michael C. Martinez

Michael C. Martinez
Senior Counsel
Democracy Forward Foundation

(“To maintain public trust in the agency’s work, NOAA must keep scientific integrity at the forefront of all aspects of its scientific activities.”).