



FSEEE's Guide to

Free Speech

in the Forest Service
Workplace

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Forest Service Employees for Environmental Ethics (FSEEE) is a 501(c) nonprofit organization. Our mission is to forge a socially responsible value system for the Forest Service based on a land ethic that ensures ecologically and economically sustainable resource management.

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Introduction

*“Perhaps eventually we could realize the ideal in which loyalty to an organization means loyalty to ethical standards characteristic of the organization at its finest.” — Natalie Daneker, “Can Whistleblowing be fully legitimated?” *Business and Professional Ethics Journal**

At one time or another in your career you may be witness to unethical or illegal behavior by a colleague or your agency. Such occasions are among the most challenging you will ever face professionally. This booklet is intended to help you negotiate these rocky shores with as few bumps and bruises as possible.

What you read here is based upon the experiences of dozens of Forest Service employees who have been caught between loyalty to their employer and loyalty to their personal ethical standards, i.e., between a rock and a hard place. Though we’ll cover the laws, rules, and regulations, effective resolution of ethical conflicts is often accomplished by other means. We’ll also explore the effective use of coalitions, media, politicians, and other tools available to federal employees. It has been FSEEE’s experience over the past decade that each ethical conflict requires a different mix of advocacy tools.

The Washington office human resources staff reviewed the first edition of this booklet when it was published five years ago. The reviewer acknowledged the publication’s factual accuracy, but claimed that it went “overboard” in encouraging employees to point out

waste, fraud, and abuse. He directed that managers not permit the first edition to be distributed in the workplace. Thus FSEEE is pleased that for this second edition, Deputy Chief for Business Operations Clyde Thompson has written the following:

“Public servants are the first line of defense to ensure compliance with the letter and spirit of the laws that govern management of our national forests and natural resources. All of our actions are designed to comply with existing laws and regulations. However, mistakes do occur. Owning up to and correcting mistakes are the hallmark of an effective and learning organization. All Forest Service employees must know and understand the extent of their rights and responsibilities to report wrongdoing as it relates to the workplace. Employees should also understand their own individual rights.”

The Duties of Forest Service Employees

Employees have a duty to further the interests of the Forest Service while on the job. This includes maintaining loyalty, obedience, and confidentiality. These duties are qualified, however, by an overriding duty to serve the best interests of the public. For example, the duty of confidentiality does not prevent an employee from disclosing gross mismanagement or other matters of public concern. The duty of obedience does not require that an employee obey an order to do something illegal, and the duty of loyalty does not mean that employees must perpetuate the mistakes that others have made. There are many official and unofficial statements of employee ethics and rules of employee conduct. Such statements can be found in various congressional enactments, executive orders, employee codes of ethics, Office of Government Ethics rules, professional societies' codes of ethics, Gifford Pinchot's *1906 Use Book*, and policy directives from current and former Forest Service chiefs. Forest Service employees have the duty to:

- Tell the truth.
- Obey the laws, and never to be a party to their evasion.
- Expose corruption wherever discovered.
- Guard the best interests of all the people.
- Protect and conserve federal property.
- Place loyalty to the highest moral principles above loyalty to government departments.
- Refrain from making unauthorized commitments purporting to bind the government.

Employees' Duty to Aid in Law Enforcement

Every citizen has a general duty to aid in law enforcement. This ethical standard is embodied in the U.S. Criminal Code (USC). If a person has actual knowledge of the commission of a felony, it is a federal crime to conceal such knowledge and fail to make it known to appropriate authorities (18 USC § 4).

Felonies that Forest Service employees might witness in the course of their employment include:

- Federal employees acting deceptively through false record keeping (18 USC § 2073).
- Federal employees concealing, mutilating, falsifying, or destroying public records (18 USC § 2071).
- Federal employees knowing and willfully concealing material facts in a government matter, and making or using a document in a government matter knowing that it contains false information (18 USC § 1001).
- Two or more people working together to defraud the United States or commit an offense against the United States (18 USC § 371).
- Two or more people working together to prevent, by force, intimidation, or threat, a federal officer from discharging any duties (18 USC § 372).

If an employee has actual knowledge of the commission of these or any other crimes, or has any questions about the possibility, the appropriate parties to contact are the Federal Bureau of Investigation and the Office of the Attorney General. FSEEE can assist employees in making these contacts, if they wish.



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“Old growth is not dead, dying, diseased, and decadent.”

Many western ancient forests owe their protection to Forest Service scientists whose research demonstrated that old growth is not dead, dying, diseased, and decadent, as agency timber managers had long asserted. The scientists' elegant research, combined with their enthusiasm as public educators, galvanized the Northwest's ancient forest protection movement, culminating in the protection of millions of ancient forest acres.

The Forest Service as Employer

In a healthy organization, the employer relies on dedicated employees to help identify potential problems. Free flow of information in such organizations requires that employees feel safe bringing bad news to the attention of their supervisors. Like many large organizations, the Forest Service has not always been a willing listener when receiving such information.

In the Forest Service's final reinvention report, *The Changes Begin*, the agency makes a commitment to "learn from our mistakes."

To the American public, no problem, program, or issue associated with Forest Service activities is more important than the protection and restoration of healthy forest ecosystems. No aim of government is valued more than public service.

When Forest Service employees stand up for the agency's dual purpose of caring for the land and serving people, FSEEE will do its best to stand behind them. *We are listening and we will continue to do so.*

Employees' Legal Rights

There are two primary legal rights that allow employees to voice their concerns about ethical land management: constitutional protection of free speech and statutory protection of whistleblowing disclosures. The First Amendment is a fundamental part of our democratic form of government. It states:

Congress shall make no law ... abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

The Bill of Rights is intended to prevent the government from interfering unnecessarily in people's freedom of expression. It means that Forest Service employees can talk about environmental ethics.

The Importance of Speech about the Environment

Justice Lewis F. Powell Jr. of the U.S. Supreme Court said that the First Amendment “protects the ability of our people through free and open debate to consider and resolve their own destiny.” The Court also recognizes that “freedom of discussion, if it is to fulfill its historical function in this nation, must embrace all issues about which information is needed to cope with the exigencies of their period.” So the First Amendment protects speech about a wide variety of public issues, including the environment.

Public discussion about land conservation and sustainable management of increasingly scarce natural resources enjoys the highest level of constitutional protection. At a fundamental level, human existence presupposes a healthy natural environment. Thus our ultimate destiny is expressed through delicately balanced policies of natural resource use and conservation. The communities we live in either thrive or decline depending on whether and how we care for our natural resources.



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“He later resigned because of his concerns about the Inyo’s illegal permitting practices.”

Inyo wilderness ranger Gary Guenther called attention to his forest's failure to limit commercial uses in wilderness areas along the scenic crest of the Sierra Nevada. He later resigned because of his concerns about the Inyo's illegal permitting practices. Guenther is currently a representative of a national organization, Wilderness Watch, which has joined FSEEE in a lawsuit against the Inyo and Sierra national forests.

The Free Speech Balancing Test

At first glance, the First Amendment seems to prohibit the government from making any law restricting freedom of speech. However, courts have interpreted the amendment to allow the government to restrict speech in certain limited circumstances (e.g., shouting “Fire!” in a crowded theater).

In general, the First Amendment grants less protection to government employees that it does to other citizens. The courts have decided that employees’ interest in free speech must be balanced against the government’s interest in efficient public service.

In the landmark case of *Pickering v. Board of Education* (1965) the U.S. Supreme Court stated:

The problem in any case is to arrive at a balance between the interests of the [government employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

To gain the protection of the First Amendment, an employee’s speech must address matters of public concern, rather than private concerns, and avoid, if possible, any disruption of government operations. Recently, the Supreme Court emphasized that a third interest must also be considered, and that is, the right of the public to hear what employees have to say.

Factors to consider when weighing the interests of the government, the citizen-employee, and the public include:

- The degree of public concern about the subject of the employee's speech.
- Whether the employee's speech involves potentially disruptive personal complaints that are not of concern to the public.
- Whether and to what degree the employee's speech threatens the maintenance of discipline by immediate supervisors, strains close working relationships that require personal loyalty and confidence, interferes with harmony and morale among coworkers, or impedes the smooth performance of duties or the fulfillment of the agency's basic mission.
- Whether the disruptive effect of the speech was avoidable.

Factors that tend toward a favorable finding of public concern include situations in which comments are publicly solicited, such as through the public processes for land planning or project-level environmental review, or speech in a public forum, such as a public hearing or the letters section of a newspaper. A newspaper reporting what an employee says as news tends to favor a finding of public concern.

In sum, the more political, or issue-oriented the employee's speech, the more protected it is by the First Amendment. Political speech is expression that concerns issues of public concern, such as the environment. Non-political speech is expression that concerns private issues, such as personality conflicts within the workplace. Political speech is different from partisan, electoral political activity. The Hatch Act sharply restricts electoral activity by federal employees while on the job or at government

expense, but it does not regulate or otherwise affect issue-oriented speech while on or off the job.

The problem with the First Amendment balancing test is its subjectivity. People have different views of how to balance the competing interests. The employee wants to vindicate her right to participate in discussions about public concerns, the public wants to be informed about how public resources are being managed, and the government seeks to preserve the efficient delivery of services. If the Forest Service and the employee cannot find common ground, the courts might have their own view. One never knows for sure what the outcome will be when this subjective balancing test is applied in a court of law.

It is very rare for a Forest Service worker to have to pursue federal court action to vindicate free speech rights. FSEEE has found that informal resolution through the chain of command is generally sufficient to have gag orders and other restraints on speech lifted. However, though we can resolve conspicuously illegal limits on speech, it is more difficult to cure workplace cultures where opposing or controversial views are ignored, ridiculed, or shunned through more subtle, interpersonal forms of retaliation. Repressive workplace environments are generally the creation of the local line officer. Anything short of replacing the offending manager is unlikely to improve the situation. If the facts clearly show a pattern and practice of repressive behavior, removal is a possibility with which FSEEE can assist.

Whistleblower Protection

In contrast to the constitutional free speech standards, federal whistleblower statutes offer more predictable standards for evaluating employee whistleblowing. The Civil Service Reform Act, as amended by the Whistleblower Protection Act, offers explicit protection from personnel actions taken against employees in retaliation for:

Any disclosure of information by an employee, former employee, or applicant for employment which the [person] reasonably believes evidences (a) a violation of any law, rule or regulation; or (b) gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety (5 USC § 1213(a)).

Recent court cases have narrowed the scope of protected disclosures to those made outside the normal conduct of one's job. If, for example, your job is to write an environmental impact statement and in the EIS you disclose that a mining operation poses a substantial risk of water quality violations that endanger the health of downstream water users, your disclosure of this information is not an act of whistleblowing that is protected against retaliation. If, as a result of your work, your superiors choose to reassign you to a job with responsibilities below your current grade level, the Whistleblower Protection Act may be of little help (other remedies through collective bargaining or internal grievance may be pursued).

As a result of these recent cases, the best legal defense for a prospective whistleblower is to blow the whistle outside of the agency's chain-of-command, such as in a letter to the editor, to an environmental organization, or to the Office of Inspector General. (If the disclosure concerns trade secrets, privacy issues, or national security, it can only be disclosed to the Office of Special Counsel or Office of Inspector General without risking prosecution for violating another law.)

Prohibited Personnel Practices

The Whistleblower Protection Act prohibits the Forest Service from taking certain personnel actions against employees because of:

- Any whistleblowing disclosure.
- The exercise of any appeal, complaint, or grievance right.
- The employee testifying for or otherwise assisting another employee in whistleblowing or cooperating with or disclosing information to the Office of Inspector General or the Office of Special Counsel.
- The employee's refusal to obey an order that would result in the employee violating the law.
- The employee's petition to Congress or disclosure of information to Congress.

Personnel actions prohibited by the Whistleblower Protection Act include any significant change in duties or responsibilities that is inconsistent with the employee's salary or grade level. They also protect against adverse decisions on an appointment, promotion, disciplinary or corrective action, detail, transfer, reassignment, reinstatement, restoration, reemployment, or performance evaluation; on decisions concerning pay, benefits, or awards; or on decisions concerning education or training (if the training or education is expected to lead to promotion or performance evaluation). Recent amendments to the federal whistleblower laws add retaliatory psychiatric referrals and threats of security-clearance revocation to the list of prohibited personnel actions.

Whistleblowers Carry a Burden

To receive protection from the Whistleblower Protection Act the employee must demonstrate that:

- She reasonably believes that the disclosure evidences illegality, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety.
- She disclosed her concerns to someone beyond the normal exercise of her job responsibilities.
- The retaliator knew that she made the disclosure.
- Concrete personnel action was subsequently taken against the employee.
- The retaliator had an improper motive.

The employee's disclosure must be a *contributing factor* to the personnel action that was taken or threatened. In other words, the employee need only show that the disclosure was one of the reasons for the employer's retaliation. Under recent amendments, the fact that an adverse personnel action occurred after the employer learned of the whistleblowing activity and before the employee's next scheduled personnel review is enough to show an improper retaliatory motive.

Often there are multiple motives for the government's action, both valid and invalid. In these cases, the employee must show that whistleblowing played at least some part in the personnel action. Then the burden of proof shifts to the government employer to show by clear and convincing evidence that the personnel action would have been taken in the absence of the whistleblowing activity. The government will usually try to show that it had another reason to take action against the employee, unrelated to whistleblowing.



FSSEE file photo

“Health concerns associated with the use of volatile treemarking paint received no response from agency superiors.”

Following years of careful documentation of worker health concerns—including miscarriages—associated with the use of volatile treemarking paint and no response from agency superiors to her data, Wallowa-Whitman forester Carla Tipton took her case to the media and the courts. Her actions led the Forest Service to switch to a less volatile water-soluble tree paint.

The Difference between Free Speech and Whistleblowing

There is a distinction between the protections offered by the First Amendment and those offered by the Whistleblower Protection Act. Under the Whistleblower Act, the public's interest in being informed about illegality and gross mismanagement is so strong that the government's interest in efficient operation is not weighed as heavily. The First Amendment protects a wider variety of speech under the standard set forth in *Pickering*, but the government's interest in efficient operation is also given more weight. The practical effect of this difference is that employees who rely on the First Amendment are taking greater risks than employees whose activities fall under the Whistleblower Protection Act. This is because the mandates of the Whistleblower Protection Act provide a better shield than the subjective *Pickering v. Board of Education* balancing test.

As expected, most courts show deference to the government's side of any story, and those courts would likely show disfavor toward any disruptive employee speech, especially when there are reasonable alternatives available. Potentially disruptive speech under the Whistleblower Protection Act would probably be shown more tolerance than such speech reviewed under the Constitution.

Caveat: There can be significant career risks even when one's activities fall under the Whistleblower Protection Act.

The How-To's of Whistleblowing

Convince yourself that you are doing the right thing.

Always use internal channels first. Unless your supervisor is part of the problem, you should take your concerns to your first line supervisor. But let's face it, sometimes internal channels are not available. Those who think about going outside the agency must be careful. They are breaking the unwritten code of loyalty to the agency.

Before making concerns widely known, you may want to consider the following questions (adapted from N. Bowie, *Business Ethics*, p. 143 (1980)):

- Is my motive to prevent public harm and promote public good, or is my motive related to personal animosity, internal Forest Service power plays, or personal economic gain?
- Have I made a reasonable effort to verify the accuracy of the facts relevant to my concerns?
- Have I made a reasonable effort to clarify the legal requirements and policies applicable to my concerns?
- Have I tried to resolve the problem through available internal channels?
- Would a reasonable person be convinced that my concerns pose a serious public problem?
- Is there a reasonable chance that by raising my concern the harm can be prevented or reversed or future similar problems prevented?

The successful whistleblower must accomplish two goals:

- 1) Change the offending agency practice or policy.
- 2) Survive the act of whistleblowing with as little career and personal damage as possible.

These goals conflict more often than not.

Successful whistleblowing generally requires:

- 1) A knowledgeable, credible, and principled employee blowing the whistle on a matter of broad public concern.
- 2) An employee who does not seek to remain anonymous, knowing that allegations made anonymously carry less weight than those made in person.
- 3) A media and citizen organizing effort that uses the information provided by the whistleblower to expose the problem and pressure superiors to reform practices and prevent or cure retaliation.

If change cannot be accomplished through internal channels, the committed whistleblower will have to employ political activism, such as letters to legislators, media coverage of the issue, and citizen organizing. Local, state, and regional environmental and other social-change organizations can assist whistleblowers in carrying out these tasks. However, the whistleblower should be aware that many nonprofit social-change groups are inexperienced in whistleblowing matters and may be more focused on making change than on protecting the whistleblower from retaliation. In addition, remaining anonymous (if you wish to do so) as a whistleblower is difficult because whistleblowing usually results from specialized information available to only a handful of agency employees; you may be easily identified.

The federal government has legal procedures that whistleblowers can follow to disclose wrongdoing and gain protection from retaliation. However, at best, the government pays lip service to these laws; at worst, these procedures have been used to identify and target whistleblowers for retaliation. FSEEE recommends that whistleblowers use the formal channels as one tactic in a comprehensive strategy of tactics that combines legal, media, political, and grassroots organizing.

Filing a Disclosure with the Office of Special Counsel

The Office of Special Counsel (OSC) is an independent executive branch agency headed by a special counsel appointed by the president. The office was established to receive and review disclosures of illegality, mismanagement, waste, and abuse; to receive and investigate allegations of retaliation for disclosures of illegality, mismanagement, waste, and abuse; to protect employees from retaliation; and to investigate certain other allegations including prohibited political activities by federal employees (i.e., Hatch Act violations) and arbitrary or capricious withholding of information prohibited by the Freedom of Information Act.

The Whistleblower Protection Act is codified at 5 USC § 1213. This statute describes the process for filing a disclosure to the OSC and what happens to the disclosure after it is filed. The process begins when an employee discloses to the OSC evidence that the employee reasonably believes shows illegality, gross mismanagement, gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The OSC is specifically prohibited from revealing the identity of a person who makes a disclosure without the person's consent. A whistleblower disclosure may be filed by an employee, a former employee, or an applicant for employment. The disclosure should also describe any retaliation the employee has suffered for raising the concern earlier.

Within fifteen days after the OSC receives the disclosure, the OSC must determine whether there is a substantial

likelihood that the information reveals illegality, gross mismanagement, etc. If there is a substantial likelihood, the OSC promptly transmits the information to the head of the agency where the alleged impropriety occurred. The OSC orders the agency head to investigate the allegations and report back to the OSC. When the Forest Service is involved, the secretary of agriculture is responsible for the investigation, but the secretary always delegates the investigation. Most investigations are handled by either the Office of Inspector General, the Forest Service law enforcement branch, or the agency's human resources staff.

After the investigation and report are complete, the agency head must submit a report to the OSC. The report must include a summary of the information in the initial disclosure, a description of how the investigation was conducted, a summary of the evidence obtained, a listing of violations or apparent violations of any laws or regulations, and a description of any action taken or planned as a result of the investigation, such as changes in agency regulations or practices. This report is supposed to be completed within sixty days after the OSC's initial determination that there is a substantial likelihood of illegality or gross mismanagement, but in practice the OSC always grants the agency extensions of time upon request. Waiting for the results of the investigation can be a difficult time for the employee who made the initial disclosure, and the extensions of time only make the wait longer and more difficult.

When the agency's investigation and report are completed, the OSC forwards a copy of the report to the employee who made the original disclosure. The employee has fifteen days after receiving the report to submit comments to the OSC to rebut the agency's



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“The transportation plan closed and stabilized thousands of miles of unneeded logging roads and protected salmon habitat.”

Siuslaw forest supervisor Jim Furnish's new transportation plan closed and stabilized thousands of miles of unneeded logging roads and protected salmon habitat from future landslides in the steep and unstable Oregon Coast Range. His collaboration with FSEEE in the video documentary *Torrents of Change* educated PBS television viewers throughout the West about the importance of sound road management practices.

report. Then the OSC must review the report and the employee's comments and determine whether the findings of the agency appear reasonable and whether the report contains the required information. The OSC finally transmits copies of the agency head's report, the employee's comments, and the OSC comments and recommendations to the president, the congressional committees with jurisdiction over the agency, and the comptroller general of the General Accounting Office. If the OSC does not receive the agency head's report within the time allowed by the OSC, the OSC must transmit the available information to the president, Congress, and the comptroller, along with a statement noting the agency's failure to file the required report.

In a case of agency retaliation against an employee for whistleblowing, the OSC can, after its investigation, choose to represent the employee in an appeal to the Merit Systems Protection Board (MSPB). Representation by the OSC carries several advantages for an employee. First, the OSC provides its services free of charge to the employee. Second, an OSC appeal goes directly to the full three-person MSPB panel. Third, the MSPB appears to take more seriously appeals brought by the OSC on behalf of employees than those brought by the employee alone. Fourth, the MSPB can grant sanctions against the retaliators only if the OSC requests them.

Don't be misled by the orderly and rational description given here. When employees step out of rank by filing a disclosure to the OSC, they are taking a chance with their careers. The experience of whistleblowers shows that the process rarely happens as cleanly as described in the law. There always seem to be problems in the process, and the problems usually work against the employee.

Our experience at FSEEE is that a successful OSC disclosure process usually involves its use as part of a much broader strategy that may include organized support from internal allies, media exposure, strategic leaks to outside groups, and/or litigation. These extralegal tactics often successfully resolve the matter well before the formal legal OSC-MSPB process can run its seemingly endless course. In the absence of such tactics, complaints to the OSC and appeals to the MSPB can take several years to conclude.

Keys to Success: Keep Records and Make a Plan

Once you discover a problem, keep good records of everything that happens.

Take notes to record the dates, locations, what was said, and who was present. Take notes contemporaneously; that is, on or about the day that events occur, like a diary. Describe the nature of your concern, your efforts to correct it within the system, any external contacts that you made, and the agency's response. Carefully record the nature and context of any criticisms or retaliation that you think may have been prompted by your clarion call for justice. You should also get copies of the official documents relevant to your concerns.

Also, employees who are committed to follow-through on their whistleblowing will think about the steps leading to resolution of the problem and make a detailed plan. Recognizing that nothing works smoothly, they should make a contingency plan.

Useful Advice

- Discuss concerns with colleagues.
- Provide professional input to EAs/EISs.
- Provide citizen input to EAs/EISs.
- Write letters to the district ranger, forest supervisor, and regional forester using a low-key, nonaccusatory tone.
- Form alliances among colleagues with whom you share responsibilities. Rather than go solo, try to orchestrate a common recommendation from a group of similarly situated people.
- Cultivate your ability to present bad news in a way most likely to get a favorable response.
- Make criticisms accurate, fair, and credible.
- Never exaggerate. Otherwise, the focus may shift from the problem to your statement of it.
- Couch criticisms of the Forest Service in terms of adverse effects on public resources (biological, recreational, or fiscal) rather than focusing on your employment situation. Describe possible solutions to the larger problem.
- Avoid being misunderstood. Be very clear, even if critical.
- Make it very clear that your public statements reflect your personal position, not the official position of the Forest Service.
- Keep in mind that while you are in uniform, it is a good idea not to deviate from official Forest Service policy when you make public statements.

- Develop informal channels to augment formal channels. Befriend people who carry weight with those higher up who will ultimately have to deal with the bad news.
- Educate all affected constituencies about the problem. Put yourself in the shoes of other interested parties and tell them why proper resolution of the problem is in their long-term interest.
- Make sure that if you use government equipment to send messages that vary from official Forest Service policy, the message is reasonably related to work and/or addresses a matter of public concern.
- Try to follow agency protocol for addressing concerns within the agency hierarchy, but recognize that you are not strictly bound to follow the chain of command when speaking on matters of public concern.
- Keep your record clean. Don't give the agency any alternative reasons to take action against you.
- If you're going to take your concerns outside the agency, don't do it halfway. If the agency senses your lack of commitment to follow through, it is more likely to bury your concerns in a mountain of excuses and label you a disruptive insubordinate.
- Don't advocate violating any law or regulation to solve a problem. If necessary, state your preference that conflicting laws be changed by Congress or that a regulation be changed through proper administrative procedures.
- Choose your words carefully, especially if you are in a place where members of the public could overhear you.
- If you are in a position that brings you in frequent contact with the public, your demeanor in raising

concerns could reflect on your ability to represent the agency before the public.

- If your comment makes it clear that you are morally or personally opposed to the government's objectives, it may call into question your ability to carry out assigned tasks.
- After the Forest Service has listened to your grievances and made a good-faith effort to deal with them, don't continue to complain persistently about the problem. It may be interpreted as insubordination.
- The First Amendment does not protect employee speech about personal concerns. Employee complaints about work assignments or other personal concerns should be raised in the context of a grievance or other formal collective bargaining process.
- In resolving personnel disputes, you have to make a choice early on whether to use the grievance procedures or whether to go before the Merit System Protection Board (MSPB). Once you've started down one path, you can't change your mind. The grievance route may lead to arbitration which can be cheaper, quicker, and less formal than the MSPB. But the MSPB can grant back pay and can set legal precedents that could help others who are similarly situated.

Rules to Watch Out For, Hints for Complying

The Office of Government Ethics published a book called *Standards of Ethical Conduct for Employees of the Executive Branch*. Employees should learn and adhere to these rules. However, some of them are unclear. Confusion could lead to misunderstandings between employees and Forest Service authorities. Two of the most problematic rules include those set forth under “Misuse of Position” at 5 CFR § 2635, Subpart G.

Improper Use of Nonpublic Information

Subsection 703 prohibits employees from improperly using nonpublic information to further the private interests of anyone. According to the plain language of the rule, the prohibition applies only in those cases where all the following criteria are met: the use of the information is improper if the information used is nonpublic (“improper use”), and if the information is used to further some private interest (“private gain”). If any one of these criteria can be overcome, the employee should be free to disclose the information. Unfortunately, the regulation fails to define either “improper use” or “private gain.”

In FSEEE’s view, the “improper use” threshold can be overcome if the employee is authorized to disclose the information pursuant to another law, such as the First Amendment, the Whistleblower Protection Act, or the Freedom of Information Act. The “nonpublic information” threshold can be overcome if the employee knows that the information has already been made available to

anyone outside the federal government. The “private gain” threshold would be overcome if the employee is addressing a matter of public concern or if the employee reasonably believes that disclosure of the information would benefit the public interest.

FSEEE would like to be able to advise employees that these thresholds are clear and easy to overcome, but unfortunately, one of the examples used by the Office of Government Ethics to illustrate this rule is inconsistent with both the rule itself and the employees’ rights under the First Amendment. The example states that an employee of the Army Corps of Engineers would be prohibited from giving a newspaper reporter or an environmental group nonpublic information about long-range plans by her agency to construct a particular dam. The problem is that the rule does not clearly prohibit the conduct described in the example, and the example does not explain how the facts lead to the conclusion that the disclosure would be prohibited. In the example, the information about the dam may be nonpublic, but it is not used to further anyone’s private interests. It is plausible that a disclosure about the environmental impact of a big dam could be made to further the public interest. In addition, the disclosure about the dam was not improper because information about the dam and its likely environmental effects would be of concern to the public and therefore protected by the First Amendment.

Employees should know that there are conflicting interpretations of these rules. Employees should not unwittingly become guinea pigs. Before you rely on FSEEE’s interpretation, contact us. You may also contact your designated agency ethics official for an interpretation applicable to particular circumstances.



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“After two years and another lawsuit, the logging remains enjoined and Barkhurst continues to protest her unjustified removal.”

A federal judge relied on findings from Umpqua biologist Cindy Barkhurst to stop sales harmful to protected trout in the Umpqua River basin. Barkhurst and two colleagues were subsequently removed from the interagency scientific team charged with ensuring that timber sales conform to the Northwest Forest Plan and the Endangered Species Act. Two years and another lawsuit later, the logging remains enjoined and Barkhurst continues to protest her unjustified removal.

Caveat: Certain information relating to privacy, national security, or free and fair trade is never to be disclosed except to the Office of Inspector General or the Office of Special Counsel. Their addresses are listed at the end of this booklet.

Additional Limitations on Use of Government Equipment

Subsection 704 of 5 CFR § 2635 requires that employees use government property, including office equipment and mail services, for authorized purposes only. This regulation is behind a Forest Service policy proposed in 1994 that would have restricted employee use of the Forest Service's electronic mail system. The proposed policy said that employees are not to use internal e-mail to criticize government policies. Some regions, for example Region 3, appear to have adopted the proposed policy even though the Washington office never did so.

In FSEEE's view, the Forest Service must respect all speech that is consistent with the First Amendment. It would be inappropriate to issue a blanket prohibition on employee use of government e-mail to criticize Forest Service policies. Such criticism is often part of the essential institutional self-examination necessary to separate good policies from bad. Use of e-mail to criticize the Forest Service would be protected by the First Amendment when the policies being discussed involve matters of public concern and when the form of the criticism does not unduly disrupt government operations.

Although the proposed e-mail policy was never finalized, employees should be aware that there are other rules that prohibit similar conduct; for example, "An employee shall not engage in ... conduct prejudicial to the Government" (5 CFR § 735.203) and "Employees

are specifically prohibited from ... distributing or posting ... matters that ... directly or indirectly condemn or criticize the policies of any Government department or agency” (7 CFR § 0.735-11(b)(12)(ii)). These rules raise similar free-speech concerns, but employees would be well advised to ensure that their use of government equipment is reasonably related to their work and not unduly disruptive.

An example of permissible use of government equipment is signing on to employee petitions addressed to a Forest Service superior that concern issues of broad public concern. In 1998, FSEEE’s distribution of such a petition (concerning roadless area protection) led the chief to clarify that employees may use government equipment to convey their views on issues to the chief at any time. The chief’s memo reversed a directive from the agency’s human resources department that sought to censor employees’ views. Agency censorship of employee speech is a chronic problem within the Forest Service that is unlikely to be behind us anytime soon.

Administrative Appeal of Resource Management Decisions

In 1989, the Forest Service added a provision to its administrative appeal rules that barred Forest Service employees from appealing decisions, such as timber sales, special use permits, and the like. In 1992, the Congress passed the Forest Service Decisionmaking and Appeals Reform Act. This law required the Forest Service to give notice of its proposed decisions, solicit public comment, and permit any person who commented on a decision to file an administrative appeal of that decision.

In 1997, Tongass forester Mary Dalton sought to appeal a timber sale decision because the sale's EIS misrepresented the environmental consequences of logging (Dalton had been the supervisory forester in charge of the on-the-ground data collection for the EIS). Dalton had commented on the draft EIS as a private citizen. Nonetheless, the regional forester dismissed her appeal without a decision, citing the 1989 provision. Dalton was also suspended for thirty days without pay for "disloyalty," immediately placed on the employee surplus list (she was a fourteen-year Tongass employee), and after the minimum sixty days on the list, given a directed assignment to an Arizona national forest, which she accepted because the alternative was dismissal from federal service.

As a result of a lawsuit brought by Dalton and FSEEE, combined with media exposure and a grassroots letter-writing campaign, the Forest Service rescinded its 1989 regulation barring employee appeals (FSEEE and Dalton also negotiated a satisfactory settlement of the

retaliatory actions taken against Dalton, including, among other things, full reversal of the thirty-day suspension). The new regulation, 36 CFR § 215.11, permits appeals from employees who have submitted written comments in response to a draft EIS before the official close of the comment period or, for decisions not accompanied by a full EIS, commented or otherwise expressed interest in the particular proposed action. This standing requirement is the same for Forest Service employees as it is for private citizens.

However, the rule also reminds employees that they may not file appeals while on official duty or use government property or equipment in the preparation or transmittal of an appeal. In other words, appeals may be brought only while off the government clock.

More problematic is the rule's bar against employees using "official information not yet released to the public" in bringing an appeal. The rule does not explain how an employee is supposed to know if information has or has not been released to any member of the public. Nor is the rule limited to information which, by statute, is barred from release to the public, such as trade secrets or information classified as confidential for national security reasons.

In FSEEE's view, this provision violates the First Amendment and, under some circumstances, the Whistleblower Protection Act. If, for example, an employee has information not previously released to the public that shows a timber sale will violate a forest plan's standards and guidelines, the employee's disclosure of that information in an administrative appeal should be protected under the Whistleblower Protection Act.

Contact FSEEE for advice if you are considering appealing a Forest Service decision.

Resources and Contacts

Whether you are using internal or external channels, it is wise to develop a supportive network consisting of sympathetic coworkers, family, FSEEE, a private attorney, and citizen organizations concerned with the issues you are tackling. You may want to contact others who have taken the difficult road of voicing concerns. By listening to these pathfinders you may learn from their experiences so that you can bring about necessary change without being consumed by the process.

If you intend to go public, there are many possible contacts who could help carry the message and/or help correct the problem, including FSEEE, environmental groups, union representatives, print and broadcast media, Internet users, Government Accountability Project, members of Congress, congressional committee staff, Office of Special Counsel, Merit Systems Protection Board, Office of Inspector General, Office of the Attorney General or local district attorney, Environmental Protection Agency, state fish and wildlife agencies, state air and water quality regulators, a private attorney, General Accounting Office, and ethics committees of professional associations, such as the Society of American Foresters or the Wildlife Society.

FSEEE keeps all communications with Forest Service employees confidential and will not release or use any information provided by employees without the express consent of the employee. We are happy to provide advice to employees at any time, but will actively advocate only for employees with claims that we believe have sufficient

merit. When FSEEE elects to assist an employee, we do so cooperatively with the employee. We explain to the employee the strategies available and their relative risks of retaliation and chances for success, based upon our past experiences. These include using the media to expose the issue, activating our citizen and employee membership to gain political support, creating peer review panels to review issues involving scientific or technical disputes, and advocating to the appropriate level within the agency through our contacts at the forest, regional and Washington offices. We can also help employees find private legal counsel or make referrals to public interest lawyers who assist whistleblowers, such as the Government Accountability Project.

Disclosure Hotlines

Government Assistance

U.S. Department of Agriculture
Office of Inspector General
P.O. Box 23399
Washington DC 20026
(800) 424-9121

U.S. Office of Special Counsel
1730 M St. NW, Ste. 216
Washington DC 20361

To report retaliation, contact:

Complaints Examining Unit
(800) 872-9855

To report illegality, mismanagement, waste, fraud, or abuse, contact:

Disclosure Unit
(800) 572-2249

U.S. General Accounting Office Fraud Hotline
(800) 424-5454

Nongovernmental Assistance

Forest Service Employees for Environmental Ethics
PO Box 11615
Eugene OR 97440
(541) 484-2692
(541) 484-3004 (fax)
www.afsee.org
E-mail: afsee@afsee.org

Government Accountability Project
Charlotte Fox
Director, Forest Program
1612 K St., NW #400
Washington DC 20006
(202) 408-0034, ext. 122
(202) 408-9855 (fax)
www.whistleblower.org
E-mail: forest@whistleblower.org

Special Section

How the Forest Service Can Avoid the Pain of Whistleblowing

The Forest Service, as an employer, has means available to make positive use of employee concerns. Those in positions of authority within the Forest Service can conduct themselves to avoid the pain of whistleblowing. Toward this end, FSEEE recommends that Forest Service line officers and policymakers:

- Reward constructive debate, even if it is critical of Forest Service policies.
- Make space available on internal Forest Service comment forms so that employees' concerns will be elicited at an early stage in the planning and decision-making effort.
- Do not commit to an improper course of action when making resource management decisions. Otherwise, employees feel powerless to correct impropriety through internal channels.
- Create a climate that encourages telling the truth and obeying the law.
- Discipline those who are responsible for illegality, mismanagement, lies or concealment, and acts of retaliation against whistleblowers.
- Provide multiple channels for internally resolving problems. This will increase the chances that employees will perceive at least one channel as safe and effective.
- Give more than lip service to the promise that retaliation against employees will not be tolerated. Employees must feel safe in fact, not in rhetoric only.



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“Dalton had her initial appeal dismissed, was suspended without pay for thirty days, and was forced to relocate from Alaska to Arizona.”

Tongass forester Mary Dalton gained the right for Forest Service employees to appeal land management decisions in her precedent-setting challenge to a Tongass timber sale on which she conducted the field analysis. After having her initial appeal dismissed, being suspended without pay for thirty days, and forced to relocate from Alaska to Arizona, Dalton and FSEEE filed suit in federal district court. On the eve of the trial, the Forest Service reversed its position, conformed its appeal regulations to federal law, and rescinded Dalton's suspension.

- Listen carefully to employee concerns. Heed warnings. Don't minimize concerns.
- Treat the messengers of good news and bad news equally. Make positive use of bad news to make better decisions.
- Make decisions that are morally, legally, and professionally supportable.

In addition, Forest Service managers should ensure that employees have the training and organizational support necessary to uphold potentially controversial land management policies and laws. These include requirements to maintain viable populations of wildlife, avoid jeopardy to endangered species, prevent water pollution, conserve riparian and aquatic resources, preserve historic sites, identify lands suitable for resource management, uphold civil rights, and comply with the disclosure requirements of the National Environmental Policy Act.

The roots of some whistleblowing activities can be traced to confusion about the appropriate roles of resource specialists and managers. For example, the dominant management paradigm has been that the sole job of scientists and specialists is to provide information to the process, while actual decision-making is left exclusively to line officers. Such extreme task separation is morally relativistic. It fails to recognize specialists' hard-earned knowledge and experience. Such strict task separation cannot reckon with the fallibility of line officers or the capability of specialists to know unsustainable management when they see it.

Former Chief Jack Ward Thomas said that a land ethic "is nothing more than the acceptance of constraints on human treatment of land in the short term to ensure long-term preservation of the integrity, stability, and

beauty of the biotic community.” Unless ethical knowledge is reserved for the high priests of the Forest Service, we must acknowledge that all employees, and even citizens, have the ability to recognize that certain decisions are sustainable and correct, while others are unsustainable and incorrect. Once we accept that human activities are constrained, we have a *duty* to foster broad participation in the delicate balancing of alternative short-term and long-term uses of the land.

Keen observers of dissent in the workplace offer an alternative view that integrates (rather than separates) the knowledge and experience of specialists and decision-makers. Consider the following from Elliston, Keenan, Lockhart, and van Schaick, *Whistleblowing: Managing Dissent in the Workplace*.

“Organizations should develop means whereby their task specialists and managers can share their different views and recognize their conflicting objectives in an open, trusting environment. At times the specialist must understand the necessity to make compromises or indeed sacrifices in terms of his or her task goals. The individual must recognize his or her role as being that of an employee who is expected to cooperate and work toward larger organizational goals. But when the task specialist raises technical concerns that involve potentially dangerous effects, managerial role players should defer to the more reliable judgment of their subordinates, at least until these matters are properly investigated to determine the facts, the risks, and the appropriate course of action. To insist upon unquestioning “obedience” at such times pushes the specialist into an uncomfortable intrarole conflict. This employee is pulled in two mutually exclusive directions: either to be a loyal

employee and follow orders or to remain committed to the standards and principles of his or her profession. Whistleblowing is the result of this conflict when the professional elects to defer to his or her professional code and conscience.

Organizations should ensure that both managers and task specialists are informed about such role conflicts ... [and] should be given training in diagnosing such conflicts and developing effective strategies for resolving them."

This approach requires a commitment by agency professionals to bring their concerns forward and a commitment by the Forest Service to gather the information necessary to address these concerns before the agency commits to a potentially unsound course of action.

Appendix

Other Free Speech Resources

The Freedom Forum is a nonpartisan, international foundation dedicated to free press, free speech and free spirit for all people. The foundation pursues its priorities through conferences, educational activities, publishing, broadcasting, on-line services, fellowships, partnerships, training, research and other programs. Their website can be reached at www.freedomforum.org.

The Free Expression Network is an alliance of organizations dedicated to protecting the First Amendment right of free expression and the values it represents, and to opposing governmental efforts to suppress constitutionally protected speech. Their website can be reached at www.freeexpression.org.

The American Civil Liberties Union is a nonprofit, nonpartisan, 275,000-member public interest organization devoted exclusively to protecting the basic civil liberties of all Americans, and extending them to groups that have traditionally been denied them. In its almost seven decades in existence, the ACLU has become a national institution, and is widely recognized as the country's foremost advocate of individual rights. Their website can be reached at www.aclu.org.

Controlling Supreme Court Decisions

Pickering v. Board of Education (The government employee's interest as a citizen in making public comment must be balanced against the State's interest in promoting the efficiency of its employees' public services) can be found at www.findlaw.com/casecode/supreme.html by entering 391 U.S. 563 in the Citation Search fields.

Elrod v. Burns (Termination based upon employee's political affiliation or views violates First Amendment where employee is not a confidential policymaker) can be found at www.findlaw.com/casecode/supreme.html by entering 427 U.S. 347 in the Citation Search fields.

Acknowledgements

FSEEE's Guide to Free Speech in the Forest Service Workplace

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