



American Chemical Society

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Madeleine Jacobs
Executive Director & CEO

January 11, 2008

The Honorable Elias Zerhouni
Director
National Institutes of Health
Bethesda, Maryland 20892

Dear Dr. Zerhouni:

Now that the enactment of the Consolidated Appropriations Act of 2008 (PL 110-497) has changed the current NIH voluntary public access policy into a mandatory policy, I would like to suggest that NIH utilize an inclusive process, such as the rule-making process of the federal Administrative Procedures Act, to guarantee the widest range of views and inputs are heard, considered and evaluated before the new mandatory policy is implemented.

As you know, the publishing community is deeply concerned that this new mandatory policy, if not carefully implemented, may result in conflicts with copyright law and intellectual property rights. These potential conflicts could interfere with scientific peer review of journal articles and adversely impact the sustainability of scientific journals. In enacting Section 218, Congress was aware that flawed implementation of a mandatory public access policy could create serious problems for the scientific publishing community which is why it included the statutory proviso directing "That NIH shall implement the public access policy in a manner consistent with copyright law."

Senate Report 110-107 further directs NIH to take the following course of action when implementing the new mandatory policy. The Report reads, in part:

"...The Committee highly encourages collaborations with journal publishers that would enable them to deposit manuscripts on behalf of the funded investigator, if all parties agree. The committee directs the NIH to seek and carefully take into account the advice of journal publishers on the implementation of this policy.

In particular, the Committee directs the NIH to ensure that publishers' copyright protections are maintained..."

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Given the statutory and legislative language on this matter, we trust that NIH will provide the publishing community with an opportunity for “notice and public comment” when devising rules implementing the mandatory policy. As this new policy would, in our view, be a major undertaking that will have a significant impact on publishers, I urge you to utilize the rulemaking procedures under the Administrative Procedures Act (APA) that have guided federal activities for over 60 years. Following the APA would assure that all stakeholders have an opportunity to provide input into the process.

As you know, NIH followed an APA-like process when it published its proposed voluntary public access policy on September 17, 2004, in the *Federal Register* and provided the public an opportunity to offer comments on the proposal. NIH noted in publishing its final policy in the February 9, 2005 *Federal Register* that it was not required to follow the APA because of the voluntary nature of the policy, but did so in order to obtain public comment on the proposed policy. NIH noted that it received over 6,000 public comments.

The public comments received on the proposed public access policy were quite thoughtful and provided value to the process as NIH modified its proposal and increased the timeframe for manuscript deposition into PubMed Central from 6 to 12 months citing the need to “ensure that peer review of scientific articles is preserved.”

It would only seem logical and fair that since the mandate policy will carry with it the full enforceability of federal law that it should be subject to the APA process, which would allow comment from all concerned parties to ensure that it is implemented fairly and comports with the Congressional intent of complying fully with copyright law.

If, for some reason, NIH does not follow the APA process, could you please advise me as to how you plan to involve the publishing community in implementing the mandatory public access policy to address issues such as copyright protection and scientific peer review?

Sincerely,

A handwritten signature in cursive script that reads "Madeleine Jacobs".

Madeleine Jacobs

Cc: Brian Crawford, President, ACS Publications Division