

DATE: July 28, 2009

TO: Inspector General, Department of State
FROM: Robert McCarthy, USIBWC General Counsel
RE: Disclosures of Alleged Fraud, Waste and Abuse

This memo describes in brief allegations of fraud, waste and abuse made by several employees and former employees of the United States Section, International Boundary and Water Commission (USIBWC). Some of the issues are related to those addressed in the 2005 OIG investigation of the USIBWC and others are new. The matters disclosed herein include possible violations of civil and criminal statutes, and gross mismanagement that jeopardizes the \$220 million USIBWC Recovery Act program. I request protected whistleblower status.

Disclosures herein include allegations of criminal electronic surveillance, rampant workplace hostility and threats, making false reports to the OIG, unlawful personnel actions, gross negligence and mismanagement of the Recovery Act, potential Anti-Deficiency Act violations, and criminal interception of electronic communications. This may be just the tip of the iceberg. Agency employees' morale could not be any lower, as reflected in OPM workplace satisfaction surveys that place USIBWC at the bottom of all federal agencies.

At least one previous disclosure of alleged fraud, waste and abuse was referred to Mary Brandt, USIBWC State Department Liaison/Special Assistant. That is inappropriate, as pointed out at the time by the Commissioner, but especially so in this case, due to questions about Ms. Brandt's possible involvement in some of the matters disclosed herein. For the same reason these disclosures should not be referred to the Commissioner. I have previously made the Commissioner aware of the matters disclosed herein, and I have provided legal advice with respect thereto. Others have dissuaded the Commissioner from taking meaningful action, allegedly including some who wield undue influence for improper reasons.

Recovery Act Mismanagement and Deception

Early in March, 2009, "Compliance Officer" Fred Graf announced at an executive staff meeting that he and an employee supervised by Mr. Graf had been named to the Recovery Act Oversight Committee. The other two members, he said, were Mary Brandt, USIBWC liaison to the State Department, and Diana Forti, who serves as Chief

Administrative Officer, Acting Budget Officer, and Chief Information Officer. I suggested the Commissioner add me to the Committee, which he did.

Nevertheless, I have never been allowed to attend a single committee meeting, save one early VTC meeting with State OIG staff. At that meeting, the committee provided to the OIG a memorandum describing USIBWC internal audit plans that had been specifically rejected by the Commissioner. As a “member” of the committee, I saw the document for the very first time at the VTC conference, after it had been distributed to State. The VTC meeting was preceded by at least one secret committee meeting from which I was actively excluded, resulting in an order from the Commissioner that I be included in all such meetings.

Over the course of the next four months I routinely objected to my continuing exclusion, to no avail. At an executive committee meeting on July 27, 2007, I formally raised the issue of my continuing exclusion from the committee. Mr. Graf and Ms. Forti, joined by Ms. Brandt, said they could handle everything by themselves and a committee was no longer needed. Apparently satisfied that this group’s reports to the State Department seem to win high praise, the Commissioner dissolved the committee.

USIBWC no doubt does an excellent job of submitting positive reports and meeting its target deadlines. I view the oversight duties as something more than that, however, in terms of legal and regulatory compliance. Gross mismanagement of the very first USIBWC Recovery Act project solicitation, issued on June 4, 2009, exemplifies my concerns.

USIBWC is Constructing Recovery Act Levees with Architectural Designs in which USIBWC has no Contractual Rights.

The first Recovery Act solicitation issued by USIBWC was based on design specifications prepared not for USIBWC, but for a county drainage district. The specifications accounted for 95% of the bid package, yet did not mention USIBWC. The specifications cited only state laws (not the FAR). Finally, USIBWC in fact has no contractual rights to the designs being used for this and other construction projects.

I was not allowed to see this solicitation until after it was issued. For over three months prior to the issuance of this solicitation I had continuously urged that USIBWC establish a contractual relationship with the design firm whose work it is using to build Recovery Act levees. Ms. Forti and John Merino, the Principal Engineer responsible for levee construction projects, rejected out of hand the options I suggested we explore, including an assignment of the county contract to USIBWC. The Commissioner took no position.

The designs being used by USIBWC were paid for by the county, which had intended to build the levees until it ran out of money. USIBWC agreed to take over levee construction with Recovery Act funds, but declined to even consider my concerns about the lack of contract privity with the design firm. Meanwhile, that continuing lack of

privity threatens to contaminate other Recovery Act levee projects where USIBWC is also using the firm's other designs.

USIBWC's sole authority for using the designs is a curt email from one county official giving his permission, an act of questionable validity. Absent a contractual relationship, USIBWC is using the design at the discretion of the County, through which all requests, questions, etc. for the design firm must be routed. USIBWC does not even have a copy of the County's contract with the design firm, although I have been trying to obtain one. The County, incidentally, has regularly criticized USIBWC in the media and to Congressional Representatives, demanding direct control of the Recovery Act funds, citing USIBWC's alleged incompetence.

Additionally, absent privity of contract with the design firm itself, USIBWC has limited if any third party recourse in the event of design flaws. A design contractor's responsibilities to third parties are potentially based on one of two theories. Under a third party beneficiary theory, the plaintiff must show the contract was specifically intended to benefit the plaintiff, despite the fact that the plaintiff has no privity of contract with the defendant. USIBWC has never even seen the contract.

Under a tort theory, damages are based on injury or property loss caused by the defendant's negligence. One limitation of tort recovery is known as the "Economic loss rule", which states that when the damage is only the economic loss of the subject of the contract, the injury is founded in contract alone and does not constitute physical harm to the user or his property. *Lamar Homes, Inc. v. Mid-Continent Cas. Co. (Lamar III)*, 242 S.W.3d 1, 21 (Tex. 2007). Texas courts extend a version of the Economic loss rule to prohibit recovery for purely economic damages arising from a negligence claim when there is no privity of contract. *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 287-89 (Tex. App.--Houston [14th Dist.] 2000, no pet.).

In the event of flaws in the design, especially latent flaws, USIBWC could be without recourse and without funds to make repairs. (Within the past few days, the Commissioner belatedly authorized efforts to establish a contractual relationship with the design firm. At the same time, he has expressed no discomfort with "assuming the risk.")

Purpose Statute and Anti-Deficiency Act Concerns

I have cautioned the Commissioner, as well as Ms. Forti and Mr. Merino, about a potential violation of the Purpose statute and the Anti-Deficiency Act, in relation to another Recovery Act Project, also being built with the county's design. This Project is being built as a joint levee-border barrier, in collaboration with the Department of Homeland Security (DHS). DHS has arbitrarily capped its contribution at an amount known to be less than the cost of construction of the barrier portion of the structure.

USIBWC has nevertheless made a decision to move forward on the project, under an interagency agreement that will make USIBWC responsible for DHS costs in excess of \$1.75 million. USIBWC rationale for picking up a portion of DHS costs is that USIBWC

believes it will save time and money versus starting over with a levee-only design. These preliminary costs estimates could change significantly, if experience is any guide. If time is a valid Anti-Deficiency Act concern, one might ask whether time could have been saved with better planning and an alternate design, under a valid contract.

Although unrelated to the Recovery Act, another potential Anti-Deficiency Act violation that should be investigated is the availability of appropriated funds at the time of a financial award for the South Bay International Water Treatment Plant. Additionally, there are serious financial questions related to Presidio Emergency Levee repairs and allegedly unreasonable costs for levee work by USIBWC's construction management contractor, S&B.

Abuse of Compliance Oversight

Mr. Graf has claimed to be performing rigorous oversight of Recovery Act implementation, yet he has led the opposition to virtually every proposal to reform procedures in budget, acquisitions, and information management. In addition, he has proposed policy "directives" that would institutionalize sweeping powers in his hands, misrepresenting the law in the process. When I expressed dismay that the Commissioner had signed one such Directive, establishing an OIG hotline in Mr. Graf's Office, Mr. Graf stated to me, "the Commissioner doesn't always know what he's signing." (The Commissioner later retracted that directive, and required all future directives to be circulated among the executive staff.)

After the Commissioner rejected Mr. Graf's OIG proposal, Mr. Graf re-packaged the proposal as an exceedingly expansive internal audit program. This again essentially vests all the powers of an inspector general in Mr. Graf, and gives Mr. Graf complete control over the scope of any audit and the contents of any audit reports. (They cannot be distributed, even to the Commissioner, without his approval.) The proposal also includes the false statement that the Commissioner is required by law to implement Mr. Graf's "audit" recommendations. Mr. Graf claims this merely formalizes the duties he is already performing. If this is true, it is at the very least a violation of ethical and auditing standards, if not law and regulation.

Mr. Graf is not an auditor, and if he were, he would be disqualified from managing an audit of any USIBWC program due to his vociferously expressed prejudgments about the quality of those programs and their management. As discussed in more detail below, he has openly decried "the executive staff's failed leadership," and openly applied terms such as "irresponsible" and "dysfunctional" to programs managed by other executive staff. In addition he allegedly has made vulgar comments and threats about certain executive staff.

Government Accountability Office (GAO) 07-731G Government Auditing Standards (GAGAS), part 3.02 provides "In all matters relating to the audit work, the audit organization and the individual auditor, whether government or public, must be free from personal, external, and organizational impairments to independence, and must avoid the

appearance of such impairments of independence.” Additionally, GAGAS 3.07 states “Auditors participating on an audit assignment must be free from personal impairments to independence (including) preconceived ideas toward individuals, groups, organizations, or objectives of a particular program that could bias the audit.”

Paradoxically, Mr. Graf has stated the first program audit in his annual auditing plan is the Human Capital Office, ably directed by Kevin Petz, a true professional with over 20 years of human capital management experience in Federal agencies. In addition to his open criticisms and intense hostility toward Mr. Petz (about which more below), Mr. Graf has another conflict: he was the acting director of the HCO office for a year, after which he was passed over in favor of Mr. Petz, who has been with USIBWC for only two years.

GAGAS states in several places that where an entity has an internal audit program it should follow the Institute of Internal Auditors (IIA) International Standards for the Professional Practice of Internal Auditing,” which states at 1130.A1 “Internal auditors should refrain from assessing specific operations for which they were previously responsible.”

Electronic surveillance of USIBWC employees

By Memo dated April 1, 2009, I notified the Commissioner of allegations that Mr. Graf had installed a remote audio-video system in the USIBWC Human Capital Office (HCO), and that Mr. Graf later monitored private communications in HCO from a remote location in his Compliance office. After the cameras had been in place for two years, an HCO employee accidentally discovered that by changing the channel her view of the HCO office entrance became a view of Mr. Graf’s private office. If true, these actions would appear to violate federal criminal law, the Privacy Act, and possibly other federal civil statutes. *See e.g.*, 18 U.S.C. §§ 2510-2520. Notwithstanding legal advice to the contrary, the Commissioner declined to authorize any investigation or report to outside authorities, saying that Mr. Graf denied using his monitor to spy on HCO. The equipment paid for with USIBWC funds is still on-site and there are available witnesses.

Unlawful personnel actions

While serving in an acting capacity as HCO Director, Mr. Graf allegedly approved numerous unlawful personnel actions. Allegedly, Ms. Forti, who was the beneficiary of at least one of these actions, has committed unlawful personnel actions of her own. (As an aside, the HCO today is beyond reproach, under the expert, ethical and professional supervision of Mr. Petz, notwithstanding ongoing harassment by Mr. Graf and Ms. Forti.)

Following the removal of Commissioner Duran, personnel documents show that on December 20, 2005, Ms. Forti, then “acting” CAO, requested and Mr. Graf, then “acting” Director of HCO, approved a pay adjustment for the new Commissioner, Carlos Marin, from \$131,400 to \$137,013. On January 13, 2006, Ms. Forti requested and Mr. Graf approved another increase for the Commissioner from \$137,013 to \$141,261.

Ms. Forti herself received improper pay increases of several thousand dollars during the same period, all approved while Mr. Graf was acting Director of HCO. On September 9, 2005 she was a Grade 13 step 4 and received a “temporary” increase to Grade 15 step 1. The temporary increase ended on January 2, whereafter she served in a permanent capacity at that grade. As a Grade 13, she could not lawfully skip entirely Grade 14, when the position in question was a Grade 14 with a target 15.

Records also indicate that on Sept. 9, 2006 Ms. Forti improperly set the permanent pay of a new employee under her supervision, Yvonne Serano, at Grade 7, Step 4 instead of Step 1, over the objections of the HCO specialist assigned to administration. This too was approved by Mr. Graf at the cost of thousands of dollars in unlawful excess pay.

HCO staff say Ms. Forti and Mr. Graf were well aware that these actions were not permitted, nor were other personnel actions they took. Ms. Forti allegedly told a Recovery Act temporary job applicant, before she had been offered a job, that she could continue collecting her USIBWC retirement in addition to pay. She allegedly seized the applications for Supervisory Legal Adviser from the desk of Commissioner Marin following his death, and did not deliver them to HCO but rather HCO had to seek them out.

Mr. Graf recently inserted himself into the hiring process of an attorney adviser. Following a lengthy selection process with over 100 applicants, a selection was proposed to the Commissioner. Mr. Graf declined to offer any comments through approved official channels. Rather, he allegedly went secretly to the Commissioner and falsely claimed that the selection procedure was illegitimate. This allegedly caused the Commissioner great consternation but after a few days and Mr. Petz’s assurances that everything was done appropriately, the Commissioner approved the selection.

The Commissioner then forwarded the selection to the EEO Officer for her review, and she promptly approved it. According to the EEO Officer, as she attempted to return the approved selection to HCO, Mr. Graf said he would take it, as he claimed to be going there anyway. Yet Mr. Graf did not deliver the document to HCO. Instead, he allegedly carried it back into the Commissioner’s Office with more false claims about the selection process, in which he had freely chosen not to participate. Eventually, Mr. Petz was able to track the document back to the Commissioner, who had previously signed it, but questioned Mr. Petz anew before returning the signed document.

Making false reports to the OIG

Allegedly, Mr. Graf and Ms. Forti sent the “anonymous” letters the OIG received charging misconduct by Principal Engineer Al Riera. Mr. Riera is in charge of agency operations and is the main reason this agency is still functioning as well as it is. Unfortunately, immediately following the death of Commissioner Marin, he clashed with Mr. Graf, Ms. Forti, and Ms. Brandt over his appointment as acting Commissioner as well as program and personnel decisions he made. Mr. Graf is reported to have sworn to “get” Mr. Riera.

The “anonymous” allegations made to OIG and turned over to Ms. Brandt were completely without merit and everyone involved was aware of this fact. Nevertheless, Commissioner Ruth subjected Mr. Riera to a very invasive investigation conducted by several employees of this agency with potential biases against Mr. Riera, yet even then he was completely cleared.

Computer Surveillance

By memo dated April 9, 2009, I advised the Commissioner that the Office of Legal Affairs had received several inquiries and complaints about the extent of computer monitoring that is allegedly being conducted at USIBWC. Several employees report instances of attempting to open files on their hard drives and finding that files are in use; finding that files in storage have been edited; and finding that emails in storage have been deleted. At about the same time, I circulated among executive staff a draft policy to address these concerns. Ms. Forti and Mr. Graf strenuously opposed it, and the Commissioner directed that it be held in abeyance.

By memo dated May 7, 2009, I advised the Commissioner concerning the extent of monitoring that the supervisor of the Information Management Division (IMD), Z Mora, told me he is authorized to conduct, the extent to which monitoring is being conducted, and the purposes for which monitoring is being conducted. Allegedly, IMD routinely targets individual computer users and screens for content in a manner that has no legitimate work-related basis. Mr. Mora believes he is authorized to do so because USIBWC owns the computers and everything on them. This of course includes confidential legal communications and files; personnel matters protected by the privacy act; and limited personal use email permitted by agency policy.

Ms. Forti and Mr. Mora, supported by Ms. Brandt, contend there are no limits on their authority to monitor employee’s computer use because employees are advised that they may be monitored. This of course does not address the manner and purposes for which employees are monitored. Further, in *United States v. Long*, 64 M.J. 57 (C.A.A.F.2006), the United States Court of Appeals for the Armed Forces held that an employee had a reasonable expectation of privacy in emails sent from her work computer even though there was a screen warning at log-in. *Id. at 64*. The court reasoned that the policies and practices of the employer, requiring individual users to have passwords known only to themselves and to change their passwords periodically to ensure privacy and limiting outside network access to the network administrator, reaffirmed rather than reduced the expectations of privacy on office computers. *Id.* Notwithstanding legal advice to the contrary, the Commissioner has yet to authorize or direct any change in policy or procedure, or even to authorize a fuller investigation.

By memo dated June 19, 2009, at the request of the Commissioner and the executive staff, I explained the legal requirements for information management in a federal agency. Having previously written about statutory and constitutional restrictions on “monitoring” individual employees’ computer use, this memo focused on statutory and regulatory

requirements for agency information management, particularly with respect to the position of “Chief Information Officer” (CIO).

In brief, I wrote that each federal agency is required to have a CIO, technically qualified by education and experience, who reports directly to the agency head. I expressed my legal opinion that agency practice does not comply with these requirements. Ms. Forti serves as Chief Information Officer (as well as Chief Administrative Officer and Acting Budget Officer), although she allegedly has no information management qualifications, and little if any management and supervision training.

By email dated June 24, 2009, Mr. Mora instructed the entire IMD staff, by e-mail, that “members of management” were out to “put us in a bad light to advance their agenda.” IMD staff were instructed “Don’t ‘hook up’ anybody with any type of additional services, access or privileges on our network or PC’s (If you have already undo it immediately). Keep your ears open and don’t offer any information about the IMD’s abilities to monitor users...” (*sic*).

At least one IMD employee reports that Mr. Mora is unqualified to perform his duties. Rather, he allegedly acts on behalf of Ms. Forti to control information and spy on other employees, including executive staff. Mr. Mora in fact insists he only monitors users at the direction of Ms. Forti. Meanwhile, according to several employees, important regulatory requirements are ignored. IMD reportedly does not comply with the Foreign Intelligence Surveillance Act (FISA), for example.

Separation of Budget and Contracts

By memo dated June 19, 2009, at the request of the Commissioner and the executive staff, I explained legal requirements for separation of budget and acquisitions responsibilities, both of which have been under the control of Ms. Forti for the last five years. I cited previous memoranda that raised legal concerns about the historic and continuing lack of appropriate separation within the agency of budget and acquisitions responsibilities. I cited the OIG 2005 Report: “The Budget and Contracting offices are reporting to the senior budget officer, in contravention of generally accepted practices regarding separation of duties”. The Report is highly critical of one “officer supervising two functions – budget and contracting – that should be under separate oversight.” The Report recommends “USIBWC should separate responsibility for its budgeting and contracting functions.” (See pp. 34 and 48 and Rec. 22).

For over five years, Ms. Forti has served as both supervisor of the Acquisitions Division and Acting Budget Director. (Ms. Forti also serves as Chief Administrative Officer and Chief Information Officer.) Coincidentally, virtually every major project that USIBWC has underway is short of funds, including Recovery Act projects. Several weeks ago Ms. Forti forecast a budget surplus, and called for unfunded requirements. USIBWC now has a partial hiring freeze through the end of this fiscal year, including hiring for positions to properly implement the Recovery Act.

The USIBWC recently received an anonymous report that an un-named employee has been using a government charge card for unauthorized purchases. In the process of investigating this allegation, it became apparent that USIBWC has no procedure in place for routine monitoring of charge card use. In contrast to his handling of allegations concerning certain members of the executive staff, the Commissioner properly insisted on a prompt investigation and that notice be given to appropriate authorities.

Within the past week, the Commissioner stated that he will require Ms. Forti to announce an opening for a Budget Officer (which she will supervise, along with contracts). The Commissioner stated he also is considering contracting for an organizational assessment. However, by memorandum to the executive staff dated July 28, 2009, the Commissioner denied that any reorganization is being considered. He specifically disavowed requested legal opinions that advised separation of budget and finance functions, reorganization of the IMD, and reorganization of the Compliance Office.

Creating a hostile workplace; Use of slanderous, malicious, derogatory, discourteous, or otherwise inappropriate language, gestures, or other conduct toward co-workers, including executive staff.

Mr. Graf is alleged to be fostering a hostile workplace, and instilling fear in some employees that he may turn violent. (As a volunteer Deputy Constable for El Paso County, he drives a vehicle with County Constable markings to and from work at USIBWC, sometimes patrols the parking lot, and is known to carry a weapon.) One employee, formerly under Mr. Graf's supervision, says he is intimidated by Mr. Graf's night time patrolling past his home (located in a culdesac).

Recently Mr. Graf openly berated the executive staff in emails sent to the entire executive staff and the Commissioner. Commenting on a routine proposal to fill a soon to be vacant part-time student position, Mr. Graf wrote:

Frankly, I am deeply concerned about what appears to be a cavalier attitude regarding the establishment and filling of positions regardless of their grade and their impact on the agency's position management structure. It appears that some executive officials are under the impression the agency has deep S&E pockets. As a result of this irresponsible approach, many of us don't have adequate funds in our cost centers to carry out essential program activities.

.....

As the sole remaining member of the executive staff from the beginning of the Commissioner Bernal administration in 1998, I must observe that the current executive staff, as a group, does not come close to executive staffs in terms of earning trust and confidence in leadership. Our dysfunctional PMC [Personnel Management Committee, created by HCO Director Kevin Petz to make personnel actions more transparent] is yet another indication of the executive staff's failed leadership.

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Speaking with "the manager involved" [a reference to Mr. Petz] has been a ridiculous waste of time and effort in the past. The "manager involved" will pretend to listen to other viewpoints and then proceed to do whatever he wants. If the PMC is too dysfunctional to address resource management issues such as position establishment actions, then perhaps another entity such as the Management Accountability Council [a latent, nonfunctional committee revived by Mr. Graf] should step in and take over the function.

Additional evidence of Mr. Graf's hostility includes, for example, his open display of a book entitled "How to Work with Jerks" at an executive staff meeting. At least one witness states that Mr. Graf said he despises his current job and the people he works with, and another states that Mr. Graf has directed highly offensive derogatory curses and threats at certain executive staff. He reportedly remarked in the presence of other executive staff officials that he was going to get a "hit man" to take out a former Commissioner (who died in a plane crash shortly thereafter).

Ms. Forti also engages regularly in unprofessional personal attacks on other employees, including executive staff as well as those under her direct or indirect supervision. Ms. Forti often responds with personal attacks on staff who disagree with her. I will not catalogue here the personal insults aimed at me and other executives. Some of this is in writing. Some she has deleted after sending, even after it is has been read.

One example of her alleged abuse of staff is found in a complaint by an employee of HCO that Ms. Forti has unlawfully intruded into personnel matters on numerous occasions, and has attempted to force staff to approve unlawful personnel actions. A former supervisor of the Acquisitions office, under Ms. Forti's direction, claimed that she felt abused by Ms. Forti. When that employee threatened to go to the Commissioner, Ms. Forti allegedly responded, "I am the Commissioner." This individual, now at another federal agency, is available to make a statement.

Appointment of the Commissioner

I have advised the Commissioner and the State Department that the President's appointment of the USIBWC Commissioner, as currently constituted, is constitutionally required to be subject to the advice and consent of the Senate.

Under the United States Constitution Appointments Clause, the president may appoint two classes of officers: principal officers and inferior officers. The former are appointed subject to the advice and consent of the Senate. Pursuant to Supreme Court standards, if the duties, authority and autonomy of the Commissioner suggest that he is a "principal" officer, as it appears they do, then his appointment absent Senate confirmation is unconstitutional.

The constitutionality of the Commissioner's appointment might conceivably be addressed in one of two ways: either by making the appointment subject to the advice and consent of the Senate, or possibly by subjecting the Commissioner to the supervision and

authority of an Executive branch official (other than the president). The added benefit of either or both measures is that the USIBWC arguably would be assured a well-qualified leader and professional administration.

Conclusion

Please consider the very real peril this situation presents to the public trust, to this agency, to international relations with Mexico, to the health and safety of millions of border residents, and to employees of this agency. In addition to disciplinary and/or criminal sanctions, the State Department should seriously consider basic structural reforms in its relationship, or lack thereof, with the USIBWC. At a minimum, the Commissioner should be subject to Senate confirmation and/or administrative oversight. The USIBWC also needs a qualified professional SES-level agency administrator, chief of staff, or deputy commissioner.
