

February 23, 2011

Lisa P. Jackson, Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Re: Petition to Investigate Potential Violations of the Federal Clean Water Act That May Require Withdrawal of Approval for the Florida Department of Environmental Protection to Administer NPDES Permitting.

Dear Administrator Jackson:

Public Employees for Environmental Responsibility (“PEER”) and the Florida Clean Water Network (FCWN) hereby petition you to investigate possible violations of the federal Clean Water Act (the “CWA”) that may require withdrawal of approval for the Florida Department of Environmental Protection (“FDEP”) to administer the National Pollution Discharge Elimination System (“NPDES”) in Florida. This petition is filed pursuant to 40 C.F.R. § 123.64.

Public Employees for Environmental Responsibility (PEER) is a national alliance of local, state and federal resource professionals. PEER works nation-wide with government scientists, land managers, environmental law enforcement agents, field specialists and other resource professionals committed to responsible management of America’s public resources. Resource employees in government agencies have unique responsibilities as stewards of the environment. PEER supports those who are courageous and idealistic enough to seek a higher standard of environmental ethics and scientific integrity within their agency. Our constituency represents one of the most crucial and viable untapped resources in the conservation movement.

The Florida Clean Water Network is a non-profit organization incorporated in the State of Florida and licensed to conduct business therein. Although corporate in nature, CWN is routinely assisted by citizens’ groups across the state. CWN’s corporate mission is to maintain oversight over those activities, both public and private, which impact Florida’s environment. It furthers this mission by working with and on behalf of Florida’s citizens.

This petition is predicated upon Petitioners’ allegation that the appointment of Herschel T. Vinyard as Secretary of FDEP violates § 304(i) of the Clean Water Act, which expressly prohibits persons employed by regulated dischargers from overseeing state agencies that administer NPDES permitting. Specifically, U.S.C. § 1314(i)(2)(D) states that:

“The Administrator shall

(2) within sixty days from October 18, 1972, promulgate guidelines establishing the minimum procedural and other elements of any State program under section [1342](#) of this title, which shall include:

(D) funding, personnel qualifications, and manpower requirements (including a requirement *that no board or body which approves permit applications or portions thereof shall include, as a member, any person who receives, or has during the previous two years received, a significant portion of his income directly or indirectly from permit holders or applicants for a permit.*)”

(Emphasis added) This requirement was fulfilled by EPA’s adoption of 40 C.F.R. 123.25(c)(1)(ii) which defines a significant portion of income as 10 percent or more of gross personal income for a calendar year for persons who are under 60 years of age.¹

We also direct your attention to 40 C.F.R. § 123.25(c) which further addresses the issue. Subparagraph (1)(i) states that the definition of a “[b]oard or body includes any individual, including the Director, who has or shares authority to approve all or portions of permits either in the first instance, as modified or reissued, or on appeal.” 40 C.F.R. § 123.25(c)(1)(i). § 122.2 of the Code further defines a “Director” as the “chief administrative officer of any State ...agency operating an ‘approved program.’”

The Clean Water Act also requires that the Director not have received a “significant portion of his income directly or indirectly from permit holders or applicants for a permit.”² 33 U.S.C. § 1314(i)(2)(D). A significant portion of income is further defined by the C.F.R.:

“Significant portion of income means 10 percent or more of gross personal income for a calendar year.”

40 C.F.R. 123.25(c)(1)(ii).

The above provisions constitute fundamental procedural safeguards of the Act and were crafted by Congress to ensure that state agencies fully comply with the federal mandate to protect the nation’s surface waters. The CWA and those sections of EPA rules adopted to enforce the CWA state that compliance with these provisions is a mandatory prerequisite for a state to administer NPDES permitting, *see* 33 U.S.C. § 1342(c)(1) (state programs must conform to § 1314(i)(2));

¹ Furthermore, his recusal on issues that would affect his past positions would not suffice. 33 U.S.C. § 1314(i)(2)(D) makes no room for recusals in such circumstances.

² A “permit means an authorization, license, or equivalent control document issued by EPA or an ‘approved State’ to implement [40 C.F.R. sections 122, 123, and 124, and] includes an NPDES ‘general permit.’” *Id.* § 122.2.

40 C.F.R. § 123.25(c) (same). Failure to meet the rules automatically renders a state ineligible to administer the federal permitting program. 33 U.S.C. § 1342(c)(2) (“Any State permit program ... shall at all times be in accordance with ... guidelines promulgated pursuant to section 1314(i)(2)”); 40 C.F.R. § 123.1(f) (“Any State program approved by the administrator *shall at all times* be conducted in accordance with the requirements of this part.”) (emphasis added). *See also id.* § 123.63(a) (failure to comply with requirements for State programs or to take corrective action is grounds for withdrawal of program approval).

On information and belief, pursuant to Section 106 of the Clean Water Act, the State of Florida also receives federal grant money from EPA in order to assist the state in administering programs designed to effectuate implementation of the NPDES Program. Petitioners respectfully suggest that provision of said funds to Florida is improper when those federal funds are used to administer a federal program such as this in a fashion that violates federal law. The EPA has several means of requiring the state to adhere to program requirements, including withholding of funds awarded to the state under Performance Partnership Grants. 40 C.F.R. § 31.43 (a). *See also*, 40 C.F.R. § 35.115.

Under Florida law, the Secretary is the statutorily designated “chief administrative officer” of FDEP, *see, e.g.* §§ 20.05, 20.255 (1), 403.061(14), and 403.0885, Fla. Stat. The FDEP, which he oversees, is directly responsible for issuing federal Clean Water Act discharge permits in the state. 62-4.055, F.A.C. Indeed, exemptions from abiding by water quality criteria are only allowed with the approval of the Secretary. 62-4, *passim*, 62-4.243 (1) and (3), F.A.C. *Id.* § 344(2-A). In addition, it is the FDEP Secretary who delegates many of the FDEP’s responsibilities not only to other FDEP personnel, but also to other agencies of the State of Florida. 62-113, Fla. Stat. Accordingly, pursuant to the federal statute and rules cited above, the Secretary may not receive, either now or at any time during the previous two years, more than 10 percent of his personal income directly or indirectly from clients that hold or are applying for permits under the Clean Water Act.

The Florida Cabinet approved Herschel Vinyard’s appointment as FDEP’s Secretary on January 19, 2011. He must also be approved by the Florida Senate, pursuant to § 20.05 (2), Fla. Stat. And though he has not yet been confirmed by Florida’s Senate, he is already acting as the Secretary of the FDEP. With the installation of Mr. Vinyard as FDEP’s Secretary, Florida appears to have violated the above rule. Immediately prior to his appointment by the Governor, Mr. Vinyard served as the director of BAE Systems Southeast Shipyards. He is also the former chairman of the Shipbuilders Council of America. He is a registered lobbyist with the Florida Legislature on behalf of Atlantic Marine Holding Company.³ As Governor Scott stated in his press release announcing Mr. Vinyard’s appointment:

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http://www.leg.state.fl.us/Lobbyist/index.cfm?Lobbyists=View_Lobbyist_Info&Tab=lobbyist&Submenu=2&First_Name=Herschel%20T.&Last_Name=Vinyard&Suffix1=&Lobbyist_ID=005888&Title=-%3E2010-%3EL-%3EVinyard%2C%20Herschel%20T.

As an example of Vinyard's focus on environmental responsibility and effective business practices, he provided counsel to BAE Systems in their recent, successful efforts to remove its treated wastewater outfall from the St. Johns River. That wastewater is now being used for irrigation purposes and eliminates a discharge to one of Florida's most significant water bodies.

In addition, Vinyard led his company's three-year effort to obtain state approval for a sovereign submerged lands lease. His experience in this complex regulatory proceeding provided Vinyard with new insights on the challenges businesses face in the permitting process and the need to provide a more efficient and streamlined mechanism to meet environmental requirements.

http://www.dep.state.fl.us/secretary/news/2011/01/0111_01.htm

Mr. Vinyard is the director of business operations at BAE Systems Southeast Shipyards. According to Governor Scott's release announcing Mr. Vinyard's appointment as FDEP Secretary, in his position as director of business operations at BAE Systems Southeast Shipyards, Mr. Vinyard is ". . . responsible for strategic planning, business development and regulatory and government affairs."⁴ As stated above, one of the reasons that Mr. Vinyard was chosen for the position as FDEP Secretary was his alleged hands on experience in negotiating on behalf of BAE Systems Southeast on issues including its outfall to the St. Johns River. On information and belief, the company name on the permit is actually Atlantic Marine Holding Company, LLC, the same company for whom Mr. Vinyard is a registered lobbyist. The NPDES permit number is FL0040592. It expired on January 27, 2010. In addition, according to the FDEP's records, BAE Systems Southeast holds at least one NPDES Permit, a stormwater permit number FLR05C567 that expires on August 7, 2015.

In addition to his work with BAE and Atlantic Marine Holding Company, Mr. Vinyard has served as the Chairman of the Shipbuilders Council of America (SCA). He was elected as Chairman in April 2009 and served as Chairman for the 2009-2010 term. According to the SCA press release announcing his appointment:

"SCA is the largest and most broadly-based trade association representing the U.S. shipyard industry. SCA members build, repair and service America's fleet of commercial vessels. Member companies constitute the shipyard industrial base that maintains and repairs Navy ships and other government craft, in addition to building vessels for the Coast Guard, Navy, Army, NOAA and other government agencies. The Council represents 40 companies that own and operate over 100 shipyards, with facilities on all three U.S. coasts, the Great Lakes, the inland waterways system and

⁴ http://www.dep.state.fl.us/secretary/news/2011/01/0111_01.htm

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Hawaii. SCA also represents 26 affiliate members that provide goods and services to the shipyard industry. . . .”

<http://www.coltoncompany.com/newsandcomment/news/SCAAnnouncesNewChair-ViceChairofAssociation.doc> While Mr. Vinyard’s attainment of this position is laudable, the fact remains that in this position he was in a position to negotiate for programs dealing with projects affecting implementation of the CWA throughout the country. And it would logically be the case that those projects would benefit companies who are also permitted entities under the CWA’s NPDES Program. The organization that Mr. Vinyard chaired also has an Environmental Committee that “. . . works directly with the EPA through the Agency’s Sector Strategies Program (SSP). *As a pioneering industry with the SSP, SCA has been able to work directly with regulators to lessen the negative impact of new regulations. . . .*”⁵ (Emphasis added) Thus, Florida’s Governor, in appointing Mr. Vinyard to oversee the FDEP and the NPDES Program, has appointed a man whose professional career has been dedicated to ensuring that the very regulations that he would now oversee are significantly weakened inasmuch as they would apply to his company and companies throughout the United States that he has represented.

Petitioners would also point out that the Florida, Department of Community Affairs (FDCA) is among the myriad of agencies with which the FDEP works in order to administer the NPDES Program. The FDCA is an agency whose purpose is to facilitate orderly development in Florida. Among the agency’s concerns is that development be undertaken in such a way as to enhance adherence to environmental laws. For example, the FDCA assists with the development of comprehensive plans throughout the state. In connection with those plans the FDCA provides guidance on numerous issues, including, for example marina siting even though marinas are no longer subject to the regional impact review process.⁶ And in addition, the FDEP has, for years, worked with the FDCA in evaluating a host of issues including stormwater protection,⁷ watershed management,⁸ ordinances for “Florida-Friendly” fertilizer use in urban landscapes.⁹ In other words, the FDCA is consulted regularly by the FDEP on issues directly affecting the NPDES Program.

Shortly after assuming office, Florida’s Governor appointed Billy Buzzett to the position of Secretary of the FDCA. Thus, Mr. Buzzett is now in charge of this agency that works with the FDEP on issues affecting the NPDES Program. Mr. Buzzett, like Mr. Vinyard, comes from the private sector. His position in the private sector was as the Vice President of Strategic Planning for the St. Joe Company, a development company with vast holdings of private land throughout Florida. As part of its ongoing development efforts the company has had numerous NPDES permits in 2008-2009 alone, including, but not limited to: FLR10Y260 (Stormwater—St. Joe-Arvida Permittee, expired in 2009); FLR10N165 (Generic Stormwater Permit, River Camps on Crooked Creek – Phase 1 Permittee, expired in 2008); FLR10R114 (Stormwater Construction—

⁵ <http://www.shipbuilders.org/aboutSCA/SCACommittees/tabid/462/Default.aspx>

⁶ <http://www.dca.state.fl.us/fdcp/dcp/marinasiting/index.cfm>

⁷ <http://www.dep.state.fl.us/water/nonpoint/docs/319h/nps2000.pdf>

⁸ http://www.dep.state.fl.us/water/waterpolicy/docs/FWP_Dec_2001.pdf

⁹ <http://pbco-npdes.org/pdf/FDEP-ModelOrdinance.pdf>

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St. Joe-Arvida Permittee, expired in 2009); FLR10R113 (Stormwater Construction—St. Joe-Arvida Permittee, expired in 2009); FLR10T241 (Stormwater Construction--Summerville Project, St. Joe Company Permittee, expired in 2009); FLR10U879 (Stormwater Construction—St. Joe Company Permittee, expired in 2009). While Petitioners are not suggesting that the FDCA has permitting authority over the NPDES Program (which would clearly require the removal of Mr. Buzzett as Secretary), it is necessary to understand the nature of the leadership of this agency in order to appreciate the effects that this agency will have upon the FDEP's decision-making on issues such as stormwater protection and NPDES Permits in Florida. The two agencies are closely tied on this issue, making it even more imperative that the person in charge of issuing NPDES for the FDEP be someone who will not be closely tied to businesses that he (and his colleagues) regulate.

On information and belief, his positions at BAE Systems Southeast Shipyards and Atlantic Marine Holding Company would have provided a majority of Mr. Vinyard's income. Thus, it is highly likely that over the last two years he has received more than 10 percent of his income from clients that are either permit holders or applicants. Accordingly, U.S.C. § 1314(i)(2)(D) bars him from sitting as FDEP Secretary if the FDEP is to continue to administer the federal NPDES Program.¹⁰

Petitioners respectfully submit that more than sufficient evidence already exists to justify an investigation by EPA to determine whether Mr. Vinyard's appointment as Secretary of the Florida, Department of Environmental Protection violates the Clean Water Act, 33 U.S.C. §§ 1314(i)(2)(D), 1342(c)(2), and to require the State of Florida to immediately take corrective action if a violation is found.

We thank you for your kind attention in this matter. Please don't hesitate to contact us should you have any questions regarding the same.

Sincerely,

Jerry Phillips
Director, Florida PEER

Linda Young
Director, Florida Clean Water Network

cc.: Honorable Rick Scott, Governor, State of Florida
Honorable Mike Haridopolos, President, Florida Senate
Herschel T. Vinyard, Secretary, FDEP
Gwendolyn Keyes Fleming, Regional Administrator, EPA Region 4
James D. Giattina, Director, Water Protection Division, EPA Region 4

¹⁰ Furthermore, his recusal on issues that would affect his past positions would not suffice. 33 U.S.C. § 1314(i)(2)(D) makes no room for recusals in such circumstances.