



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

APR 13 2011

Mr. Jerry Phillips
Director
Florida Public Employees for
Environmental Responsibility
P.O. Box 14463
Tallahassee, Florida 32317-4463

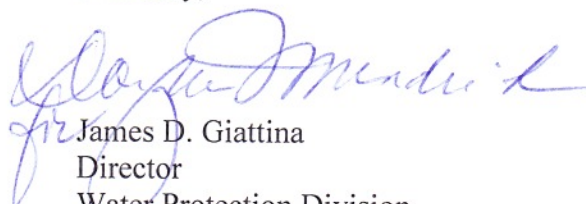
Dear Mr. Phillips

This letter constitutes the U. S. Environmental Protection Agency's (EPA's) preliminary response to your February 23, 2011, Petition filed pursuant to 40 C.F.R. § 123.64, requesting that EPA conduct an investigation to determine whether the recent appointment of Herschel T. Vinyard as Secretary of the Florida Department of Environmental Protection violates Section 304(i)(2)(D) of the Clean Water Act, 33 U.S.C. § 1314(i)(2)(D).

As a first step in EPA's review, EPA has forwarded your Petition to Secretary Vinyard and requested that he provide a response to the Petition. A copy of EPA's letter to Secretary Vinyard is enclosed.

If you have questions, please contact Paul Schwartz, Associate Regional Counsel, at (404) 562-9576.

Sincerely,


James D. Giattina
Director
Water Protection Division

Enclosure



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 4
ATLANTA FEDERAL CENTER
61 FORSYTH STREET
ATLANTA, GEORGIA 30303-8960

APR 08 2011

VIA EMAIL AND REGULAR MAIL

Herschel T. Vinyard, Jr.
Secretary
Florida Department of Environmental Protection
Marjory Stoneman Douglas Building
3900 Commonwealth Boulevard
Tallahassee, Florida 32399-3000

Dear Secretary Vinyard:

As you are aware, EPA Administrator Lisa Jackson has received from two environmental groups, the Florida Public Employees for Environmental Responsibility (PEER) and the Florida Clean Action Network (FCAN), a petition (the Petition) seeking an EPA investigation into potential violations of the federal Clean Water Act (CWA) conflict of interest prohibitions relating to Florida's administration of the National Pollutant Discharge Elimination System (NPDES) permitting program (Section 304(i)(2)(D) of the CWA, 33 U.S.C. § 1314(i)(2)(D), and 40 C.F.R. § 123.25(c)). The Petition, dated February 23, 2011 (copy enclosed), indicates that the Petition was filed pursuant to 40 C.F.R. § 123.64, which sets forth EPA's regulatory procedures for withdrawal of a state's EPA-approved NPDES permitting program.

The substantive issue raised by the Petition relates to whether your appointment as Secretary of the Florida Department of Environmental Protection (FDEP) implicates the CWA NPDES conflict of interest prohibitions as a result of your potential receipt, during the most recent two years, of a significant portion of your income, directly or indirectly, from holders of, or applicants for, NPDES permits. Specifically, the Petition identifies your former roles as (1) Director of Business Operations for BAE Systems Southeast Shipyards (BAE), (2) chairman of the Shipbuilders Council of America (SCA), and (3) lobbyist on behalf of Atlantic Marine Holding Company (AMHC), as likely sources of a significant portion of your income during the past two years. The Petition further indicates that these entities were either NPDES permittees or, in the case of the SCA, was an organization whose membership was comprised of NPDES permit holders.

In order for EPA to determine how best to respond to the Petition, we request that you respond to the issues raised in the Petition. To facilitate your response, we are enclosing a copy of an EPA General Counsel legal opinion, dated February 14, 1973, containing analysis of the scope of the CWA NPDES conflict of interest statutory and regulatory provisions (General Counsel Opinion). Our preliminary review of the Petition suggests that the discussion in the General Counsel Opinion regarding "Corporate or Institutional Employment" may be particularly relevant.

Should you, in fact, have a conflict of interest under Section 304(i)(2)(D) of the CWA, EPA would be willing to discuss options for resolving such conflict. EPA has, in the past, determined that such a conflict of interest may be resolved through an irrevocable delegation of CWA authority to another State official with no conflict of interest, and who is not subject to control by the person with the conflict of interest. That official would need to have the authority to administer the NPDES permitting program independent of those with a conflict of interest. The person with the conflict of interest must also relinquish any authority he or she may have to perform other acts necessary to administer the program (including, for example, implementing water quality standards, and establishing waste load allocations and total maximum daily loads). Such a delegation(s) would need to be in place until two years after the official with a conflict of interest ceases to receive a significant portion of income directly or indirectly from NPDES permit applicants or permit holders. Additionally, it may be appropriate for a delegation as described above to be accompanied by a provision for a public right of appeal of administrative actions in contravention of the delegation. Although EPA has interpreted the CWA and its implementing regulations to allow for such an arrangement, you may want to consult with your State Attorney General's office as to any additional provisions relating to conflicts of interest or delegation mechanisms available under Florida law.

Please provide your response to the claims made in the Petition by April 25, 2011. To the extent information you provide may constitute confidential business information as defined under 5 U.S.C. § 552(b)(4), you may assert a business confidentiality claim covering part, or all, of the information requested in the manner described by 40 C.F.R. § 2.203(b). To make such a claim, you must mark each document claimed to be confidential with "**CONFIDENTIAL**" or a similar designation. If a document contains both confidential and non-confidential information, the portions claimed to be confidential must be clearly marked with brackets or similar identifiers. Information covered by such a claim will be disclosed by EPA only to the extent, and by means of the procedures, set forth in 40 C.F.R. Part 2, Subpart B. If no such claim accompanies the information when it is received by EPA, the information may be made available to the public by EPA without further notice to you. Note that certain categories of information cannot be made subject to a claim of confidentiality. See 50 FR 51663, Dec. 18, 1985.

We appreciate your willingness to work with us to resolve the issues raised in the Petition. Please feel free to call me at (404) 562-9556 should you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Mary J. Wilkes", with a long horizontal flourish extending to the right.

Mary J. Wilkes
Regional Counsel and Director
Environmental Accountability Division

Enclosures

cc: Gwendolyn Keyes Fleming, Regional Administrator, EPA Region 4
James D. Giattina, Director, Water Protection Division, EPA, Region 4
Jerry Phillips, Director, Florida PEER
Linda Young, Director, Florida Clean Water Network

GENERAL COUNSEL OPINION
DATED FEBRUARY 14, 1973

Conflict of Interest—EPA Guidelines

Federal Water Pollution Control Act — Section 304(h)(2)(D) — Conflict of Interest — Before final approval of its permit program, State must certify that its board membership complies with Act's conflict of interest provision — State employment does not disqualify employee from board membership, since State departments and agencies are not deemed to be "permit holders or applicants for a permit" within meaning of Section 124.94(c) of guidelines — Municipal employment does not disqualify employee, as municipalities have no responsibility under Section 402 to administer permit program — Federal employees are not disqualified since EPA, rather than State board, will issue permits to Federal facilities — Corporate or institutional employment disqualifies individual from board membership whenever corporation or institution operates facilities subject to permitting under Section 402 — Where individual is owner or partner of firm which receives significant income from permit holders or applicants, such owner or partner is disqualified from board membership; the disqualification arises even though the individual's work for a client permit holder is not directly related to pollution control problems — Employee of a firm who is salaried is not disqualified as his income is not derived from client permit holders or applicants — Individuals whose employment income within the past two years derives from permit holders or applicants; retired individuals who receive a significant portion (50%) of their income from permit holders or applicants; and individuals who receive significant stock dividends from such businesses are disqualified from board membership — Recipients of mutual fund (diversified) payments, and individuals who receive pension plan income where plan is under control of entity other than former employer, are not disqualified from board membership — Individuals receiving income from entity subject to permitting under State or Federal legislation other than FWPCA are not thereby disqualified — Disqualification of individual board members may be mitigated by re-arranging the final decision-making procedure or by non-participation by disqualified board members from rulings in which there would exist a conflict of interest — Requirements of Section 304(h)(2)(D) must be met immediately and compliance may not be deferred.

A great deal of discussion recently has centered around the application of the conflict of interest provision in Section 304(h)(2)(D) and EPA's Guidelines (Section 124.94) relating to State agency board membership.

The Act requires that a State requesting final approval of its permit program submit a full and complete description of the program it proposes to establish and administer under State law and a statement from the attorney general that the laws of the State provide adequate authority to carry out the described program. In addition, the Act requires that any State permit

program at all times be in accordance with the Guidelines promulgated under section 304(h)(2), including the conflict of interest provision.

At the time the State requests final approval of its program the State must certify that the board membership is in compliance with the conflict of interest provisions. It is incumbent upon the State to make specific determinations regarding the qualification of individual board members. Although the state's certification of compliance with Section 304(h)(2)(D) is not conclusive upon EPA, it should be given considerable weight in reviewing the State's program submission.

An enormous number of questions may arise regarding the application of the conflict of interest provision to specific cases. These questions require both legal and factual determinations. EPA has a major responsibility to provide guidance on the legal issues. With respect to factual determinations, however, the initial and principal responsibility should be exercised by the States. For this reason, EPA regional officials should avoid making formal determinations concerning application of the conflict of interest provision to specific individuals, at least until after the State has submitted its application for final approval of its permit program.

In order to assist the Regions and the States further it is desirable that additional guidance be given on a number of situations which occur frequently in State board membership. The following is intended to provide such guidance.

Government Employment

State employment. Many state facilities will require Section 402 discharge permits. If the term "permit holders or applicants for a permit" included State agencies or facilities, all State officials and employees would then be disqualified from membership on State boards. Since the State is to administer the permit program, it would be impossible to apply an interpretation of the statute requiring that a State employee be disqualified from board membership where his only "conflict" is the receipt of income from the state. Therefore, state department and agencies are not deemed to be permit holders or applicants for a permit for purposes of this provision. This position is set forth in section 124.94(c) of the guidelines.

Municipal employment. Most, if not all, municipalities will have sewage treatment works and other discharges subject to permitting under section 402. The rationale above relating to State agencies or departments does not apply to municipalities. Municipalities are subject to regulation under the permit program in the same manner as other point source dischargers. They, unlike states, however, have no responsibility under section 402 to administer the program.

Federal employment. EPA's proposed regulations for the Federally operated permit program (38 F.R. 1362-1370, 40 CFR Part 125) provide that

"... with respect to federal agencies and instrumentalities, . . . the Administrator will continue to process permit applications in accordance with these regulations and will be the exclusive source of permits." Although Federal facilities must obtain discharge permits, an employee receiving a significant portion of his income by virtue of Federal employment is not disqualified since EPA, rather than any State board, will be issuing permits to Federal facilities.

Corporate or Institutional Employment

In some instances, existing board members may receive income from institutions or corporations which operate facilities subject to permitting under section 402. It may be argued that such persons should not be disqualified if they have no connection with the management or operation of discharging facilities, or budgetary decision-making that would affect such management. The conflict provision makes no such distinction, however, nor can such a distinction reasonably be implied. Thus, even though the connection between the nature of employment of the individual and the operation of a discharge facility may be tenuous or remote, it is clear that the provision is tied to the receipt of income from the institution or corporation, and not the nature of the person's position within the institution or corporation.

It should also be noted that the statutory prohibition applies irrespective of whether the employer is a non-profit organization such as a university or research institution. The test is simply whether the employer is a "permit holder or applicant for a permit."

Professional Employment.

In many cases, existing board members such as lawyers, engineers or stockbrokers may work for firms which do not have discharges subject to section 402 (and therefore the firms themselves would not be "permit holders or applicants"), but whose income is derived principally from clients with discharges subject to section 402. If the person is an owner or partner of the firm, such that he receives a direct share of the firm's profits, he then receives income from clients who are or may be permit holders or applicants. In such a case, if a significant portion of the firm's income (i.e., 10% or more under section 124.94(b) of EPA's Guidelines) is received from permit holders or applicants, the owner or partner would be disqualified.

Disqualification of *owners or partners* of such firms would be required by the conflict provision even though the individual's work for a client permit holder or applicant is not directly related to pollution control problems arising under the FWPCA. As noted in the preceding section, the provision makes no distinctions concerning the nature of the tasks performed by the individual.

An *employee* of a law firm, consulting engineering firm, stock brokerage firm, or other similar professional organization (which itself is not a permit

holder or applicant) receives a salary from the firm, and therefore does not receive income from client permit holders or applicants by virtue of his receipt of salary from such firm.

Special Categories of Income

Employment income within past 2 years. Section 304(h)(2)(D) requires disqualification of board members who have received a significant portion (i.e., 10% or more) of their income from permit holders or applicants within the preceding two years.

Retirement income. Even though one is presently retired from employment by a permit holder or applicant and is receiving retirement income rather than an employee salary the conflict provision would require disqualification if he receives a significant portion of his income from such source. However, since a retired person's future income status generally is less tied to his former employer's interest than would be the case if he were currently employed by a permit holder or applicant, the Guidelines provide that the term "a significant portion of this income" shall mean 50% of gross personal income for a calendar year if the recipient is over 60 years of age and is receiving such portion pursuant to retirement, pension, or similar arrangement.

Income from diversified investments. The Guidelines provide in Section 124.94(e) that "income is not received directly or indirectly from permit holder or applicants for a permit" where it is derived from mutual-fund payments, or from other diversified investments over which the recipient does not know the identity of the primary sources of income.

Pension plan income. Pension plans normally are set up as separate trusts, or other distinct legal entities, not subject to direct control by the employer, and provide periodic benefits to retired employees. Amounts received by particular beneficiaries are fixed according to the plan and are unrelated to the current fortunes of the employer. Therefore, where a board member receives income pursuant to a pension plan under the control of an entity other than his former employer, this income would not appear to produce a conflict within the scope of section 304(h)(2)(D), even though the income received may exceed the applicable retirement income percentage.

Stock dividends. Even though stock dividends ordinarily could not be affected by a company adversely to the interest of a board member entitled to receive dividends, the amount of such dividends would be directly tied to the fortunes of that business and/or related businesses. If the amount of such dividends, either separately or together with other income, exceeds the applicable percentage the recipient would be disqualified from serving on the board. Therefore, stock dividends are specifically included within the term "income" under section 124.94(d) of the guidelines.

Permit holders or applicants other than under the FWPCA.

There is no indication in Section 304(h)(2)(D) that the conflict of interest provision is intended to be one broadly aimed at excluding conflicts with respect to permits not issued under the Federal Water Pollution Control Act. Therefore, if a board member receives or has received income from a company or other entity which is subject to permitting under State or Federal legislation other than the FWPCA (e.g., air or solid waste permit requirements), such income would not require disqualification under section 304(h)(2)(D).

Directors, Executive Secretaries or other employees of a State Board

The guidelines provide that the term "board or body" includes any individual including the Director, who has or shares authority to approve permit applications or portions thereof either in the first instance or on appeal. Therefore, any Director or other employee who has authority, in full or in part, to approve permit application and who either currently receives or has during the previous 2 years received 10% or more of his gross personal income from a permit holder or applicant is disqualified from serving in the position indicated above.

Board relationships which may mitigate the consequences of a conflict with Section 307(h)(2)(D).

Assuming that one or more board members fall within the conflict of interest provision, various proposals have been suggested to make it possible for the State to retain these board members and continue to operate its permit program under other organizational arrangements.

Removal of permit issuing decision from the Board. A State may wish to place the responsibility and power to make final determinations on permit applications on an employee of the board, such as a Director or Executive Secretary. For his proposed arrangement to comply with section 304(h)(2)(D), and EPA's Guidelines (Section 124.94(a)), the Director or other employee would have to have complete authority to rule on permit applications, and he himself must be free of a conflict of interest. In order to maintain the insulation of the board from the decision on individual permits, a right of appeal to the full board would not be permissible. In addition to the authority to issue permits, the employee also would have to have authority to perform other acts necessary to the administration of the permit program as required under section 402(b) and EPA's Guidelines. Otherwise, the mere insulation of the issuance function probably would not be sufficient to remove the board from the thrust of section 304(h)(2)(D) to eliminate conflicts which would tend to inhibit aggressive administration of state permit programs. Finally, the Director must be able to issue permits, and otherwise independently administer the permit program, without being subject to control by a State board which does not meet the requirements of section 304(h)(2)(D).

Non-participation by a board on certain permit applications. It has been suggested that the conflict of interest provision might be avoided by requiring a member with a conflict to abstain from ruling upon permit applications in which he has or may have an interest which causes a conflict. This is not a viable alternative, in view of the flat proscription against board membership where the particular member has received a significant portion of his income from *permit holders or applicants*. Since the provision applies to permit holders, as well as applicants, there would be a continuing conflict.

Application of Section 304(h)(2)(D) immediately or through attrition. It may be suggested that the requirements of section 304(h)(2)(D) can be applied as and when vacancies on State boards occur, rather than immediately. Section 304(h)(2)(D) is part of a series of requirements which must be met by States prior to approval of their permit programs. Therefore, deferral of compliance with the provision during a transitional period cannot be permitted under the statute.