

January 17, 2006

The Honorable Barbara Boxer
Chairperson, Senate Committee on
United States Senate
Washington, DC 20510

The Honorable James Inhofe
Ranking Member, Senate Committee on Environment and Public Works
United States Senate
Washington, DC 20510

RE: Opposition to Nomination of Roger Martella to Serve as EPA General Counsel

Dear Chairperson Boxer and Ranking Member Inhofe:

We are writing to convey the opposition of Public Employees for Environmental Responsibility (PEER) to the nomination of Roger Martella to serve as General Counsel for the Environmental Protection Agency (EPA). Our opposition is rooted in actions and positions taken by the EPA Office of General Counsel while Mr. Martella has been Principal Deputy or Acting General Counsel.

In short, we are concerned that, under Mr. Martella, the legal resources of EPA are increasingly being devoted to the avoidance of the law rather than compliance with the law. As a consequence, EPA has diminished its role in protecting public health and the environment.

In particular, we would sight the following recent positions or actions taken by the EPA Office of General Counsel:

1. Invocation of Sovereign Immunity in Environmental Whistleblower Cases

Under Mr. Martella, EPA is taking the position that absolutely none of the safeguards for whistleblower contained in major environmental laws protect its own employees from reprisal. EPA's stance would place the provisions of all major federal environmental laws, such as the Clean Air Act and the Safe Drinking Water Act, beyond the reach of federal employees seeking legal protection for good faith efforts to enforce or implement the anti-pollution provisions contained within those laws.

EPA's briefs invoke the ancient doctrine of sovereign immunity which is based on the old English legal maxim that "The King Can Do No Wrong." It is an absolute defense to any legal action unless the "sovereign" consents to be sued.

The position advocated by EPA would reverse nearly two decades of precedent. Approximately 170,000 federal employees working within environmental agencies are affected by the loss of whistleblower rights.

One recent case in which the issue of sovereign immunity is being litigated is that of Sharyn Erickson, an EPA employee who had reported deficiencies in agency toxic clean-up contracts. After conducting a hearing, a federal administrative law judge called EPA's conduct "reprehensible" and awarded Ms. Erickson \$225,000 in punitive damages. This case is currently before the U.S. 11th Circuit Court of Appeals.

We believe that EPA is flouting the intent of Congress that the whistleblower protections of these anti-pollution laws apply equally to the federal government as they do to private sector employers. Unless the sovereign immunity question is resolved, scores of federal employee whistleblower cases will be dismissed or languish in limbo while the issue is litigated.

2. Abdication of Public Health Responsibilities through Assertion of Statute of Limitations

Under Mr. Martella, EPA is seeking to insulate itself from statutory requirements that it implement lead-safe housing rules that were due by law more than a decade ago. In its legal briefs, EPA claims that once six years have elapsed it can no longer be compelled to comply with the law.

By law, EPA was supposed to adopt lead-safe regulations for repairs and renovations in older housing by October 28, 1996. Up until 2005, EPA claimed that, while tardy, it was still working to develop the rules. That year, however, PEER discovered the EPA public statements were false and that the agency had made a secret decision to abandon the rules altogether. PEER filed suit against EPA in December 2005.

In its initial reply, EPA did not raise the issue of timeliness but, in a motion filed on August 31, 2006, EPA contends that the PEER suit is too late: "PEER was required to bring its claim by October 28, 2002."

The law at issue requires all remodeling in buildings constructed before 1978 be performed by certified contractors and workers trained in lead-safe practices. According to EPA, each year, approximately 7 million home renovations produce hazardous quantities of lead dust exposing tens of thousands of American children who suffer irreversible damage, such as lost IQ points and developmental disabilities. In Chicago, for example, one in five children under age 5 has dangerously elevated blood-lead levels.

We believe that EPA is wrong on the law but, more importantly, is shirking its clear public health responsibility to protect children. Every day that goes by without the lead-safe rules in place, EPA commits a new violation; its legal obligations do not lapse.

Moreover, the implications of EPA's latest position are just appalling – the agency can run out the clock by assuring everyone that it is working on compliance and then suddenly claim that is immune from suit. The claim of immunity means the agency can then ignore mandatory statutory duties to protect the public health.

Unlike Mr. Martella, we believe that Congress did not write laws in ink that evaporate after six years.

Under pressure from members of this Committee, EPA finally proposed a lead-based paint renovation rule year that would apply only to housing occupied by children under age 6. This proposed rule, which EPA has yet to act upon, omits protections for day-care centers; housing occupied by pregnant women or children over age 6; as well as vacant buildings that could later house families with young children.

3. Harassment of Its Own Specialists

Under Mr. Martella, the EPA Office of General Counsel has been a principal instrument in the intimidation and punishment of agency employees who point out problems, report violations or voice dissent over factual misrepresentations made by EPA managers or spokespersons.

Rather than discuss individual cases, if the Committee wishes details about specific instances of such actions, PEER would be more than willing to supply this information in any format of convenience to the Committee.

Thank you for considering our views on Mr. Martella's re-nomination to serve as EPA General Counsel.

Sincerely yours,

Jeff Ruch
Executive Director

Richard Condit
General Counsel

cc: Members, Senate Committee Environment and Public Works