

May 29, 2007

Inspector General Claude M. Kicklighter
Office of Inspector General
Department of Defense
400 Army Navy Drive
Arlington, VA 22202-4704

RE: Request for Investigation

Dear General Kicklighter:

On behalf of Public Employees for Environmental Responsibility (PEER), I am writing to request that your office initiate an investigation into violations of federal laws and regulations and questionable conduct by officials within the Department of the Army as well as within the Army Corps of Engineers.

As one of the principals in this matter is the Assistant Secretary of the Army for Civil Works, this request is being directed to your office, rather than to a subordinate inspector general attached to the Army or one of its components.

The subject matter of this complaint centers on an attempt by the Commonwealth of Virginia to obtain an expansion of State Program General Permit (SPGP-01) from the Corps. Based upon the materials available to PEER, we believe that the following occurred –

- An illegal pre-decision was made during closed door meetings with top officials to award the expanded authority to Virginia prior to consideration of public comments on the matter in violation of 33 CFR 325.2 (a) (3) and 33 CFR 325.3 (c) (1);
- An improper attempt to influence an official regulatory decision was committed in connection with a threat to withhold millions of dollars in state partnership funds unless the SPGP was granted;
- Disregard of public comments took place in violation of 33 CFR 325.2 (a) (3); and

- Corps staff was subjected to retaliation in violation of the Clean Water Act, 33 U.S.C.A. § 1367(a), and the First Amendment of the U.S. Constitution.

Background

On November 20, 2006, the Army Corps Norfolk District commander, Colonel Dionysius Anninos met with L. Preston Bryant, the Virginia Secretary of Natural Resources, Army Assistant Secretary John Paul Woodley, and other officials. At that meeting, Col. Anninos and Sec. Bryant agreed that the Corps would grant the Virginia Department of Environmental Quality (DEQ) a sizable amount of its permitting authority over developments with impacts on streams and wetlands.

A public notice announcing a proposed modification to the SPGP was issued on December 15, 2006. In subsequent weeks, however, Col. Anninos changed his mind. In early March, Col. Anninos informed the DEQ of his decision not to proceed with the SPGP modification.

In a March 19, 2007 letter to Col. Anninos (attached), Sec. Bryant demanded that the Colonel honor the prior verbal agreement that the Corps would grant the state the expanded SPGP. Otherwise, Bryant threatened, the state would withhold cooperation on future water planning and environmental projects worth millions of dollars. In addition, Bryant demanded that Col. Anninos disregard any objections in public comments filed by individuals and that the Colonel “root...out” any Corps employees who may dissent.

In addition, Assistant Sec. Woodley was copied on this letter which implied that Mr. Woodley would reverse Col. Anninos unless he relented and went ahead with the SPGP modification.

Within a week of receiving the letter, Col. Anninos announced to both Corps and DEQ staff that he would go ahead with the SPGP modification. On April 2, 2007, Col. Anninos met with Mr. Woodley and gave him the assurance that he would do so.

During this period, Col. Anninos temporarily transferred Corps employees who had submitted public comments on the proposed SPGP modification as citizens. In addition, the employees were subjected to an Army 15-6 investigation to determine if ethical violations had occurred and, if so, whether disciplinary action against them was appropriate.

Discussion

A. Improper Pre-Decision

It appears from his March 19, 2007 letter that Sec. Bryant firmly believed an agreement had already been made with the Corps in November 2006 to expand SPGP authority to

DEQ. Assistant Sec. Woodley, who participated in the November 2006 meeting and was copied on Sec. Bryant's March 2007 letter, did not contradict this perception.

Consequently, the solicitation of public comments was merely window dressing for a decision that had already been made before the December notice for public comments was even published.

B. Improper Influence and Considerations

According to the governing regulations, the decision about the SPGP modification is supposed to be decided on whether the DEQ has a program demonstrated to be equivalent to that of Corps. Public comments point out that the DEQ lacks the ability to ensure compliance with permits or enforce violations, in part because its staff lack experience, equipment or vehicles required to monitor sites. Moreover, DEQ's thin staff lacks necessary training and suffers a high turnover rate due to job dissatisfaction.

Notwithstanding the relevance of these factors, they appear to have been ignored in subsequent deliberations. Instead, it was the threat of Sec. Bryant to withhold state cooperation in environmental and water supply planning programs that caused Col. Anninos to set aside whatever misgivings he had about the merits of the SPGP proposal.

The silence of Mr. Woodley in the face of threats issued by Sec. Bryant is notable. Mr. Woodley is himself a former Virginia Secretary of Natural Resources and is reportedly planning to return to that state. His actions imply that he supported the position of Sec. Bryant and would not back Col. Anninos if he decided to deny SPGP expansion.

As a consequence, the decision as to whether to grant SPGP expansion has been influenced, if not determined, by political factors outside the considerations specified in law and regulation. Moreover, apart from the strict interpretation of the regulations, the decision violates the spirit of the Clean Water Act whose purpose is to protect water quality – a goal that appears to have been treated, at best, as an afterthought in this instance.

C. Disregard of Public Comments

In his March 19, 2007 letter, Sec. Bryant states:

“To your credit, you have disqualified all individual [public] comments that have been submitted.”

The rationale for this assertion is that public comments submitted by Corps employees in their personal capacities somehow, in Bryant's words “at the very least, tainted the process and, at worst, marginally corrupted it.”

The point of public comments is to hear from the public. In this instance, the public comment process has been improperly set aside because one of the interested parties disagreed with the content of some comments or the manner in which they were submitted.

D. Violation of Whistleblower Law and Constitutional Free Speech Guarantees

Corps employees in the Norfolk District who submitted public comments on the Virginia SPGP proposal were subjected to a temporary change of duties, an ethics investigation and disciplinary action.

Under the Clean Water Act, all employees, including those of the Corps, are protected from retaliatory action in connection with disclosures that further the enforcement or implementation of the Act. In this instance, the public comments filed by Corps employees fall within that zone of activity specifically protected by the Clean Water Act in that the comments exposed matters that directly bear on the quality of protections for jurisdictional wetlands.

Hence, the actions taken against those employees appear to violate the whistleblower provisions of the Clean Water Act.

Moreover, when speaking as citizens, federal employees enjoy full First Amendment protections (see Garcetti v. Ceballos, 126 S. Ct. 1951 (2006)). In this instance, the Corps employees were clearly expressing themselves on a matter of public concern. By threatening and taking reprisals against these employees because of their personal expressions on a matter of public interest, their agency appears to be infringing upon their rights guaranteed by the First Amendment.

For the foregoing reasons, PEER believes that an investigation by your office is in order. Should you desire additional information in relation to any of these specifications, please do not hesitate to contact me.

Sincerely,

Jeff Ruch
Executive Director