

August 22, 2012

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

Re: Petition to Investigate Florida, Department of Environmental Protection Deputy Secretary Jeff Littlejohn's for Conflict of Interest 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) are hereby petitioning your agency under 40 C.F.R. § 123.64 to investigate the appointment of Jeff Littlejohn, P.E. who is currently serving as the Deputy Secretary for Regulatory Programs at the Florida, Department of Environmental Protection (FDEP). Mr. Littlejohn's previous employment, we believe, suggests that he has a direct conflict of interest that disqualifies him under the federal Clean Water Act (CWA). That conflict of interest, we maintain, violates the CWA, thus necessitating our petition under 40 C.F.R. § 123.64 and may require withdrawal of approval for the FDEP to administer the National Pollution Discharge Elimination System ("NPDES") in Florida.

The seriousness of Mr. Littlejohn's appointment to this position in March 2011 is compounded by the conflict of interest involving his immediate supervisor, FDEP Secretary Herschel T. Vinyard. You may recall that on February 23, 2011, we petitioned your agency to investigate similar violations of the CWA brought about by the appointment of Secretary Vinyard to head the FDEP. Secretary Vinyard, like Deputy Secretary Littlejohn has a conflict of interest in his current position by virtue of his immediate past employment. Although the EPA is investigating the circumstances of Secretary Vinyard's employment, to date no final decision has been rendered by Region 4.

Federal Law Governing The EPA's Evaluation Of This Petition

This petition is predicated upon Petitioners' allegation that the appointment of Jeff Littlejohn as Deputy Secretary for Regulatory Programs at 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:

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“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 states that a “[s]ignificant portion of income means 10 percent or more of gross personal income for a calendar year.”¹ In addition, 40 C.F.R. § 123.25(c) (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.” (Emphasis added)

The above provisions constitute a fundamental procedural safeguard 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 provision 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)); 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).

The EPA’s Office of General Counsel provided guidance to the State of Wisconsin on December 4, 1992, when then Principal Deputy General Counsel Gerald M. Yamada addressed that state’s concerns over whether or not the Clean Water Act and/or the Clean Air Act prevented the service of an agency head who had a conflict of interest due to previous income received from a

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.

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regulated entity. In his opinion letter to the state, Mr. Yamada wrote that with respect to the CWA:

“Based on these statutory and regulatory requirements, individuals with such conflicts of interest may not serve as members of boards or bodies (or directors) that approve permit applications or portions thereof. Most States implement this provision by ensuring that State water boards or bodies do not include individuals who receive, or have received in the previous two years, significant portions of their income from permit holders or permit applicants.”

EPA’s own guidance on this matter is quite clear that these types of conflicts of interests are not to be tolerated.

Furthermore, 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 the 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.

FDEP’s Administrative Hierarchy

In order to fully appreciate the problems brought about by Mr. Littlejohn’s prior employment it is necessary to understand the significance of his current position as Deputy Secretary for Regulatory Programs at the FDEP. As previously stated, Mr. Littlejohn currently reports directly to Secretary Vinyard. And under Florida law, Secretary Vinyard 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. 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 to other agencies of the State of Florida. 62-113, Fla. Stat.

Significantly, in Florida the Secretary has, by rule, delegated his authority to the Deputy Secretary (a/k/a Assistant Secretary), in this case, Jeff Littlejohn. Thus, Mr. Littlejohn’s authority is functionally equivalent to that of Secretary Vinyard whenever Secretary Vinyard is absent. Rule 62-113.200, F.A.C., states that:

“The Secretary, as head of the Department, has delegated authority as follows:

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(1) To the Assistant Secretary of the Department to act on behalf of the Secretary in all matters during the absence of the Secretary, including the signing of contracts, and in the absence of both the Secretary and Assistant Secretary to a designated Division Director to act in the Secretary's behalf *on all matters.*"

(Emphasis added) The practical application of this rule on a day to day basis is that it is the Deputy Secretary Littlejohn who has the authority to act on all CWA matters that come under the purview of the Secretary if the Secretary is unavailable for whatever reason.

Furthermore, if, as Petitioners maintain should happen, the EPA determines that Secretary Vinyard's conflict of interest disqualifies him from having input on CWA matters he would likely use Rule 62-113.200, F.A.C., in an attempt to delegate those responsibilities to Deputy Secretary Littlejohn—who shares a similar conflict of interest. Thus, it is imperative to consider and act upon Mr. Littlejohn's conflict of interest as it impacts CWA decision-making in Florida.

Deputy Secretary Littlejohn's Conflict of Interest

FDEP's website indicates that Mr. Littlejohn "joined DEP from Isiminger & Stubbs Engineering, Inc. where he served for more than 10 years as a professional engineer specializing in coastal, environmental and marine design and permitting. [He] is an active member of the engineering community, serving as a member of the Florida Engineering Society, a Florida Chamber Environmental Permitting Short Course instructor as well as a member of the National Society of Professional Engineers."²

Mr. Littlejohn's previous employment at Isiminger & Stubbs comes into sharper focus when looking at his LinkedIn profile, which reveals that his responsibilities for the firm were:

²See, <http://www.dep.state.fl.us/secretary/regulatory/default.htm>

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Principle Professional Engineer

Isiminger & Stubbs Engineering, Inc.

September 2000 – March 2011 (10 years 7 months)

Consulting Engineer, specializing in coastal, environmental, and marine design and permitting, including:

- Environmental Permit Applications and Processing
- Coastal Construction Permit Applications and Processing
- Sovereignty Submerged Land Consulting
- Hydrographic Analyses
- Bathymetry (Soundings)
- Design, Contract Document Preparation and Contract Administration for:
 - Piers and other Boat Facilities
 - Coastal Structures and Shoreline Protection
 - Dredging and Navigation Channels

See, <http://www.linkedin.com/pub/jeffrey-littlejohn-p-e/14/a49/405>

Mr. Littlejohn was not simply an employee of Isiminger & Stubbs. A check of annual reports filed by the firm with Florida's Secretary of State, Division of Corporations shows that Littlejohn was a Regional Vice President with the firm during 2008,³ 2009,⁴ and 2010.⁵ The 2011 annual report, which was filed after Littlejohn was named Deputy Secretary at FDEP, no longer shows him as an officer of the company.⁶

So far Mr. Littlejohn has already shown that he values the regulated community more than he respects Florida's laws. In one of many articles on the subject, the *Tampa Bay Times* reported⁷ that Mr. Littlejohn ordered one of the FDEP's top wetlands experts to disregard existing regulations and issue a permit to a Highlands Ranch Mitigation Bank, a company well-known to him. Littlejohn's position was premised upon a memo that the attorney for Highlands Ranch had written for him that sought to change the FDEP's policy. When the FDEP expert refused to issue the permit she was suspended, but then later reinstated to her position.

Littlejohn's knowledge of lobbying and its uses apparently comes not just from his prior job. According to the *Broward-Palm Beach NewTimes*, Mr. Littlejohn's parents are lobbyists for

³ <http://ccfcorp.dos.state.fl.us/pdf/922202D3.pdf>

⁴ <http://ccfcorp.dos.state.fl.us/pdf/80964888.pdf>

⁵ <http://ccfcorp.dos.state.fl.us/pdf/70970472.pdf>

⁶ <http://ccfcorp.dos.state.fl.us/pdf/01652103.pdf>

⁷ See, *Wetlands expert suspended by DEP after she refuses to approve permit*, <http://www.tampabay.com/news/environment/wetlands/article1232352.ece>

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developers, the Florida Land Council, the Florida Ports Council and the Florida Farm Bureau Federation.⁸ A search of the registered lobbyists with the Florida Legislature in 2011 confirms this to be the case⁹ and the same is true for 2012.¹⁰ Mr. Vinyard, who himself was the former chairman of the Shipbuilders Council of America, has thus appointed as his Deputy someone whose parents have strong ties to the Florida Ports Council. Needless to say, the decisions made by these two men will be watched very closely by people and companies with whom they and their families are closely aligned.

One issue that has immediately risen to the forefront is the potential re-opening of a deepwater port in the small Florida Panhandle town of Port St. Joe. Re-opening this port could have significant environmental impacts for a number of reasons, not the least of which is the presence of dioxins at the site due to previous discharges by a pulp & paper mill at the site. (The previous owner of the mill and one of the largest private landowners in Florida owns substantial acreage in close proximity to the proposed port and would thus also benefit from its reopening.) On information and belief, Chuck Littlejohn, Mr. Littlejohn's father and lobbyist for the Florida Ports Council, has provided services to the Port St. Joe Port Authority. Thus, the efforts to reopen this port now have powerful friends including Mr. Vinyard, who spoke at a Port Authority meeting on April 12, 2012, as well as the father of Mr. Vinyard's Deputy Secretary at the FDEP.

Based upon the above it is highly likely that over the last two years Mr. Littlejohn has received more than 10 percent of his income directly or indirectly from clients that are either permit holders or applicants. Accordingly, U.S.C. § 1314(i)(2)(D) bars him from sitting as FDEP Deputy Secretary if the FDEP is to continue to administer the federal NPDES Program.

Petitioners respectfully submit that more than sufficient evidence already exists to justify an investigation by EPA to determine whether Mr. Littlejohn's appointment as Deputy 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.

The Petitioners

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.

⁸ http://blogs.browardpalmbeach.com/pulp/2012/07/dep_deputy_secretary_jeff_litt.php

⁹ http://www.leg.state.fl.us/data/lobbyist/Reports/Lobbyist_LEG_2011.pdf

¹⁰ http://www.leg.state.fl.us/data/lobbyist/Reports/Lobbyist_LEG_2012.pdf

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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 citizen's 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.

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
Herschel T. Vinyard, Secretary, FDEP
Gwendolyn Keyes Fleming, Regional Administrator, EPA Region 4
Mary J. Wilkes, Regional Counsel and Director, Environmental Accountability Division,
EPA Region 4
James D. Giattina, Director, Water Protection Division, EPA Region 4