

June 26, 2003

Glenn A. Fine  
US Department of Justice  
Office of the Inspector General

Nikki L. Tinsley  
US Environmental Protection Agency  
Office of the Inspector General

VIA FACSIMILE & FIRST CLASS MAIL

Dear Inspectors General:

I write to express my concern about the behavior of Department of Justice (DOJ) and Environmental Protection Agency (EPA) employees that has come to my attention through Ms. Janet MacGillivray, Senior Environmental Attorney at Riverkeeper, Inc. According to Ms. MacGillivray, Department of Justice Senior Counsel William A. Weinischke apparently pressured her not to testify in federal court regarding a controversial federal government agreement with Monsanto to address the company's decades of widespread, carcinogenic PCB pollution of Anniston, Alabama – now one of the most polluted places on earth.

I am writing to both of you to request a joint investigation into this matter because there are growing questions about the possibly related, coordinated behavior of staff at both your respective cabinet departments pertaining to the cleanup agreement, known as the Anniston "consent decree." These allegations are troubling because of the Administration's failure to reinstate funding for Superfund. It appears that this behavior reflects a larger effort to undermine our nation's toxic cleanup program and the basic principle that polluters, not taxpayers, should pay the costs to make our neighborhoods environmentally safe again.

Ms. MacGillivray informs me that on Friday, January 17, 2003, Mr. Weinischke made repeated attempts to reach her to dissuade her from testifying at a federal hearing regarding final approval of the Anniston Consent Decree. The hearing was held on Tuesday, January 21, 2003. Mr. Weinischke pressured Ms. MacGillivray just days before she left New York to testify in federal court in Alabama. She is a Senior Attorney at the non-profit environmental organization Riverkeeper, which has been actively working for a cleanup of the PCB pollution of the Hudson River. Ms. MacGillivray returned none of Mr. Weinischke's calls because of her concerns about their inappropriateness, but he was able to reach her when she answered her home office phone. In her view, Mr. Weinischke made veiled threats about Ms. MacGillivray's job security, even going to the extent of calling a colleague of hers and pressuring Ms. MacGillivray to call her colleague to learn why she should not testify. These calls and attempts to dissuade Ms. MacGillivray from testifying appear to be highly inappropriate, unethical contacts on Mr. Weinischke's part. See Rule 3.4(f) of the Model Code of Professional Responsibility (stating that "a lawyer shall not advise a person not a client to refrain from voluntarily giving information to another party"); ABA Formal Ethics Opinion 93-378 (Nov. 8, 1993) (declaring that it is improper to make ex parte contact with an expert witness if there is a proceeding before a federal court); Alabama Formal Ethics Opinion 01-02 (stating that "obviously an attorney may not coerce or intimidate an opposing expert or in any way attempt to change or influence an expert's testimony" and holding that where a matter is before a federal court it is unethical to have ex parte contact with an

expert witness); see also Oregon State Bar Formal Ethics Opinion Number 1992-132 (Sept. 1992) (stating that “in sum, it is unethical for a lawyer to attempt to persuade a fact witness or expert witness by the opposing side not to testify”); Utah State Bar Ethics Advisory Opinion Committee No. 99-03 (stating that “it would be improper for an attorney to attempt to persuade a witness not to testify”). (Attached as Exhibit 1).

However, just as troubling are seemingly related phone and e-mail contact by EPA headquarters staff to former colleagues of Ms. MacGillivray’s at her old employer, the US EPA Region II Office, seeking information on her job performance at EPA in an apparent attempt to gain compromising information about her. (See Statement of Ms. Janet MacGillivray, attached as Exhibit 2).

It should be noted that one of the reasons that Ms. MacGillivray had been called to testify was that she had been told on April 8, 2002 by EPA Assistant Administrator of the Office of Solid Waste and Emergency Response, Marianne Horinko, that the reason the Anniston site was not listed on the National Priorities list (NPL) as part of the pollution agreement was because “the PRP [Monsanto] didn’t want it.” (See transcript of the Anniston court proceeding, attached as Exhibit 3).

The issue of what was done or not done for Monsanto in this cleanup agreement is highly relevant because of recently surfaced documents that undercut the repeated assertions by Administrator Whitman that the cleanup agreement was decided by regional, career staff. The documents we obtained (See documents and resulting news clips at <http://www.ewg.org/reports/whitman/summary.php>) indicate that a key, lucrative, and pro-Monsanto change in the cleanup agreement was made just days (3/13/02) after an “inter-agency” meeting called by Administrator Whitman (3/6/02). An internal US EPA memo notes that among the meeting attendees is an anonymous DOJ representative. We assume that Senior Counsel, Weinischke was also in the Whitman meeting that directly preceded the pro-Monsanto consent decree change . (Attached as Exhibit 4).

If true, this behavior by staff at both agencies is highly inappropriate and also merits investigation because it raises serious, troubling questions as to the ethics and legality of these actions.

When we attempted last week to ask questions about Administrator Whitman’s involvement in the cleanup agreement’s provisions after 15 months of evasive responses to our Freedom of Information Act requests, EPA headquarters staff deferred comment to EPA Region IV staff. Despite the unresolved questions about Monsanto’s contacts with Administrator Whitman and her staff in brokering the Consent Decree – even after a Congressional inquiry – Administrator Whitman awarded Mr. Weinischke and the entire Region IV Anniston PCB team the prestigious “Gold Medal” award for outstanding service in the spring of 2003. (Attached as Exhibit 5).

The people of Anniston, and the public at large, need answers to the fundamental question of who was acting on Monsanto’s behalf in this high-stakes situation, and whether or not it was appropriate service to taxpayers. This behavior provides a chilling example of Bush Administration’s seemingly coordinated effort to undermine the enforcement provisions of Superfund, our nation’s toxic cleanup program.

Sincerely,

Heather White  
General Counsel  
Environmental Working Group

CC: Senator Barbara Mikulski  
Senator Richard Shelby  
Senator Barbara Boxer  
Mr. David Baker, Community Against Pollution