



U.S. OFFICE OF SPECIAL COUNSEL

1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

December 6, 2000

The Special Counsel

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-00-0792

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable William S. Cohen, Secretary, Department of Defense (DOD), which he has provided to the U.S. Office of Special Counsel (OSC) in accordance with 5 U.S.C. § 1213(c)-(d). Secretary Cohen provided the report in response to OSC's finding (pursuant to 5 U.S.C. § 1213(b)) that there existed a substantial likelihood that information which Dr. Donald Sweeney communicated to OSC evidenced violations of law, rule, or regulation and a gross waste of funds by officials of the U.S. Army Corps of Engineers (Corps).

The DOD report was prepared by the Office of Inspector General, Department of the Army, which investigated Dr. Sweeney's disclosures at Secretary Cohen's request. Dr. Sweeney's comments on the agency report (submitted to this office pursuant to 5 U.S.C. § 1213(e)(1)) are also enclosed.

Pursuant to 5 U.S.C. § 1213(e)(2), we have carefully re-examined Dr. Sweeney's original disclosures and reviewed the agency's response as well as Dr. Sweeney's comments. As described below, I have determined that DOD's findings substantiating the essence of Dr. Sweeney's disclosure—that Corps officials exerted improper influence and manipulated a cost benefit analysis, in order to justify an expensive navigation improvement project—appear reasonable within the meaning of section 1213(e)(2). Indeed, DOD's investigation went beyond Dr. Sweeney's specific allegations to examine broader institutional concerns regarding the Corps' decisionmaking.

On the other hand, I find that notwithstanding the statutory requirement that DOD conduct an examination concerning all of the matters transmitted (5 U.S.C. § 1213(c)(1)(A)), DOD has apparently not yet conducted a thorough analysis of some of Dr. Sweeney's subsidiary allegations regarding the conduct of the cost-benefit analysis. I also find that, while the report identified a number of major areas of concern regarding the Corps' decision-making in this matter and generally, DOD has not provided a description of the corrective action that the Secretary intends to take, as required by section 1213(d). Pursuant to 5 U.S.C. § 1213(e)(3), I respectfully recommend that these matters receive appropriate follow-up by the Executive Branch and relevant Congressional oversight committees.

A. Background: Dr. Sweeney's Disclosures and OSC's Referral for Investigation

This matter arises out of information provided to the Office of Special Counsel pursuant to 5 U.S.C. § 1213(a) by Dr. Donald Sweeney, Senior Regional Economist, Department of the Army, U.S. Corps of Engineers, Saint Louis District, Saint Louis, Missouri. By letter of February 24, 2000, I notified Secretary Cohen of my conclusion, based upon that information, that there existed a substantial likelihood that Corps officials had unlawfully manipulated a cost-benefit analysis concerning the feasibility of wide-scale improvements to the navigation system on the Upper Mississippi River (UMR) and the Illinois Waterway (IWW).¹

The purpose of the feasibility study at issue was to determine the most effective means of relieving congestion on the UMR-IWW. Dr. Sweeney alleged that the manipulation of the feasibility study resulted in a proposal for unnecessary and extremely expensive improvements, estimated to cost between 750 million and 1.1 billion dollars.

The large-scale construction at issue in the feasibility study would primarily entail extending between five and seven locks on the waterway. Dr. Sweeney, the former technical manager of the economics work group assigned to the project, maintained that until his removal from the feasibility study, the consensus of the work group was that the cost of such a large-scale construction project far outweighed the benefits.

In a lengthy and detailed affidavit, Dr. Sweeney provided information to OSC indicating that top Corps officials improperly influenced changes in several parameters in the economic analysis portion of the feasibility study in order to alter the computation of resulting "costs" and "benefits." Dr. Sweeney further alleged that, as a result of the manipulation of these parameters, the economic analysis ultimately presented to the public inaccurately indicated that the benefits of the wide-scale improvements would outweigh the costs. This "positive" cost-benefit analysis, Dr. Sweeney alleged, would have influenced the development of the waterway project; a project he maintains would result in a gross waste of funds.

Dr. Sweeney also alleged that by manipulating several key parameters pertaining to the required cost-benefit analysis, Corps officials violated applicable laws, rules, and regulations.² For example, the Water Resources Development Act of 1996 (WRDA),³

¹ The cost benefit analysis is referred to as both the feasibility study and the study throughout this document.

² Water Resources Development Act of 1996, 33 U.S.C. §§ 2281, 2282. Army Corps of Engineers Planning Regulations, ER 1105-2-100. Guidelines for Water and Related Land Resources Implementation Studies (March 10, 1983), statutorily authorized by the Water Resources Planning Act, 42 U.S.C. § 1962a-2.

³ 33 U.S.C. § 2282

directs that the feasibility report shall describe "with reasonable certainty" the economic, environmental and social benefits and detriments of the recommended plan, as well as, alternative plans. Implicit in such a requirement is that any analysis or description of the costs and benefits be legitimate. Dr. Sweeney has alleged that Corps officials have so altered the parameters that the "new" analysis lacks economic validity.

As described in OSC's February 24th transmittal letter, the parameters that Dr. Sweeney alleged Corps officials had improperly influenced included: 1) the "N-value" (a variable that measures the willingness of consumers to pay for more efficient barge transportation); 2) "rehabilitation cost savings" (the benefits that accrue from the construction of large scale lock extensions, which avoid the need for rehabilitation or replacement of existing lock components); 3) "industry self-help" (the extent to which the shipping industry itself can use the assistance of other tows waiting for lockage to reduce the time it takes towing vessels to go through a lock); and 4) the estimated cost of the proposed project to extend the locks. A summary of Dr. Sweeney's allegations follows.

1. Dr. Sweeney's Allegations Regarding Unlawful Manipulation of the "N-Value"

In the affidavit he submitted to OSC, Dr. Sweeney explained that the ultimate objective of the economic development analysis is to estimate the willingness of consumers to pay for the economic value of reducing barge congestion. This willingness depends in large part on the alternatives available to barge transportation. The "N-value" represents the elasticity of demand; in other words, it accounts for the alternatives to barge transportation. The higher the value of N (the greater number of alternatives to barge transportation) the lower the benefits of the costly lock extensions.

Dr. Sweeney's group estimated that the N-value for grain and other raw agricultural products equaled 2.0, while all other commodities were given an N-value of 1.0. Dr. Sweeney recognized that there was some legitimate uncertainty regarding the appropriate values of N. Dr. Sweeney stated, however, that even much lower N-values led to the same economic conclusion.

According to Dr. Sweeney, the economic model his group employed was subject to repeated independent technical reviews both within and outside of the Corps and was affirmed by each review. Additionally, the Corps contracted with Dr. Mark Burton, an outside expert in the field of transportation economics, to examine the methodology utilized by Dr. Sweeney's system economic model. Dr. Burton supported the overall economic model, and stated "Moreover, in the absence of any theoretical or empirical evidence that suggests otherwise, it is impossible to reasonably advocate an exponent value [N-value] other than 2."

Dr. Sweeney advised OSC that in June of 1998, the Corps created a new economics panel, and disbanded Dr. Sweeney's group, which had worked on the project since March

of 1993. Although Dr. Sweeney, as well as the new economics panel, had expressed interest in further assessment of the N-value, the panel decided, without further research, on a compromise value of 1.5 for all raw agricultural products. Non-agricultural products remained at the original 1.0 value. Significantly, the analysis still showed that extending the locks was not justified for at least the next fifty-years.

Dr. Sweeney alleged that during this time period he and the economics panel were being pressured by Corps officials to alter their analysis and find the large-scale improvements justified. In particular, Colonel James V. Mudd sent an e-mail on October 2, 1998, regarding his stated position that the Corps should serve as an "advocate" for the inland waterway system. In that e-mail Col. Mudd instructed, "To help in the execution of this responsibility, you will develop the economic component of the case for a recommendation that includes near term improvements, recognizing that the nation is better served by improvements that err on the large scale side than by actions that err on the underdeveloped side."

Dr. Sweeney stated that on May 27, 1999, Col. Mudd instructed Mr. Richard Manguno, an economist who was a member of the new economics panel, to use an N-value of 1.2 for grain. In a later phone conversation with Col. Mudd and Mr. Manguno, among others, Dr. Sweeney explained that Col. Mudd's rationale for arriving at 1.2 was mathematically flawed. The 1.2 N-value was utilized in the most recent benefit-cost analysis, over Dr. Sweeney's objections.

2. Dr. Sweeney's Allegations Regarding Alteration of Rehabilitation Cost Savings Parameter

Dr. Sweeney defined "rehabilitation cost savings" as those benefits that accrue from the potential construction of large-scale extensions to the locks, which avoid the need to rehabilitate or replace existing components of the locks. If rehabilitation cost savings exist, they are considered a benefit, because the resources that would have been spent on rehabilitation are freed up for other uses.

According to Dr. Sweeney, after a detailed analysis, Mr. Jeff McGrath, an economist in the St. Paul District, concluded that no rehabilitation costs for the seventeen major components in the existing lock would be necessary for 35 to 40 years. Dr. Sweeney explained that under the principles of the economic model, the present value of rehabilitation costs so far in the future would be insignificant. Dr. Sweeney indicated that this analysis underwent an extensive technical review, which concluded that the analysis was sound.

According to Dr. Sweeney, in May of 1999, several weeks after management directed that a "reanalysis" of the rehabilitation costs be completed, a document entitled "Major-Rehabilitation Cost Avoidance Associated with Lock Extensions," was released to the public. Dr. Sweeney alleged that—without considering the prior engineering and

economic analysis and, without any apparent reanalysis—management concluded that significant rehabilitation costs existed.

Dr. Sweeney contends that the stated rationale for this new conclusion is flawed because management summarily, and without any further engineering or economic analysis, changed a factor that was previously studied, and agreed upon, both by economic groups and the outside technical review group. The economists and engineers in the project groups, as well as Corps officials who attended the periodic economic summits, had agreed that no major rehabilitation would be needed on the current locks for 30-35 years. This conclusion was completely ignored in the new economic assessment.

The document containing the new conclusion asserted that, contrary to earlier conclusions, major rehabilitation would be required in less than 18 years. This changed conclusion was important because the sooner rehabilitation is required for the current lock system, the greater the rehabilitation costs, thus, the more likely expensive lock extensions will appear economically feasible. In fact, Dr. Sweeney alleges that this number is critical because in recent analysis released by the Corps the “net positive economic benefit” for extending the locks, is almost entirely dependent on the existence of rehabilitation cost savings.⁴

3. Dr. Sweeney’s Allegations Concerning Change in Industry Self-Help Variable

One way towing vessels can reduce the time it takes to go through a lock is to receive help from other tows also waiting for lockage. This practice, explained Dr. Sweeney, is called “industry self-help.” Dr. Sweeney’s economic model computed that industry self-help could reduce transit time by roughly 20 minutes. The economic analysis further indicated that self-help alone would fully address the future transportation needs of the system.

The second economics group slightly reduced the estimated timesavings, yet still arrived at an average decreased transit time of 20 minutes, with slightly higher costs. According to Dr. Sweeney, the reduced transit time dramatically lessens the estimated economic benefit of constructing extended locks.

In a January 14-15, 1999, Navigation Study Team meeting, Corps officials told Mr. Manguno to restrict the model to assume that industry self-help can be used a maximum of 5 percent of the time, in contrast to the 50 percent use predicted by the

⁴ At a November 18, 1999, presentation of the cost benefit analysis of extending five locks, 7.122 million dollars of the net positive economic benefit, totaling 8.686 million dollars per year, were rehabilitation cost savings.

model.⁵ The primary rationale given for this change is that the self-help requirements will not be provided as a federal action. According to Dr. Sweeney, this is a completely arbitrary restriction on the use of self-help.

4. Dr. Sweeney's Contentions Regarding Reduction in Cost Estimates for Extended Locks

Dr. Sweeney emphasized that in any cost-benefit analysis, the estimated cost of a project plays a critical role. During the course of his leadership of the project, the work group developed an innovative construction technique that consisted of extending the current locks using primarily prefabricated construction. This technique lowered the costs for the project from approximately 2 billion dollars to 1 billion dollars for five locks. Included in the cost estimate is a "contingency" factor for potential cost overruns. Although the typical Corps project contingency factor was 25 percent, the cost factor was increased for the lock extension project to 35 percent because the lower construction cost estimates relied on novel construction techniques. Both economic work groups and the independent technical review validated this estimate.

Dr. Sweeney stated that in May of 1999, several weeks after management called for a "reanalysis" of the costs, Mr. Gary Ross, then the project manager, reduced the contingency costs from 35 percent to 25 percent. He did so, according to Dr. Sweeney, without any documentation on what, if any, analysis was performed to arrive at the new cost figure. Dr. Sweeney indicated that if there was a "reanalysis" performed, it was not subject to an "Independent Technical Review," as required by Corps regulations.

* * * * *

In sum, Dr. Sweeney maintained that if any of the directed changes to the above-listed parameters had not been made, expansion of the locks would not have resulted in a positive cost-benefit analysis for the foreseeable future. On the basis of Dr. Sweeney's detailed affidavit, I concluded that he had demonstrated a substantial likelihood that Corps officials had violated laws, rules, and regulations, and that a gross waste of funds would occur as a result of these violations. Accordingly, pursuant to my statutory authority (5 U.S.C. § 1213(c)(2)), I transmitted his allegations to Secretary Cohen for an investigation and report.

B. Summary of Findings and Recommendations in Agency's Report

In accordance with 5 U.S.C. § 1213, Secretary Cohen directed the Department of Army Office of the Inspector General (DAIG) to conduct an investigation into

⁵ Although there were environmental concerns raised with respect to the self-help option at the meeting, Dr. Sweeney maintained that providing mooring buoys would still preserve self-help as a cost-effective option to extended locks.

Dr. Sweeney's allegations. That investigation revealed evidence of serious misconduct and improprieties in connection with the feasibility study conducted concerning the UMR-IWW project. It also suggested the existence of institutional biases that led to the misconduct in relation to the UMR-IWW feasibility study, and that may affect Corps decisionmaking in other projects.

1. The DAIG confirmed Dr. Sweeney's allegation that Corps officials manipulated the economic analyses of the feasibility study in order to steer the study to a specific outcome. Further, the report found that Major General Fuhrman, former Director of Civil Works, and Major General Anderson, Mississippi Valley Division Commander, created a climate within the Corps that led to the manipulation of the cost-benefit analysis. The report also found that Col. Mudd, District Engineer, directed a specific value for a key parameter (the N-value) when he knew it was mathematically flawed and contrary to the recommendations of Corps economists.

The report found that Col. Mudd's actions were designed to produce a favored outcome, that is, large-scale construction. In addition, the report found that Maj. Gen. Anderson improperly gave preferential treatment to the barge industry, potentially the direct beneficiaries of a decision to implement large-scale construction.

2. The report also concluded that an institutional bias for large-scale construction projects may exist throughout the Corps. With respect to the feasibility study, the report found that this institutional bias created an atmosphere where objectivity in its analyses was placed in jeopardy. The report identified three primary factors potentially responsible for the bias.

The first factor the DAIG identified was Maj. Gen. Fuhrman's guidance concerning the Corps' role as "advocate" for the inland waterways. The report found that the dissemination of this guidance constituted a pivotal event in the study, in that "[i]t provided the impetus for manipulation of the study results." Witnesses expressed concern that the advocacy role was a departure from the Corps' responsibility to be an honest broker in the study process.

The second factor the DAIG identified was the Corps' "Grow the Program" initiative. The report found that this factor had a less well defined impact on the study. The report stated, however, that the initiative had potential to affect future studies. According to the report, compelling evidence indicated that a key element of the program was encouragement of grass roots lobbying for projects.

The third factor the DAIG identified was the Corps' reliance on external funding. According to the report, the external funding created a conflict with the Corps' "honest broker" role. The Districts are dependent upon project funding to maintain their staffs. The continued vitality of the Districts was dependent on producing study results that favored construction projects. Although senior Corps officials believed that the

professionalism of its employees was sufficient to overcome the conflict, the report found that use of the "advocacy guidance" and customer service model offered strong indications to the contrary.

In fact, the report observed that there was a widespread perception of bias among the Corps employees interviewed. This bias related to the view that the Corps held an inherent preference for large-scale construction projects. In conclusion, the report stated that the overall impression conveyed by testimony of Corps employees was that "some of them had no confidence in the integrity of the Corps' study processes."

3. Pursuant to 5 U.S.C. § 1213(d)(5), agency reports are required to specify the actions the agency intends to take as a result of the investigation into a whistleblower's allegations. These actions can include, among other things, changes in agency rules, regulations or practices and disciplinary action against individuals who engaged in misconduct. 5 U.S.C. § 1213(d)(5).

DOD has not advised us of any specific corrective action that will be taken in response to its findings. Instead, Secretary Cohen's cover letter states that the report of investigation and executive summary will be forwarded to the Secretary of the Army for consideration of any necessary changes in Army rules, regulations or practices concerning the Corp's conduct of its studies, and for appropriate action with respect to the "three military officers as to whom allegations were substantiated."

4. The DAIG report observes that the scope of the investigation did not include an assessment of the validity of the underlying economic analysis Dr. Sweeney's group undertook, and in particular, the four parameters at issue. The National Academy of Sciences (NAS) has been asked to evaluate the analytic accuracy of the study.

The DOD provided a supplement to its report, dated November 17, 2000, in which it indicates that NAS has asked the Department of Army for an extension of time to complete its analysis. Originally, NAS was to complete the report by November 30, 2000. The supplement states that "Army has not yet acted on this request."

The supplement also indicates that, to date, the Corps has not initiated construction activities on the Upper Mississippi River and Illinois waterways. A second supplement, forwarded by DOD on December 1, 2000, included a memorandum from the Office of the Assistant Secretary for Civil Works, Department of Army, stating the following with respect to the issue of construction on the waterways at issue:

Finally, we agree that it would be imprudent to implement any changes at this time that relate directly to the allegations made this past spring concerning the Upper Mississippi/Illinois Waterway Project. We share your view that the Army should await the findings of the Army Inspector General investigation

and the final outcome of the National Academy of Sciences study that you commissioned, before determining whether there is a need to take any further action with respect to the project study.

C. Special Counsel's Review and Comments on Agency Report

Pursuant to 5 U.S.C. § 1213(e)(2), upon receipt of any report of an agency head required under subsection (c), I am directed to review the report and determine whether the findings of the agency head "appear reasonable" and whether the report contains the information required under subsection (d) of section 1213. It is my conclusion that, while the agency's findings on the central matter transmitted appear to be reasonable, the DOD report does not meet statutory requirements in several respects.

The report, as described above, substantiated Dr. Sweeney's essential allegation: that the feasibility study was unlawfully manipulated. In particular, DAIG carefully investigated the circumstances under which the crucial "N value" was altered, without adequate justification, for purposes of ensuring a result that would permit the construction of the lock expansion project. Further, DAIG expanded the investigation beyond Dr. Sweeney's more narrowly defined allegations to search for the reason why the process was vulnerable to manipulation and to expose the existence of an institutional bias favoring large-scale construction. The findings with respect to these issues are well-documented and appear reasonable. Indeed, the DAIG went beyond the specific matters OSC referred for investigation in its efforts to identify matters of broader concern at the Corps.

In several respects, however, DOD's submission to OSC does not comply with statutory requirements. In particular, DOD has not provided the information required by section 1213(d)(5): a description of any action taken or planned as a result of the investigation including, among other things, changes in agency rules, regulations or practices, or disciplinary actions to be taken against any Corps officials or employees. Instead, Secretary Cohen's letter indicates that the DAIG report is being referred to the Secretary of the Army for him to consider necessary changes in Corps rules and practices, as well as disciplinary action against the military officers involved in this matter. Under the statute, such information was required to be provided by DOD in its response to OSC.⁶

Similarly, section 1213(d)(4), requires that the report list violations or apparent violations of any law, rule, or regulation. The OSC transmittal to the Secretary included Dr. Sweeney's allegations that the Corps failed to follow appropriate regulations governing the conduct of feasibility studies. The DAIG report cited to specific violations of the regulations setting forth general standards of conduct. It did not, however, identify violations of the regulations governing the conduct of feasibility studies, notwithstanding

⁶ Under the statute, DOD's report was due back to OSC within 60 days of its transmittal. In this case, OSC granted DOD four extensions of time, totaling 239 days.

that it received testimony from numerous employees at all levels that the conduct of the study was not consistent with those regulations.

In addition, the DAIG report does not appear to comprehensively address all of the specific allegations transmitted. As outlined above, my February 24, 2000, transmittal to the Secretary included allegations that Corps officials manipulated four parameters of the feasibility study. The report addressed in detail and substantiated the manipulation of one parameter: the N-value. The report's findings with respect to the three other parameters, however, do not appear to address the documentary evidence Dr. Sweeney has identified, and also seem based upon limited testimonial evidence.

DOD has indicated that the pending National Academy of Sciences study will address the validity of the other parameters. The NAS recently requested an extension of time from the Army—to three months after November 30, 2000—to complete its analysis. The statute, however, requires DOD to address these allegations in its report. Given the amount of time that has already elapsed, I have concluded that it would not be appropriate to grant DOD another extension of time to await the submission of the NAS study.

Finally, I have concluded that the report's conclusions regarding the basis for Dr. Sweeney's reassignment from the Economics Panel do not appear reasonable. The report concludes that Dr. Sweeney's removal from that post was likely due to concern over his timeliness in completing work. While that reason was proffered by Corps officials, the evidence set forth in the report suggests that the reason proffered may be pretextual, and that further investigation would be warranted in order to draw any reliable conclusion.

Thus, the testimonial evidence indicates that the majority of the employees interviewed believed that Dr. Sweeney was removed because of the unwelcome results of his feasibility study which found that large-scale construction was not warranted. Moreover, the timing of the reassignment is highly suspicious. Dr. Sweeney's study team, which had been working for more than five years on the matter, was approximately ninety days from presenting the results of the study to the public when he was removed from the panel. After his removal, the study results were altered. Further, with the exception of Mr. Rhodes, the vast majority of the testimony presented in the report indicates that the economics study team was not behind schedule for producing any particular product.

Because the report fails to adequately address the significance of this evidence, and appears to be based upon an incomplete investigation, I conclude that its findings regarding the reasons for Dr. Sweeney's removal from the panel do not appear reasonable. I recommend that DOD consider re-examining this issue. Alternatively, if Dr. Sweeney desires, OSC can conduct its own inquiry pursuant to its authority to investigate allegations of prohibited personnel practices: 5 U.S.C. § 1212(a)(2).

D. Dr. Sweeney's Comments

Pursuant to 5 U.S.C. § 1213(e)(1), I provided a copy of the agency's report to Dr. Sweeney for his comments. In his comments, Dr. Sweeney praised several of the report's conclusions. First, he commented that the report confirmed the "heart" of his disclosure, in other words, that the feasibility study was manipulated. Second, he concurred with the report's conclusion that there exists an institutional bias within the agency in favor of large structural projects. Dr. Sweeney stated that he believed the findings concerning the underpinning of the institutional bias to be thoughtful and the findings suggest critical underlying problems in Corps structure and culture. In general, Dr. Sweeney found the report to be thorough and the findings to be appropriate and consistent with his personal experience.

Dr. Sweeney also identified some of the same shortcomings in the report that we set forth above. For instance, he noted the failure of the report to specify appropriate action planned by the agency to rectify the wrongdoing substantiated by the report. In addition, Dr. Sweeney outlined a plan to address the need for decisive action in several areas. He believes making these changes will improve the Corps' future management of projects.

Dr. Sweeney also questioned how the report could conclude that the three parameters, other than the N-value, were not manipulated when DAIG failed to conduct a documentary investigation into the matter. Dr. Sweeney presented further documentation to support his allegations that all of the parameters, not just the N-value, were subject to manipulation by Corps officials. In addition, Dr. Sweeney asserted that the report's conclusion that he was replaced as leader of the feasibility study work group because of concern about delays in his work product, was unreasonable given the evidence to the contrary presented in the report.

Finally, in his comments, Dr. Sweeney refers to disclosures which were made by various environmental groups in March of 2000, after OSC's transmittal in this matter. Dr. Sweeney observes that the groups disclosed that the Corps had committed to spend almost 3 million dollars of "Preliminary Engineering and Design" (PED) money to the project, notwithstanding that a final report on the project had not been completed. In his comments, Dr. Sweeney alleges that these commitments of funds violated the WRDA.

The provisions of section 517(6) of the WRDA of 1999 state, "[t]he Secretary shall expedite completion of the reports for the following projects and, if justified, proceed directly to project construction, engineering and design of ... the extension of locks..." Dr. Sweeney notes that the DAIG report found that because the final report, including the feasibility study, had not been completed, it was questionable how the "if justified" stipulation in the Act could have been satisfied. DAIG suggested that this issue should be addressed by the Army Office of General Counsel.

Dr. Sweeney states that DOD should have included in its report to the Special Counsel, findings regarding the lawfulness of the PED expenditures. I have concluded, however, that while the legal issue to which Dr. Sweeney refers is a significant one, it is beyond the scope of our original February 2000 referral. Hence, DOD was not required by the statute to report to OSC on this matter.

Conclusion

As required by section 1213(e)(3), I have sent a copy of the DOD report and the whistleblower's comments to the Chairmen of the House and Senate Armed Services Committees. We have also filed a copy of the report in our public file and closed the matter.

Respectfully,



Elaine Kaplan

Enclosures