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DATE: October 2, 2000
CASE No. 1999-CAA-5

PAUL JAYKO,
Complainant,

v.

OHIO ENVIRONMENTAL
PROTECTION AGENCY,
Respondent.

Appearances:
E. Dennis Muchnicki, Esq.
Dublin, Ohio
and
Michael D. Kohn, Esq.
Washington, D.C.
For the Complainant

Jack W. Decker, Esq.
Richard N. Coglianese, Esq.
Columbus, Ohio
For the Respondent

Before: THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED DECISION AND ORDER
AND PRELIMINARY ORDER

These proceedings arise under the employee protection provisions of the Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851; the Clean Air Act ["CAA"], 42 U.S.C. Section 7622 (a); the Solid Waste Disposal Act ["SWDA"], 42 U.S.C. Section 6971; the Toxic Substances Control Act ["TSCA"], 15 U.S.C. Section 2622; the Federal Water Pollution Prevention and Control Act ["FWPCA"], 33 U.S.C. Section 1367; the Safe Drinking Water Act, ["SDWA"], or Public Health Service Act ["PHSA"], 42 U.S.C. Section 300j-9; and the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. Section 9610; implementing regulations appear at 29 C.F.R. Part 24.1. Such provisions protect employees from discrimination for attempting to carry out the purposes of the environmental statutes of which they are a part, and specifically for preventing employees from being

retaliated against with regard to the terms and conditions of their employment for filing "whistleblower" complaints or for taking other action relating to the fulfillment of environmental health and safety or other requirements of these statutes.

A hearing in these consolidated cases was held from June 21-25, 1999 and July 26-30, 1999. The parties were represented by counsel and were given an opportunity to present evidence and arguments.

STATEMENT OF THE CASE:

On July 28, 1998, Mr. Jayko filed a complaint of discrimination under Section 322 of the Clean Air Act; Section 1450 of the Safe Drinking Water Act; and 507 of the Federal Water Pollution Control Act; Section 7001 of the Solid Waste Disposal Act; Section 110 of the Comprehensive Environmental Response, Compensation, and Liability Act; Section 23 of the Toxic Substances Control Act; and Section 211 of the Energy Reorganization Act. The complaint was investigated and found to have merit. On January 4, 1999, the Ohio Environmental Protection Agency ["OEPA"] requested a formal hearing in this case. A hearing in these consolidated cases was held from June 21-25, 1999 in Bowling Green, Ohio and July 26-30, 1999 in Perrysburg, Ohio.

ISSUES

1. Whether the respondent is an "employer" under the Acts;

2. Whether respondent is immune from liability;

3. Whether complainant engaged in protected activity under the Acts;

4. Whether the respondent knew or had knowledge that the complainant engaged in protected activity;

5. Whether respondent committed adverse action against complainant;

6. Whether the actions taken against the Complainant were motivated, at least in part, by Complainant's engagement in protected activity; and

7. What damages, if any, the complainant is entitled to as a result of the retaliatory actions taken by respondent.

SUMMARY OF THE FACTS:

Complainant Paul Jayko was hired by the Respondent, OEPA, an agency of the State of Ohio, as an Environmental Specialist 2 ["ES2"], effective December 30, 1990. Mr. Jayko has remained in the ES2 classification at all material times thereafter. Mr. Jayko was assigned to OEPA's Northwest District Office ["NWDO"], located in Bowling Green, Ohio. Since his hire, Mr. Jayko has been assigned to the Division of Emergency and Remedial Response ["DERR"] at NWDO as a site coordinator.

By the Summer of 1997, Jayko had been assigned as "site coordinator" for three "sites" in the Marion, Ohio area - the River Valley Schools ["RVS"], the Marion Engineering Depot ["MED"], and the Scioto Ordnance Plant ["SOP"].

On May 21, 1997, Mr. Jayko, along with his immediate supervisor, Jeff Steers, and Mr. McLane, also a supervisor at OEPA, attended a dinner at Pizza Hut in Marion, Ohio, between an afternoon pre-meeting, and a scheduled walking tour of the affected site, to be followed by a meeting with the public, there. At that Pizza Hut dinner, Mr. Jayko consumed two beers, and was later brought-up on disciplinary charges by Mr. Steers. They alleged that he was either drinking on duty, or before a public meeting in violation of OEPA work standards. He was later charged with having engaged in either theft, fraud or deceit in submitting a travel voucher for reimbursement of either an excessive amount, or for reimbursement for the alcoholic drinks arising out of the same incident, also in violation of OEPA work standards.

On June 29, 1998, Mr. Jayko was informed that he would no longer be functioning as "site coordinator" for the RVS, MED and SOP sites. Instead, Mr. Jayko was assigned other sites to supervise. On July 30, 1998, Mr. Jayko was informed by letter from OEPA Director, Don R. Schregardus that he was being suspended without pay for a period of ten working days, beginning August 3, 1998, and ending prior to August 17, 1998. The suspension was for charges arising out of his having consumed the two beers, and having submitted a request for the travel reimbursement which included the two beers. This suspension, according to OEPA Officials, was separate from Mr. Jayko's removal as site coordinator.

At the time of the hearing, Mr. Jayko remained employed by OEPA, NWDO DERR, as an ES2 in the Remedial Response Section, in another site coordinator position.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

FINDINGS OF FACT:

Stipulations of Fact:[1]

a. Complainant Paul Jayko was hired by the Respondent, OEPA, an agency of the State of Ohio, as an Environmental Specialist 2 ["ES2"], effective December 30, 1990. Mr. Jayko has remained in the ES2 classification at all material times thereafter. Mr. Jayko was assigned to OEPA's NWDO, located in Bowling Green, Ohio. Since his hire, Mr. Jayko has been assigned to the DERR at NWDO as a site coordinator.

b. At all times material hereto, and until January 8, 1999, Donald Schregardus was OEPA's Director, a cabinet-level position within the government of the State of Ohio. Mr. Schregardus was OEPA's chief executive officer and appointing authority, the OEPA official authorized by Ohio law to hire, suspend or discharge OEPA employees.

[1]The parties hereto stipulate that the following facts are true, for purposes of this hearing only.

c. At all times material hereto, NWDO's District Chief was Ed Hammett, who reported to Mr. Schregardus and its Assistant Chief was Jeff Steers. At all times material hereto, the Environmental Manager in charge of NWDO DERR was Bruce Dunlavy, who reported to Mr. Steers. NWDO DERR was divided into Remedial Response and Emergency Reponse Sections, and the supervisor in charge of each section reported to Mr. Dunlavy. Throughout his employment with OEPA, Jayko was a member of the Remedial Response Section, and his supervisors there included Jeff Wander, Ellen Gerber and Archie Lunsey.

d. At all times material hereto, Mr. Jayko has been a member of a collective bargaining unit whose recognized exclusive representative, pursuant to O.R.C. Chapter 4117, is the Ohio Civil Service Employees Association ["OCSEA"]. At all times material hereto, a collective bargaining agreement has been in effect between OCSEA and the State of Ohio which governs many of the terms and conditions of Mr. Jayko's employment pursuant to O.R.C. § 4117.10.

e. By the Summer of 1997, Mr. Jayko had been assigned as "site coordinator" for three "sites" in the Marion, Ohio area - the RVS, the MED, and the SOP. The parties are unable to stipulate as to Mr. Jayko's precise duties as "site coordinator."

f. On June 29, 1998, Mr. Jayko was informed that he would no longer be functioning as "site coordinator" for the RVS, MED and SOP sites. Instead, Mr. Jayko was assigned other sites to supervise.

g. On July 30, 1998, Mr. Jayko was informed by letter from Mr. Schregardus that he was being suspended without pay for a period of ten working days, beginning August 3, 1998, and ending prior to August 17, 1998. At the time of his suspension, Mr. Jayko's rate of pay, including longevity supplements, was $23.65 per hour.

h. Mr. Jayko remained employed by OEPA, NWDO DERR, as an ES2 in the Remedial Response Section, as of the time of hearing.

Background:

1. Paul Jayko was employed as an Environmental Specialist (ESA), Site Coordinator for the North West District Office (NWDO), Division of Emergency and Remedial Response (DERR) of the Ohio EPA, starting with the agency on December 30, 1990, and continuing in that position on various projects through the date of the hearing. (T 139, 1443, 1844,)

2. Mr. Jayko's credentials at the time of his hire included Bachelor of Arts and Masters of Business Administration degrees from Bowling Green State University in 1979 and 1986, respectively; employment in the environmental field for the OHM Corporation, in Findlay, Ohio, where he worked in the thermal-technologies group, dealing with incineration systems and disposal of PCBs involving dioxins governed by TSCA, (the Toxic Substances Control Act), and military service with continuing "immediately deployable," ready reserve status as a U.S. Army, Special Forces ("Green Beret") officer with nuclear, biological and chemical

warfare training, presently being considered for the rank of Lt. Colonel. (T 1444, 1451-56, 1462)

3. As a site coordinator, Mr. Jayko had varied duties, depending on specific assignments, such as: initiating investigations; reviewing and giving comments on other investigations that had been done; requesting or reviewing "scopes of work;" reviewing and approving plans that had been prepared by other entities such as contractors; meeting with public officials or citizen groups to discuss what had been done to direct the progress of investigations; making recommendations on feasability studies such as the preferred remediation alternatives that would be employed at sites; overseeing the work that had been done physically on the ground, and actual field sampling. (T 1439-40)

4. In June 1997, Mr. Jayko was reporting to Ellen Gerber, who supervised the Remedial Response section, until November 1997, when Archie Lunsey transferred from his supervisory position with the Emergency Response section, and continued in a technical supervisory capacity over Mr. Jayko, while "functional" supervision on a day-to-day basis was in the hands of either Jeff Steers, Assistant Chief of the NWDO, or Bruce Dunlavy, Supervisor of the Division of Emergency Response (DERR) who reported to Mr. Steers. (T 174, 329-31; 923-25)

5. Mr. Steers reported to Ed Hammatt, Chief of the NWDO, who reported to Don Schregardus, Director of the OEPA, a Cabinet Member position of then Ohio Governor, George Voinovich. (T 923)

6. As will be discussed further herein, on June 1, 1998, Mike Czeczele, who was an Assistant to Director Schregardus in the Columbus, Ohio, Central Office (CO), and was involved in the budgetary process concerning the Marion investigation, took a two level cut to be transferred to the NWDO and was inserted into the supervisory position vacated by Mr. Lunsey, to assume a direct, active role in the Marion investigation, reporting to Mr. Dunlavy. (T 329-31; 923-24, 1172-76)

7. Initially, Mr. Jayko's duties as site coordinator also routinely included communicating with members of the public and the media about projects that were under investigation and assigned to him and interfacing with officials of ODH, such as Robert Indian, Investigator, and those of the U.S. Army Corps of Engineers ("USACOE" or "the Corps," herein) such as Kenneth Crawford, Chief of the Louisville Division, and Investigator Wes Watson on Formerly Used Defense Sites (FUDS). (T 1439)

8. OEPA's functions in relation to the U.S. Government's role at FUDS are governed by the Department of Defense and State Memorandum of Agreement (DSMOA) , which was entered into pursuant to a July 18, 1989, invitation addressed to interested States by the United States Department of Defense (DOD), and the Ohio Environmental Protection Agency (OEPA) on September 10, 1992, which provided that the DOD and the OEPA approved the agreement:

9. Attachment A to the DSMOA, included FUDS and sites on the National Priorities List at that time, plus those that might be submitted for emergency treatment upon notice to the DOD by the State. (*Id. @ p. 5*)

10. Under cover of a letter from the Department of the Army (DOA) of May 27, 1998, the DOA agreed to an amended list of sites under DSMOA Attachment A, specifically including as Item No. 31, the Marion Engineering Depot (MED) where the River Valley Local Schools (RVLS) were located, and Item No. 46, the Scioto Ordnance Plant (SOP), a much larger FUDS site, part of which was located within a few hundred feet of the MED. (RX 93, p. 23; RX 129-131)

11. By the account of Wes Watson Investigator for USACOE, and OEPA Supervisor, Jeff Steers, the role of OEPA under the DSMOA is to enforce and ensure consistency with the federal clean-up program, involving thereunder, the two State of Ohio cabinet agencies, OEPA and the Ohio Department of Health (ODH), the USACOE and the Agency for Toxic Substances and Disease Registrar (ATSDR), a branch of the Center for Disease Control (CDR), for the U.S. Government. (T 496-500; 546-47)

12. To perform the duties as site coordinator, Mr. Jayko had the knowledge to involve nearly every one of the environmental disciplines, including the air pollution, solid waste, hazardous waste, surface water and the drinking water groups, and the ability to interact with chemists, engineers and those with other professional backgrounds, involving nearly every (environmental) authority, such as CERCLA (the Comprehensive Environmental Response Compensation and Liability Act, *i.e.* the Superfund), and insuring that they were acting consistent with the National Contingency Plan (NCP)and other legislative acts. (T 1440-43, 1451)

13. Mr. Jayko also had sufficient knowledge to initiate investigations involving the discovery of the existence of radiation contamination and its sources, which included contaminants subject to provisions of the Energy Reorganization Act (ERA). (T 1862-63, 1903-18)

14. Prior to Mr. Jayko's assignment as site coordinator for the River Valley Schools, Marion, Ohio project, he served as site coordinator for various projects within the jurisdiction of the Northwest District Office of the Ohio EPA, including the Dura Landfill project and the Baker Wood creosote plant project, near the Little Scioto River, within the Marion County area. (T 1844)

15. In 1992, Mr. Jayko submitted a written request for a "Level of Effort" (LOE) evaluation of the Baker Wood site, (RX 48, Attachment) which was forwarded to the Central Office of the OEPA in Columbus, Ohio by his supervisor, Bruce Dunlavy, (RX 48) and was never acted upon by that office, (T 542) through no fault of Mr. Jayko. (T 1801-02)

16. Throughout the period from the time of his employment through at least 1995, all of Mr. Jayko's evaluations were satisfactory ("meets expectations") or above, with specific "outstanding achievement" awards and commendations for the manner in which he acted on specific projects, wrote his reports and communicated his actions, particularly related to the

Dura Landfill Project in 1994 and 1995, and other public service awards in 1998 and 1999. (CX. 7, 8, 12 , 58 and 59, JXs. 9-11, T 1607-09)

17. Summarizing Mr. Jayko's evaluations as of the end of 1997, the last evaluation before his transfer in July 1998, Mr. Dunlavy stated:

> I thought that his work was quite competent; that he had a very well-developed ability to keep track of what was going on in different areas, to handle multiple priorities and to keep a schedule, and keep effective and complete records of what he was doing. From that standpoint, I thought his work was effective. (T 932)

18. Mr. Dunlavy noted as weaknesses of Mr. Jayko that did not present a problem to him, stating:

> He has a manner, a personality trait that is off-putting to some people in that he has a style that I describe as smart-alecky. If you are the kind of person who expects things to be what they seem to be and you take all these things seriously, it can make it difficult to deal with him. If you recognize it for what it is ... and ... don't take it seriously and move into the real aspects of the work, it is not a problem. (T 933)

19. The only specific adverse comments or complaints concerning Mr. Jayko's performance before his assignment as site coordinator for the RVS project, involved limited day-to-day criticisms from supervisors performed during the normal course of their duties, that did not adversely affect Mr. Jayko's overall performance or ratings in any formal rating system that was presented into evidence at the hearing.

20. I find that none of the matters raised at the hearing concerning allegations of failing to participate in conferences on such matters as the 1996 Dura Landfill project, or lack of cooperation at any other specific point in time with any of the witnesses during that period, were intended to be made formal personnel actions as a part of Mr. Jayko's permanent record. Therefore, I also find that Mr. Jayko's record as of the time of his appointment to the Marion, River Valley Schools project site coordinator position, must be considered "clean" for purposes of this decision and order, and that the assignment was made without reference to any such prior perceived misconduct.

The Marion, Ohio and River Valley Local Schools Investigation:

Phase I - June 26, 1997 - October 14, 1997

21. On or about June 26, 1997, Mr. Jayko began receiving citizen calls from people who lived in Marion[2] stating they had an increase in leukemia in that area that was far above what should have been there.[3] (T 1611)

22. The citizen leukemia calls resulted in a memo dated August 1, 1997, from Paul Jayko to Ed Hammett, District Chief, NWDO, entitled Cancer Cases, River Valley School District, Marion, Ohio, recommending "in the strongest possible way" that an "immediate" LOE investigation of the RVS grounds and property be commenced through an LOE contractor, considering that the RVS buildings were built on the ground of a former military installation; that it was highly probable that disposal of carcinogenic solvents, along with the burning and burying of unknown materials took place on soils that were either immediately adjacent to the school or then a part of the school athletic fields; that the RVS would resume their academic calendar on August 26, 1997, thereby placing 1,000 plus individuals into a situation of unknown risk,[4] and that the only way of assuring that the students, faculty, and staff at the RVS are not returning to an area of eminent risk is to conduct environmental sampling of soils, air, surface and ground waters, there. (CX 60, T 1616)

23. In addition, on August 8, 1997, Mr. Jayko drafted a comprehensive summation of the Ohio EPA's Marion investigation from July 2, 1997 through August 7, 1997, which he addressed to Robert Indian at ODH, regarding the Marion Engineer Depot (MED) and Scioto Ordnance Plant (SOP), and emphasizing possible contaminants shown in those studies, and those resulting from recent investigations. (RX. EX. 113, T 1616-17)[5]

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[2]Calls were received from Mary Baratt who discussed concerns of other parents and citizens, school children and health effects; Lena Cummings, who had a daughter Jamie who contracted leukemia in her early twenties and underwent a bone marrow transplant, and had attended River Valley Schools (RVS); Robin Malard, whose daughter Stephanie had contracted breast cancer at an early age; and Kruma Akers whose daughter Kim had graduated from RVS and had undergone a bone marrow transplant for leukemia. (T 1611) In addition, Ms. Bernie Pettijohn called frequently. She had attended school there, and generally expressed concerns. (T 1612)

[3]I credit the accounts of Paul Jayko concerning his investigation of the Marion matter in full. His consistency in his accounts, both orally and in writing, and his demeanor on the witness stand, convinced me that he was presenting a truthful and accurate account about what had transpired therein over the course of the year of his involvement in the investigation. Further, while many of his accounts as an investigator involve hearsay accounts, such accounts are generally admissible in these proceedings as exceptions to the hearsay rule under 29 CFR § 18.803(a)(8)(iii), "Factual findings resulting from an investigation..." etc., and are subject to a blanket ruling on the admissibility of those oral and written reports, which I have continued in effect, and will not address again in this decision and order.

[4]It is my determination that, in stating that school was to begin on August 26, 1997 and the 1,000 students of RVS were being placed into a "situation of unknown risk," Mr. Jayko invoked specific health and safety concerns under the environmental Acts in his memo to Mr. Hammett.

[5] See, CO Ordnance Plant in Marion Engineer of Marion, Ohio, a profile after 40 years,the report by Chiles D. Mosher and Delpha Group Mosher, (CX Ex. 71) as well as other supporting documents, including a June 20, 1990 letter from James J. Fiore, Acting Deputy Director of the Division of Eastern Area Programs, Office of Environmental Restoration, Department of Energy. (CX. Ex. 72) In The History of the Production Complex: The Methods of Site Selection, prepared for the U.S. Department of Energy by History Associates Incorporated, Rockville, Maryland in September, 1987. (CX. Ex. 73) Also included is the Project Review Fact Sheet, Scioto Ordnance Plant, dated May 2, 1995. (CX. Ex. 75)

24. The above histories stated that the Marion sites included as some of the possible contaminants, radioactive materials, carbon tetrachloride and trichloroethylene, and an unidentified, on site, disposable area. (RX. EX. 113 at p. b3)[6]

25. To this point in time (August 1997), there had also been a limited investigation by the U.S. Army Corps of Engineers, (the Corps) involving radiological contamination, due to U.S. Army and Atomic Energy Commission (AEC)property ownership as outlined in the Limited Site Investigation Report, for the Manhattan Project, which had determined that there were no "gross radiological contamination" findings, and gave it a "No further Action" rating in each one of those categories. (RX. 113 at p. b3)[7]

26. Mr. Jayko conducted additional investigations at a portion of the MED, now known as the Marion Industrial Depot, which included a physical inspection within and around the area, and found numerous business tanks used for agriculture, fertilizer, paper, charcoal, personal consumption products, and lighting purposes. (RX. 113 at p.6)

27. In the conclusion to his August 7, 1997 report, Mr. Jayko stated that he had confirmation that the River Valley Local Schools had been built on a portion of the former Marion Engineer Depot; that the MED continued to operate until the property was acquired by the Board of Education through a quit-claim deed; that there were "known and suspected carcinogenic materials used in it's day-to-day operations; that it was highly probable that many of these materials were disposed of by releasing them to the ground, now occupied by the River Valley Schools and adjacent properties; and that it was suspected that military training, which utilized radioactive materials, occurred on or around the school property; that not all of the materials that had been toxic, radioactive or hazardous materials were removed from the former sites; that they remained there until as late as 1989, and that while once discovered, and removed, it is uncertain whether there are any other sources of toxic or hazardous materials remaining at the site. (Rx. Ex. 113 at p.8)

28. Mr. Jayko's log book entries demonstrate that he immediately grasped the scope of the project that was being confronted for the first time at the NWDO when he contacted OEPA's FUDS site coordinators and the U.S. Army Corps of Engineers (USACOE) representatives in June and July 1997, and later, on August 4 and 6, emphasized ODH's responsibility as the lead agency in that phase of the investigation, with USACOE probably taking the ultimate responsibility for it, (JX 18 @ p. 1-4, & 6) if and when the U.S. Government was finally determined to be the "PRP." (Primary Responsible Party). (T 515)

29. Concluding that there was a "strong potential for human health risk" and recognizing that the RVS was to resume it's academic calendar on August 26, 1997, "placing 1,000 plus individuals into a situation of unknown risk," Mr. Jayko suggested that the only way of assuring that the students, faculty and staff of RVS are not returning to an area of "eminent" risk is to conduct

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[6]For a summary of the reports, and a list of contaminants, possible leukemia causing contaminants, see Appendix A to this decision and order.

[7]For reasons that will be discussed herein, this determination does not alter Mr. Jayko's protected status under the ERA and the other environmental Acts.

environmental sampling to include: "a radiation survey, a soil gas investigation, air monitoring, and shallow soils" and that "OEPA commence an immediate investigation of the RVS grounds as well as the adjacent areas," stating "this recommendation has the support of the Office of the Director, Ohio EPA." (RX 113 at p. 9)

30. I fully credit this well researched account by Mr. Jayko, as constituting both protected activity and the substantial basis for his reasonable belief about the health and safety of students at RVS and the contaminants existing at the time of his report, and recommended action about possible causes for the excessive rates of leukemia in Marion, Ohio, thereby invoking all the protections of the applicable statutes including, in my opinion, those of the ERA.

31. Toward the end of August 1997, the staff at Ohio EPA received an undenied directive from Ohio Governor Voinovich's office through the Ohio Department of Health (ODH) and Jeff Steers, Ohio EPA DERR, Assistant Environmental Administrator, of the Northwest District Office (NWDO), to commence an investigation, and to "leave no stone unturned," in the investigation of the Marion, Ohio, River Valley Schools matter.[8] (T 1612-13, 1678)

32. I find that, partially as a result of Mr. Jayko's report to ODH, on August 20, 1997, ODH notified the U. S. Nuclear Regulatory Commission (NRC) that it would perform surveys at the RVS middle and high schools; that it's gamma spectrum analysis had resulted in the identification of an unlicenced one millicurie radium-226 source, discovered in the high school chemistry room, and a second source on the school grounds approximately 100 feet from the school buildings; that its resulting report, Radiological Screening Survey of the River Valley Schools, dated September 11, 1997 revealed that it had uncovered a box containing rocks and a one milligram Ra-226 source found in a high school classroom with a reading of 1000 uR/Hr.; that it was issuing an order for its removal, and that it believed that there was no relationship to the elevated incidences of leukemia in the area. (Rx. Ex. 116 at p. 2)

33. As a result of the ODH reports, on September 16, 1997, the Corps exhumed a .5 millicurie radium-226 disc, and radioactive material identified as a radium-226 source from the high school laboratory, both of which were removed to a Wright Patterson Air Force Base laboratory; that other soil samples were being analyzed, and that, after remediation, readings of the area indicated only background levels of radiation. (See, NRC Preliminary Notification of Event or Unusual Occurrence of Event PNO-III-97-007 and PNO-III-97-007A, of August 27, 1997 and September 17, 1997. JX 11 & JX 12)

34. The initial NRC, Preliminary Notification of Event or Unusual Occurrence of Event, stated: "The former Department of the Army facility apparently did not hold any NRC/AEC licenses,"

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[8]Mr. Steers testified that the investigation began when OEPA received this directive from ODH, which was the initial lead agency for Ohio, and that the responsibility had gradually shifted to the OEPA. (T 494-95) No mention is made of Mr. Jayko's investigation and involvement from June - August, 1997. Basically OEPA had abandoned Governor Voinovich's command to "leave no stone unturned" and neither the public nor Mr. Jayko were so informed. This does not change my view that Mr. Jayko was justified in following the admonition of Governor Voinovich.

which I find to be inconclusive on the subject of whether radioactive materials were ever stored on the sites. (JX 11)

35. Upon return from a scheduled vacation on August 22, 1997, Mr. Jayko discovered that the requested sampling had not been ordered from Lawhon (Lawhon & Associates' Interim Report); that, OEPA's Site Investigation Field Unit (SIFU) had been ordered to collect samples for which normal informational meetings had not been held; that the sampling had not been started, and it appeared that it could not be completed satisfactorily before the first day of school. (T 1619)

36. On August 22, 1997, Mr. Jayko and Mr. Steers met with SIFU's Jeff Wander at the RVS property, and, on finding that he did not know what to sample, walked him through the grounds, explaining the former military occupation of the site which he did not know about, and recommending a full scan analysis.[9] (T 1623-25)

37. Also in the last half of August 1997, OEPA Drinking Water Program Manager, Doug Scharp and Dale McLane took drinking water samples from the RVS faucets and following unspecified tests, declared that those samples represented that the water was safe, and of no concern to the opening of the schools. (T 1566-85)

38. Municipal water providers are required under the SWDA to periodically test for substances on a "maximum contaminant level" (MCL) list promulgated by the USEPA, which does not specifically include a test for gamma radiation. (T 1892)

39. I find that this drinking water sampling encompassed only a portion of that requested by Mr. Jayko, and that it did not meet broader based concerns about the school grounds otherwise expressed by him.

40. On the evening of Monday, August 25, 1997, RVS Superintendent of Schools, Dr. Kirkton, who had not been provided with the August 20, 1997, ODH gamma spectrum analysis report, received a call from a reporter of the Columbus Dispatch at his unlisted, home telephone number, asking if he intended to open school the next day when there was radioactivity in the front yard and cancer causing agents on the athletic fields. (CX 61, T 1626)[10]

41. On August 26, 1997, the opening day of school at RVS, television stations 4 and 10, and newspaper reporters were already at Superintendent Kirkton's office when he arrived, and he ejected them from the school lobby. (CX. 61, T 1627)

42. Shortly thereafter, Mr. Jayko, who also had not received the report, heard of Superintendent Kirkton's encounter with the reporters, and called Dr. Kirkton, who repeated his anger at Ohio

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[9] A "full scan analysis" involved looking at the volatiles, the semi-volatiles, pesticides, PCDs, metals, etc.

[10] I credit Mr. Jayko's notes as an account of what happened over the time period of August 22, 1997 - September 2, 1997.

EPA, and his disappointment in its failure to let him be the first to know of the results before being made public. (T 1627)

43. On Friday, August 29, 1997, Mr. Jayko received the SIFU log sheets revealing the number and places of the drinking water samples, and late in the afternoon, at 5:00 p.m. the first pages of the incomplete test result data were faxed from Craig Butler of the PIC (Public Information Center). (CX 61 @ p. 1)

44. On September 2, 1997, while Mr. Jayko was scheduled to meet with members of the public at RVS at 3:30 p.m., and left in time to do so, further incomplete copies of SIFU drinking water test results were first misdirected to the Northeast District office in Twinsburg, Ohio, and then re-sent to Mr. Jayko's office at 3:37 p.m., too late for the meeting. (CX 61 @ pp. 1 - 2)

45. While there is no evidence of Mr. Jayko's thoughts having been otherwise communicated to Ohio EPA management, his notes fourteen days after the above sampling by SIFU (about September 9, 1997) reveal concerns about: the chain of custody of the water samples; the compositing of 10 samples from 20 to 30 locations; the identification of the number of samples actually sampled; the submission sheets with results for only some of the samples; the inability to match all samples with sample result sheets; the fact that there was no specific data on VOCs, or Pesticides/PCB's as of September 2, 1997; an August 26, 1996 letter from Ed Pfau indicating review for VOCs with no related results; the data provided by Hathy Haas, DES and, regarding the September 2, 1997 Ioannedies sampling report, that only 4 of the 5 samples with VOCs and SVOCs were tested of the 10 taken, and on 2 of the 4 samples tested, only 2 others were clearly identified, with one a composite of unknown location, and again, no specific VOCs sample results. (CX 61 @ pp. 2 - 3)

46. From September 11, 1997 - October 10, 1997, Mr. Jayko had continuous daily involvement in the investigation, including contacts with the various departments of Ohio EPA, ODH and the Corps, and these included input to the formation of the Lawhon Plan, the draft proposal of which was presented for comment on October 10,1997, in a meeting with Lawhon and others in Westerville, Ohio (JX 18, p. 19 - 31) and a draft of Robert Indian's report which was also discussed by ODH Directors with the Ohio EPA Director in Columbus, on that date.

47. In mid-October 1997, Director Schregardus anticipated questions about the Marion public water supply by directing collection of water samples of city water with at least the same parameters that the City utilizes to validate its data. (T 529-35)

48. On October 14, 1997, Mr. Jayko sent a memo to his supervisor, Jeff Steers, about news articles on elevated PAHs[11] in the Scioto River, (RX 62) and had discussions with Doug Scharp, and, Ruth Vandegrift Supervisor of the ODH Bureau of Radiation Protection, and Mr. Steers about the memo and a plan of Ohio American Water to send Drinking Water Program

[11] Polyaromatic hydrocarbon = aromatic hydrocarbons containing more than one fused benzene ring. (The Environmental Dictionary.)

representative Majewski, to Marion to collect samples that day, including EPA requirements for alpha, beta and gamma rays, and other chemical tests. (T 528, 1630-32)

49. Ms. Vandergrift had told Mr. Jayko that there were too many radiologic unknowns, and suggested that such radioactive contaminants may have been in the area and that improper disposal may have occurred historically, leaving a potential that they may have gotten to the water shed, and traveled to the area that Ohio American uses for their river intakes.[12] (T 1632-33)

50. Upon inquiry about the October 14, 1997 drinking water samples that had been completed, of which Mr. Steers testified that everything seemed fine with the quality of the intake samples with no elevated PAHs, (T 534) Mr. Jayko was told that only a couple of the parameters that he was interested in could be added due to the sample constraints (size, type of jars, etc.) on the samples already taken, which the lab agreed to add. (T 1633)

[12]Regardless of the truth or falsity of Ms. Vandergrift's account from a hearsay standpoint, I credit Mr. Jayko's account of what she said, and have no reason to discredit it. As an investigator, he had an obligation to take the account seriously, to direct sampling accordingly, and to have the protections of at least two of the Acts(ERA and SDWA), if not all of them, in so doing.

Phase II - October 15, 1997 - December 31, 1997:

51. On October 15, 1997, Mr. Steers sent a memo to Mr. Scharp, referring in part to Mr. Jayko's letter of the previous day, phrased in terms of an attempt to "rule out" the water supply as a source of radiation, and some of the concerns that "Paul has with PAHs and other stuff that appears to persist in the water plant intake and well field." (T 532; RX 63)

52. On October 15, 1997, Mr. Jayko drafted an interoffice (internal) communication to Jeff Steers, expressing concerns regarding the collection of Ohio American Water's raw water supply and finished waters that were collected on October 14, 1997, objecting to the fact that the records office had initiated the collection in order to "rule out the municipal supply as a potential link to the cancers in Marion," and expressing six concerns as follows:

> **Concern No. 1**: The Biological, Sediment and Water Quality Study of the Little Scioto River, Marion, Ohio, dated April 8, 1994 demonstrates that 17 PAHs exist in the Little Scioto River (5 of which are known or suspected carcinogens). Twenty three metals and cyanide were measured in the river. DDT metabolites were measured at highly elevated levels.
>
> **Concern No. 2**: The normal test parameters that are required of Ohio American Water Company do not address the great majority of these cancer causing agents.
>
> **Concern No. 3**: The samples that were collected on October 14, 1997 were submitted to the laboratory for the standard Ohio American Water Company parameter list. Due to the methods of collection (ie: containers and preservatives), the analysis will be the same as is normally conducted by Ohio American, with the following exceptions: gamma radiation, cadmium, and selenium. Not analyzed are PAHs, trinitrotoluene, pesticides, and metals.
>
> **Concern No. 4**: The raw water intake from the Little Scioto River is located within one-quarter mile of the most highly contaminated area of the river.
>
> **Concern No. 5**: Parameters that will remain for analysis, in order to insure that the water entering distribution lines is actually free of contaminants would include: full metals analysis, pesticides, and semi-volatiles to include total PAH.

> **Concern No. 5[sic]**:[13] DDAGW has now been tasked by the Director's office on two occasions (August 22 and October 14) to collect samples of municipal waters. It is my suggestion, that prior to a third tasking, a sampling work plan be prepared and be followed. (JX 6)[14]

53. Mr. Jayko received immediate feedback from Archie Lunsey and Bruce Dunlavy on management's reaction to the memorandum, letting him know that it was not well received; that Mr. Jayko had committed something to writing again that they did not want memorialized; and that, as Mr. Lunsey told him, management viewed this as "making them look foolish, making them look like they didn't know what they were doing [and that] ... they weren't doing the job they were supposed to be doing,"[15] (T 1647-48) which is also confirmed by Mr. Steers, (T 454-74) with different reasons for the reaction. (T 534-41)[16]

54. On October 16, 1997, OEPA spokespersons Carole Hester and Al Franks, issued a Weekly Report to OEPA Press Secretary, Mike Dawson, and copies to others, but not Mr. Jayko, (JX 7) which stated:

> Marion Health Study - We are designating Beth Gianforcaro and Jim Leach as primary spokespersons. Beth will be in Marion and Columbus for the various briefings/ meetings today. Jeff Steers will be the sole district spokesperson if something technical is needed. We will make sure that both the citizens and the media are kept advised as the sampling/ investigation proceeds during the coming weeks. (JX 7)

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[13]Note that there are two Concern Nos. 5, an obvious typographical error.

[14]See summary of Mr. Jayko's testimony, (T 1634-44) about the October 15, 1997, Six Concerns memorandum in Appendix B.

[15] I note for background purposes only, rather than as a specific finding of a violation of the applicable acts, that this reaction was so inappropriate and chilling to the rights of Mr. Jayko as a protected employee under the applicable whistleblower acts to pursue an investigation that could have led to violations of the Acts, that it may well have served as a separate complaint. In such an investigation, management may not interfere with a seasoned, senior employee's documentation of his concerns and conclusions generated by his own investigation. It is not as if he was in the initial phases of his employment, and directions on what and when to document matters, were being given. The present interference struck at the core of the investigation, extending far beyond the scope of it's legitimate exercise of managerial discretion. [In *Machinists Local Lodge 1424 (Bryan Mfg. Co.) V. NLRB*, 362 US 411 (1960), the United States Supreme Court affirmed the National Labor Relations Board's holding that it may consider earlier misconduct in order to shed light on events occurring within the period of the statute of limitations governing present unfair labor practice charges of the employee. See also, *Mechanic Laundry & Supply*, 240 NLRB 302, 100 LRRM 1243 (1943), in which the NLRB affirmed the use of such evidence to establish motive for discrimination.] This position has been confirmed by the ARB in *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993 ERA-6, ARB July 14, 2000, while not now independent causes of action, they are relevant to the later discipline and transfer of Mr. Jayko.

[16]Concern No. 4 dealt with possible contaminants within 1/4 mile of the water intake for Marion's water supply. Mr.Steers was satisfied with samples at the intake, (T 540) and annoyed at Mr. Jayko's concern about the contaminants 1/4 mile below it. I find that Mr. Jayko's continuing concern was warranted as an investigator charged with finding the causes of leukemia there, and that this outweighed the annoyance of Mr. Steers, both as his supervisor, and as supervisor for the Water Supply program, which involved a potential conflict of interest with an investigator charged with going further in the investigation.

55. Director Schregardus has testified that he was involved in the original decision to appoint agency spokespersons for the Marion investigation, but maintains that it was not due to Mr. Jayko's October 15, 1997 memo. (T 773-74)

56. I find that there is no evidence of actual appointment of a single or sole agency spokesperson until after Mr. Jayko's October 15, 1997 memo, as described above.

57. It is my opinion that this was one of the most significant initial reactions of Ohio EPA management to Mr. Jayko's pressure to have adequate testing performed.

58. I find that Mr. Jayko's October 15, 1997 Concerns memo constituted a correct and appropriate internal documentation of his professional opinion regarding his concerns about the direction of the investigation at that point in time; that it was a protected public health and safety document under the acts; that management's reaction to it was unwarranted; and that it's conduct has never been explained to the satisfaction of the undersigned.

59. On October 17, 1997, Mr. Jayko was told by Jeff Steers that he needed to be at his desk waiting for a conference call involving Marion, and sat there for a half an hour or so, but, when it never came, he was told that they could not find the conference call and they were not going to have it, and later learned that instead, there was a meeting in the NWDO building that he was not invited to attend with Hammett, Dunlavy, Lunsey, and others, and that a task force for Marion would be formed to continue the Marion project. (JX. EX. 18, p. 33, T 1779-80)

60. I take judicial notice that also on October 17, 1997, ODH issued a report entitled, Leukemia Mortality Among Residents of Marion, Ohio, 1966 - 1995, drafted by Robert W. Indian, M.S., which confirmed that the leukemia mortality rate for the City of Marion for these years was higher than the "Remainder of Marion County" and the State of Ohio, having risen "over 122% over the last three decades," with against a 30% decline for the remainder of the county and an 8% decline for the State over the same period; .[17]

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[17]For the reasons noted, Respondent's Exhibit 89 is admitted into evidence as 89a, and it's objections thereto are overruled. At respondent's request, I am admitting the subsequent reports of August 20, 1998, Leukemia Incidence Among Residents of Marion, Ohio,1992-96, and that of December 9, 1998, Review of Cancer Rate Studies by the Ohio Department of Health for Marion, Ohio, both of which soften the October 17, 1997 report, are admitted into evidence as Respondent's Exhibits 89b and 89c. In my post-hearing review of the evidence, I noted that the original Respondent's Exhibit 89 was marked for identification and not offered into evidence at the hearing. I then issued an order to show cause why it should not be admitted, to which both parties responded, with objections of the respondent duly noted. The document was referenced in the October 31, 1997 listing of the members of the Marion Environmental Team (CX 13 p. 1a), the "Purpose" provision of which stated:

> *Provide multimedia support on environmental conditions in the City of Marion and Marion County and to take the lead role in implementing the recommendations, as applicable, in the Ohio Department of Health's report entitled: "Leukemia Mortality Among Residents of Marion, Ohio, 1966 - 1995" October 17, 1997*

I find the document admissible in its entirety on the basis of this reference alone, as well as constituting a public document derived from a scientific, medical or technical process, within the provisions of 29 CFR 18. 201(a)(3), and therefore admissible on the basis of judicial notice. Additionally one court ruled: "documents that are referred to at a hearing do become part of the record." *Zenith Radio Corp. v. Matsushita Electrical Industrial Co.*, 529 F. Supp.

61. I find that, due in great part to the pressure of Mr. Jayko to do so, on October 17 and 27, 1997, the ODH labs conducted gamma ray tests on the drinking water samples taken on October 14, 1997, and that they proved to be lower levels than those of concern specifications.

62. I also find that, while there was no legal requirement that OEPA conduct the gamma testing that Mr. Jayko sought in his October 15, 1997 memo, it was a legitimate and appropriate request when considering that they had been ordered to "leave no stone unturned" in the attempt to find the cause of the incidences of leukemia, one of which potentially involved radiation.

63. Whether Mr. Jayko had knowledge of the present existence of uranium-polluted water or not, the number of documents demonstrating a potential for radiation sources combined with the knowledge of dumping grounds with unidentified waste in the near proximity to those named locations, and the presence of abnormally high leukemia cases believed to exist in the area, provided a reasonable basis for an investigator such as Mr. Jayko to sample those areas, and to have a reasonable basis to believe that OEPA might violate laws if it did not test for it.

64. On October 22, 1997, a memorandum was sent from Jeff Steers to Mr. Balduf, Mr. Hammett, Mr. Lunsey, Mr. Dunlavy and others, regarding a meeting to discuss: the Marion situation; formation of a multimedia team to follow-up on environmental areas of concerns with ODH, on "expectations that Ed, the Director and I have on intended outcomes," and on meeting expected recommendations; expanding the investigation of environmental pathways into the City of Marion, and wherever else they needed to be done; providing reasonable assurances to the citizens of Marion and Marion County that there was currently nothing in the environment which was detrimental to their health as their end goal, and informing them that they may never be able to find a cause and effect relationship between leukemias and something in the environment. (CX. EX. 52; T 333-34)

65. Mr. Jayko was not copied with this document. (CX EX. 52)

66. I find that the above described course of conduct following Mr. Jayko's October 15, 1997 memo constituted the initiation of a deliberate exclusion of Mr. Jayko from important elements of the investigation as site coordinator, the likes of which have not been demonstrated by substantial evidence regarding any other OEPA site coordinator, thereby changing a basic term and condition of his employment as the RVS site coordinator.

67. On October 30 and 31, 1997, ODH screened MED Building 517, finding residual radiation and asking USACOE to sample for radionuclides known to have been stored there for alpha, beta and gamma ray measurements, with the discovery and removal of lead 210, (a daughter of

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866, 900 (E.D.Pa. 1981). "[A] rule that arbitrarily excluded from the judicial record documents that were not presented to the court individually and in their entirety would not serve the important purposes of the common law right to inspect and copy." *Id.* at 901. In another, it was decided that the trial judge's decision to admit an entire report, even though there were questions concerning trustworthiness of certain portions of the report, was not an error, as long as the report was used to help fill in a causation gap, and the plaintiffs did not rely on the report to establish a desired point. *In Re Korean Air Lines Disaster of September1, 1983*, 932 F.2d 1475, 1483 (D.C. Cir. 1991).

radium fixed into a pipe in one corner of the wall, and possibly the wall itself); the installation of a chain link, barbed-wire, padlocked fence, and the posting of the building, and further testimony recommended in the surrounding soils. (RX. EX. 118, p.p. 1-7)

68. I find that there is no evidence that the OEPA was a contractor or subcontractor of a Nuclear Regulatory Commission (NRC) licensee.

69. On October 31, 1997, after the above meeting, Mr. Steers circulated a memo to all of the staff verifying that, "The team has been instructed to work closely with ODH in seeking out information which can allow us to conclude that the existing 'environmental' conditions in the local community(s) do not pose a threat to human health," to which is attached the list of team members. (CX 13; T 343)

70. The above team listing included Bruce Dunlavy as the Team Leader, and Paul Jayko as the RVSD (Director) of Investigations. (*Ibid.*)

71. At the hearing, Mr. Steers attempted to explain what he was trying to say in both memos as follows: the community was looking for assurances that ideally, they would want to determine in the end that, hopefully, that there wasn't anything in the environment "currently" (at that time) that's "posing a risk to human health;" that the "intended outcome" was to provide such reasonable assurances to the City of Marion and Marion County, and that he was not trying to prejudge what would be an ideal outcome. (T 342)

72. I find that the testimony of Mr. Steers was confusing and contradictory on this point, finally admitting that he could have used a better choice of words in the memoranda.

73. I also find that the actual wording of the memoranda spoke for themselves and meant what was stated in them, not what was stated in the obviously prepared testimony of Mr. Steers; that basically he was attempting to rewrite the memoranda at the hearing, and that he intended to convey his thinking to the team that he wanted them to limit their investigation and findings to one thing: that there was nothing in the "current" or present environment that was causing a threat to human health; that they should not, at least at that time, investigate past environmental contaminants which might have caused the leukemia cases, and that this was based upon a philosophy of the management of the OEPA that they might, "never be able to go back in history and find out why people contracted leukemia," as stated by Mr. Steers. (T 343)

74. In this regard, Mr. Steers acknowledged having received an e-mail in June or July from the Columbus office stating that in his meeting with a Marion reporter, "Don Schregardus said he wants us to be very aggressive in telling reporters there is no evidence linking the sites to leukemia." (CX 44; T 348).

75. In addition, I find that I am unable to credit a statement this early in the investigation that represents that, "there is nothing in the current environment that is causing a threat to human health," when all testing for both present and past causes of leukemia have not been exhausted and finally determined not to exist, and that such a statement to the public would constitute a

misrepresentation of possible threats to human health that might be found to be present in tests yet to be performed.

76. More importantly, this leads me to discredit the entire policy of the OEPA management as such a misrepresentation of the Marion investigation, since it would affect both the employees of the agency charged with the obligation to carry out that misrepresentation, and the public pronouncements concerning the investigation.

77. These directives had the effect of contradicting that of the Governor, "to leave no stone unturned" in finding the causes of the leukemia.

78. As a result, Mr. Jayko, justifiably, could not accept some of these decisions to limit the investigation, especially those concerning the sampling, and Mr. Steers confirmed that by so doing, he was not considered a "team player." (T 344-46)

79. In addition to the above, at the hearing, Mr. Steers raised two other points that had not been previously documented or raised: (1) That Mr. Jayko had never submitted a "work plan," for the Marion project; (T 539) and, (2) That the failure to act on the 1992 Baker Woods LOE request that had been submitted by Mr. Jayko to OEPA management, (RX 48) which, in part had implications on his October 15th Concerns memo, was the fault of Mr. Jayko because he did not follow-up on the LOE request. (T 541; FF 12)

80. I find that there is insufficient evidence presented by OEPA in this record that any other type of a "work plan" than Mr. Jayko's reports and requests set forth herein, and his participation in the formulation of the Lawhon Plan, was required, or would justify its reaction to the memo.

81. I also find that in presenting the 1992 Baker Woods LOE request to Mr. Dunlavy, who, in turn, submitted it to OEPA's Central Office in Columbus, Ohio, which allowed it to go unanswered, (T 542) Mr. Jayko did all that was required of him to do, and the fault, if any, in failing to act on the LOE request was solely that of OEPA management, since, as stated by Mr. Steers, "I cannot explain why nothing was done ...." (T 453; FF 112)

82. On November 14, 1997, Mr. Jayko participated in a conference call at the Central Office involving Mr. Dunlavy, Mr. Lunsey, and other individuals regarding their decision, over his objection, to eliminate two of the primary analyses that had been called for in the Lawhon Work Plan for dioxins and microtoxins. (JX. Ex. 18, p. 37, T 1652)

83. While Mr. Jayko was, in fact, "debating" the issue, primarily with Heidi Soren, who, contrary to Mr. Jayko, wanted dioxins and mycotoxins eliminated and wanted handheld meters used to achieve the same results that Mr. Jayko wanted, Mike Czeczele, who was then an Assistant Director in Columbus, Ohio, with the concurrence of another Assistant Director Jenny Tiel, said that he would be willing to gamble on doing a "phase(d) approach" as suggested by Ms. Soren,

resulting in both dioxins and mycotoxins tests being eliminated and the rejection of Mr. Jayko's air monitoring demands.[18] (T 1652-53)

84. Respondent witnesses contend that Mr. Jayko did not actively participate in this telephone conference, and that he did not speak up when the issues that he was advocating were being discussed, (T 423-26; 558-59) when the purpose of the call was obviously to contest the recommendations that Mr. Jayko himself had made, and the opposition was simply being presented from several sources, and Mr. Steers could not recall any question being directed to Mr. Jayko. (T 430)

85. I credit both Mr. Jayko's testimony and that of Mr. Lunsey that Mr. Jayko explained during that particular conference call his rationale for structuring the sampling, arguing that dioxins and mycotoxins were suspected leukemia causing agents; his specific recall that Mr. McLane did not participate in it; his specific argument with Heidi Soren about his positions referred to above; the fact that they all knew his positions on the Lawhon proposals; that their presence is suggested by PCBs previously found to exist in the August testing, and that any lack of participation that existed was primarily in the minds of respondent's witnesses, which, if it existed, had no impact on the outcome of the decisions made to eliminate his proposed tests anyway.

86. Mr. Steers, Mr. Czeczele and Ms. Tiel maintain that the reason for the elimination from the Lawhon Plan of the dioxin and mycotoxin studies was budgetary, (T 361) and would have been $150,000.00 in lab costs, while the more comprehensive air monitoring studies, Ms. Tiel felt could be accomplished without "throwing money" at them. (T 1928-29)

87. Even though tests for dioxins and mycotoxins were finally done seven or eight months later in February 1998, (T 362) the tests that Mr. Jayko was seeking in October and November of 1997, were sarcastically referred to by the respondent as the "Cadillac" version in its brief in an attempt to discredit the legitimacy of the advocacy of his investigation, despite the introduction of the term by Mr. Steers, who testified that he advised Mr. Jayko to ask for a "Cadillac" version to see what funding they could get. (T 553)

88. As a result, I find that this characterization was unwarranted, inappropriate, and more revealing about its own biased conclusions than one to shed light upon what otherwise might have been considered legitimate arguments in support of its position.

89. I also find that there is no substantial evidence of any timely statement to the public that the investigation was being limited by budgetary constraints, or that those constraints could only be alleviated by transfer of the investigation to the USACOE.

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[18]The differences were that Mr. Jayko stated that there was nothing about mycotoxins that allows you to do a phased approach. "Either you do it or you don't." Mr. Czeczele's "phase(d) approach" would include sampling for PCBs, and on finding them with incomplete combustion of PCBs, then dioxins would be a likely result. Since they had already determined that there were PCBs on the school grounds as confirmed by SIFU, (3 of 10 preliminary tests showed PCBs which were indicators of dioxins and mycotoxins. - T 354) neither one of their arguments "bore out." (T 1652-53) Also, the Lawhon Plan called for long term monitoring stations set up to filter air drawn through them for long periods of time such as 24, 36, 48, or 72 hours, and then having the filters used for the tests sent to labs for testing, which was also rejected by OEPA.

90. I also find that this constitutes further substantiation that there was no substantial evidence to support a view that a complete current investigation was being performed, since elements that would have affected such an investigation involving an important issue of public health, even if limited to current causes of leukemia as contended by OEPA officials, were being eliminated from the testing.

91. I also find that any disconnection that may have been suffered or exhibited by Mr. Jayko by this point in November 1997, such as indicated by Mr. Steers, (T 560) was the effect of his treatment, rather than the cause of problems that he was some how initiating, and that further frustration and withdrawal or non-participation after that time in certain meetings and conference calls were likewise the effect rather than the cause of such problems.

92. Several documents from the RVS public file at the Northwest office reveal that years after Mr. Jayko made the suggestions on including tests for dioxins and mycotoxins, the course of action suggested by him was taken, and thereby reinforcing the reasonable basis that he had for advocating the related tests.[19](CXs. 67, 68 and 70, T 1655-56)[20]

93. OEPA witnesses propose that OEPA allows its staff to freely discuss issues with the media; that its staff may involve PIC if they are uncomfortable; that when the project is large or carries significant media attention, OEPA will designate a spokesperson to communicate or coordinate media inquiries; that PIC is also designated to respond to national news inquiries, and that a single spokesperson for the Marion investigation based, in part, on Mr. Jayko's October 15, 1997 memo that was internal. (FF 56)[21]

94. On November 15, 1997, the Columbus Dispatch published an article, Drinking water link to leukemia still unproven, containing quotes from Mr. Jayko about PAHs discovered in the 1992

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[19] An argument developed between the Claimant and the respondent concerning admissibility of these 1999 documents. Mr. Decker stated: "I think it cuts both ways if we are willing to do these now, why would we retaliate against Mr. Jayko for suggesting they be done earlier." I have determined that they are both material and relevant and are admitted into evidence.

[20] In CX 67, Diane McClure notes re: dioxins, indicates concern on screening for dioxins, and possibly looking at some other types of screening protocol; CX 68, Jeff Steers letter to Kevin Jasper at the Corps of Engineers, re: EPA requests that dioxin screening be conducted concurrently at the River Valley property based on available information regarding past-army activities (T 1661), and CX 70, Gerald Meyers, Vice President of Met-Calf and Eddy of Ohio, Inc. letter to Mr. Jasper, the project manager of the Corps of Engineers, re: sampling and analysis for "high chlorinated dibenzopedioxins [ph], which are dioxins, what we normally think of as dioxins and also for dibenzofurians [ph]," (*Ibid*) and the most appropriate method for collecting and analyzing samples, which, according to Mr. Jayko, is the same argument that he made concerning the SIFU data rather than using composite samples, which can be very misleading, that they should be discreet samples." (T 1662) In CX 69 the other letter to Mr. Jasper from Captain Eddy dated April 16, 1999, it reviews and comments on the work plan that the Corps has supplied so far. Mr. Jayko comments that in nearly every paragraph Met-Calf and Eddy puts forth an argument that was identical to the arguments he was making back in 1997 and early 1998, about "[h]ow to investigate the quality control, the data gaps, what type of compounds that were likely to be there, and how they needed to be screened."

[21] "FF" stands for "Findings of Fact" used with the number of the "Findings of Fact" set forth in this decision and order.

investigation that paralleled one in his October 15, 1997 Concerns memo about the drinking water intake being 1/4 mile upstream from the intake, without mentioning attributing it to the 1992 report, (CX 56, p.2)[22] and OEPA officials concluded that he was the source of leaks concerning the current investigation. (T 1787-90)

95. Despite the reference to the other 1992 quotation of Mr. Jayko in the article, Mr. Hammett then called Mr. Jayko to the office and forcefully expressed his anger to him about the quotations, to which Mr. Jayko had to explain the present references to the past Dispatch article, and the fact that he had not given a current interview on the subject. (T 1789-90, 2030)

96. No evidence was presented to support any OEPA position that Mr. Jayko did not have the right to make the statements that he did in 1992, nor was there an inquiry by Mr. Hammett to determine whether Mr. Jayko might have been interviewed or making statements in his private capacity as a citizen, as Mr. Steers maintained that OEPA employees may do.

97. In fact, no evidence has ever been produced that Mr. Jayko ever discussed the current investigation with the media after some initial interviews in the summer of 1997, until after his removal as site coordinator in July 1998; and, in fact, there is no evidence to contradict Mr. Jayko's testimony that he directed all inquiries about Marion to either Mr. Steers or Ms. Gianforcaro, as instructed. (T 1696-97)

98. I find that the actions of Mr. Hammett in calling Mr. Jayko to task over the November 15th Dispatch article was facially unwarranted, and that its timing and forcefulness was anything but an inquiry of a supportive supervisor into a circumstance that might otherwise have merely required some more limitations or discretion on the part of a subordinate on a newly stated policy, with the effect that it had a chilling effect upon Mr. Jayko's performance as site coordinator, nowhere more apparent than in the following.

99. Mr. Jayko received the following e-mail memorandum from Jeff Steers dated November 17, 1997, which stated:

> This is a reminder to everyone involved in anything Marion. No interviews, tours or discussions with Media unless its coordinated through PIC. Such media contact should at a minimum include Jim Leach, or in his absence, Beth G. (CX 14)

100. Contrary to Mr. Steers' contention at the hearing that the media could contact Mr. Jayko concerning RVS matters, (T 550) Mr. Jayko's name as site coordinator was not included in the memo as a person to contact; and as one of the people most informed of what was going on, he was being directed not to have any type of discussions, interviews, or tours on those matters. (T 1765)

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[22] Another quote was obviously from the 1992 report, which was clearly mentioned in the November 15, 1997 article. (*Ibid.)*

101. Pat Heider was present at a November 1997, staff meeting in the Division of Drinking and Ground Water, when he asked Mr. Hammett about a site called Textile Leather, expressing his concern that some of the water would volatize and pose a health risk, and stating that he wanted to write an IOC memo documenting the potential for human exposure to such risks, even though OEPA regulations did not require such testing. (T 1061-62)

102. After a heated conversation between the two, Mr. Hammett told Mr. Heider not to put such an IOC or note in the project file, and made reference to a site coordinator in DERR who was doing this that was causing problems, to which Mr. Heider replied that he knew the site coordinator in DERR, that he had read the IOC's, and that they contained facts. (T 1062-65)

103. I conclude by the inferences to be drawn from the undenied evidence regarding this matter, and the fact that there was no other evidence presented regarding any other site coordinator to whom the reference to "causing trouble" by putting such factual information into the file could refer, that it could only have referred to Mr. Jayko who was causing trouble by putting legitimate investigative information into the file.

104. A second item insisted upon by Mr. Jayko in the Lawhon plan that was eliminated involved ground air monitoring.[23]

105. There was also a dispute between Mr. Jayko, and the Central Office staff, in order to save money at OEPA when "clip data" from lab tests by CERCLA certified Contract Lab Program [CPL] labs to ensure quality was eliminated from the Lawhon Plan to save money, but resulting in reports that Mr. Jayko believed would be unreliable. (T 1946-47)

106. On December 31, 1997, the Lawhon contract expired with actual field work ceasing in mid-December, and all the work they were doing had to be completed in order to get their final reports together. (T 1675, 1933)

107. Since there was no contractor in place to continue Lawhon's work, Ohio EPA District staff members were faced with an 18 inch stack of raw data which was not work that they were normally required to review, not validated and not of clip quality data. (T 571-72, 1675-76)

108. On January 8, 1998, Mr. Jayko sent a letter to Mr. Steers regarding the status of the Lawhon investigation as of its December 19, 1997 Interim Report, revealing a summary of incomplete work and other problem areas, plus eight areas of "Anomalies," three of which involved: (1) A 200' X 300' area within the RVS baseball and football fields with buried metallic objects possibly containing waste material with a high electrical conductivity property such as in sludge; (2) Another 400' X 400" area south of the first with similar findings, but a different "signature,"

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[23] The OEPA Division of Air Pollution plan did "ambient air monitoring" rather than ground level testing. (T 1670) Mr. Jayko objected: "[Y]ou cannot make any type of a logical conclusion as to what exists at the school by measuring . . . air quality on top of the fire station on the west side of Marion if your school is located on the east side of Marion. And that's what was done. We set up air monitoring stations that measured ambient or surrounding air quality, rather than air quality at the site." (T 1671-72) To him, it did not matter if they did that type of air sampling, but they had to do sampling at the site, in the breathing zone where people could be actually be subjected to any volatiles or particulate that would emanate from that site. There was no such plan, and he objected to that, yet the ambient sampling was the only thing that occurred. (T 1672)

possibly involving munitions; and (3) A third, under the parking area, involving either waste or utilities. (JX 8)

109. On January 23, 1998, Mr. Jayko sent a memo to all of the team members setting forth a comprehensive list of sixteen areas that might otherwise require investigations by OEPA, ODH and the Corps for other possible leukemia associations or environmental impacts on the Marion area, including a recommended expansion of studies to cancers and illnesses other than leukemia, and studies of the drinking water at various times of the year, at different locations and at varying depths, (JX 9) to which Mr. Steers testified that he did not object since he had solicited guidance from all team members on possible sources of leukemia in the environment, (T 565) following Mr. Jayko's letter on the effects of the loss of the Lawhon contract.

110. Mr. Jayko also felt that the public was under the assumption something was being done, that it was not, and that no communication was being made to the public of that fact. (T 1678)

111. Mr. Jayko also knew that in order for any type of action to be taken under the public drinking water program, four consecutive quarters of monitoring were required to find consecutive quarters of "ascendance's" (increases in the readings), so he wanted to know what their plans were to monitor them for the additional quarters. (T 1765)

112. In January 1998, Mr. Jayko was asked to review a letter to Governor Voinovich regarding an inquiry from Mr. Krumanaker, when he noticed that there was a statement in it that he felt was inaccurate to the effect that "no evidence had been found with . . . problems in the municipal drinking water in Marion," to which he replied in a memorandum dated January 23, 1998, as follows:

> It is not accurate to state that the Ohio EPA has found no evidence of any problems with the municipal drinking water in Marion. Trihalomethanes (carcinogens) were detected in August 1997 sampling at the RVLS.[24] (CX 19, T 1765)

113. On January 29, 1998, Mr. Steers sent two memos to Nancy Whetsto of Central Office Support, with copies to Mr. Czeczele, Ms. Gianforcaro and Mr. Hammett, one remarking on his being back in charge of "the whole thing," with their game plan, with roles for the whole staff, and repeating that he had instructed the NWDO staff not to talk to any media, since he wanted, "to stop, all disconnected info so that anything we say is said with the bigger picture spin on it;" (emphasis added) and the other clarifying that he had talked to Ed Hammett about discussing the Lawhon report's "preliminary data," since it was "all raw data," emphasizing that no conclusions could be drawn from it, and that Director Schregardus should be given a "heads up" on it. (CX 18)

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[24]Trihalomethanes are elements that are regulated under the MCL, which is the drinking water standards. Although they do occur naturally, they also occur when you combine chlorine and chlorination process of water supply with any type of organic matter that's in there, and produce these trihalomethanes. The reason that maximum contaminant limits are set is that if the levels get too high they present a danger and are carcinogenic. (CX. EX. 17; T 1765-66)

114. Mr. Jayko was not copied with this memorandum, and first saw it after the discovery process for the present litigation. (T 1767)

115. Mr. Steers maintained at the hearing, that aside from Ms. Gianforcaro and himself, the media could contact Mr. Jayko, (T 550) if available, although none of the documents support that position.

116. Claimant's counsel asked him if he saw anything inconsistent between the memoranda, and Mr. Jayko stated that since they had discussed the trihalomethanes as preliminary data, there was a message going out that they weren't to talk about it. (T 1768)
With regard to his understanding of what the "bigger picture spin" was supposed to be, I find that Mr. Jayko believed that it was that there was no evidence of risk on the data that OEPA was finding. (T 1770)

117. It is my conclusion that Mr. Jayko's understanding was an accurate one about what was happening with the "spin" being given to the release of data by the OEPA as stated by Mr. Steers, which was that there was no evidence of risk on the data that it was finding.

118. With regard to Mr. Steer's testimony that from January to April 1998, Mr. Jayko was getting frustrated and seemed discouraged, I find that Mr. Jayko justifiably was frustrated and concerned, and that he was also justifiably never hesitant to communicate to management his dissatisfaction with the situation.

119. Some time during this January 1998, time period, Mr. Steers appointed Diane McClure to summarize the Lawhon data, since it was his belief that the USACOE was going to take the project over, and would need a summary. (T 573)

120. On April 2, 1998, Mr. Jayko received word from the Central Office that the contract with another contractor, PSARA Technologies which was in negotiations to be the successor to Lawhon, had been demobilized, and their contract had been terminated as of March 20th, and the OEPA Environmental Investigation of Marion was at a "standstill." (T 1677-78)

121. As of April 2, 1998, Mr. Jayko was convinced that there was no progress being made on the work plan; that the program was unfinished, and that, it appeared that the EPA had "dropped the ball," contrary to the directive of Govenor George Voinovich, that the mission was to "leave no stone unturned." (T 1678)

122. In terms of who was left to be running the investigation, it appeared to Mr. Jayko that no one for EPA was; they appeared to be waiting for the Corps of Engineers to get a contractor in place, and then put a work plan together and implement it, and that it would have to duplicate a lot of their work already done to do so. (T 1680)

123. On April 8, 1998, Jeff Steers sent a memorandum to Director Schregardus (CX 20) regarding a trenching (sampling) operation by USACOE that was performed at RVS in March 1998, and reported on March 30, 1998, noting that soil excavated from the trench revealed various concentrations of solvents and other organic chemicals, and stating:

While not in excessive concentrations, such as would be characteristic of a hazardous waste, there is concern that they were found at a depth of only three feet in an area that is regularly saturated with water. (CX 20)

124. The memo also noted that the Columbus Dispatch had published an article the previous Sunday, in which the Corps described its findings, but did not include a description of the petroleum/solvent contaminated soils; that, while the article appears alarming, they have attempted to stress that the findings are yet another piece of the investigation which can be used to build on past studies, so they thought it important that caution continue to be exercised around the exclusion zone previously established in the athletic fields, and that they would be conducting a soil gas survey of the surface to determine if any chemical vapors were being released from the surface contamination, to be done as soon as practical - in three to four weeks. (*Ibid.*)

125. The memorandum concluded that, "there is no evidence to suggest that there is a health threat to persons on other portions of the school grounds." (*Ibid.*)

126. Mr. Jayko was involved in the oversight of that trenching operation, and was aware of the results which were correctly stated in the memo, and that the material that was sampled and sent out for analysis came back as a reactive sulfide, and that it had to be, and in fact was, manifested as a hazardous waste for handling and disposition. (T 1775)

127. On April 9, 1998, there was an exchange of e-mails including one from Kevin Jasper to Jeff Steers that was setting up a conference call which stated that the next thing they had to discuss was: "Is [there] risk at RVS? What risk does the contamination in the anomolies (as we know it now) pose? Do we separate the Risk of the Arsenic in the ditches from the anomolies?", (CX. EX. 21) and also asked: "Do you want to include Paul Jayko in on these calls? Please pass the number [to call] along if so."

128. In the second part of the April 9, 1998 e-mail exchange, in a reply from Kenneth Crawford of the Corps to Jeff, Kevin and "All," to the first, he referred to "lessons learned the hard way" that "reporters are always looking for conflict, sometimes finding it where it doesn't exist," reminded them that they had stood together and were working hand-in-hand to resolve the matter with them (OEPA)," and stated that in his years working with environmental problems, he had, "never seen such outstanding interagency cooperation." (*Ibid*)

129. Mr. Jayko did not get a copy of the above e-mail exchange until after he was removed from the project, and would definitely [have] expected to have been included in the conference call. (T 1777-78)

130. It is my conclusion that a deliberate determination was made in April not to include Mr. Jayko as the site coordinator, on either the compliments that had been rendered by the Corps to OEPA for things that he had been a direct part of, or the telephone conference, or the future plans, and that he ended up totally unaware of the exclusion, until the hearing discovery process.

131. In late April 1998, a Director from Central Office told Mr. Jayko to gather all of the paperwork, all the documents and all the data and everything that he had pertaining to the investigation for a repository in Marion, which was a section of the library where the documents would be kept. (T 1681)

132. Mr. Jayko was going to be leaving for two days so he put all of the documents to be delivered in the repository under the table that was behind him, showing them to an administrative assistant, Emelia, stating that everything on the table needed to be photocopied. (T 1682)

133. Included in the documents to be deposited in the repository was his chronology,(JT. Ex. 18) concerning which he made a point in telling the administrative assistant to give Jeff Steers another chance to look this chronology over, and on his return on Monday there was a yellow post-it on it that said something to the effect that "its okay." (T 1682)

134. All the material was collected, and the last he saw of it, it was staged in the front lobby, apparently to be sent down to Marion. (T 1682)

135. In July of 1998, Jeff Steers came down to his cubicle with supervisor Archie Lunsey and told Mr. Jayko that if he had a copy of the chronology it should be in the public file. (T 1682)

136. Mr. Jayko looked through one or two public file drawers, pulled it out and handed it to him, after which Mr. Steers took it away, apparently without comment. (T 1682-83)

137. Mr. Jayko had also put together status reports or updates and monthly reports to Mr. Dunlavy, all based on the chronology, as he had done traditionally, including the past Dura report, where he used such a log for the same purposes involving status reports, updates, and monthly reports.[25] (T 1683)

138. Director Schregardus appeared to be offering some criticism of Mr. Jayko's chronology or log when he stated words to the effect that he felt that the documents should look like what he considered to be a "field notebook" in which the person would put down the particulars of a site sample, the parameters, what the results were at the time the sample was taken. (T 1688)

139. Mr. Jayko explained that his chronology or log was not that type of a document; that while the term "log" had been used throughout the hearing, he had always maintained them as "chronologies," the first page of which said so at the top; that these are documents that he used merely to record the mechanics of the day-to-day operations of how we got from point A to B, and the type of commitments he made to someone or that someone made to him. (T 1689)

140. Mr. Jayko agreed that the distinction drawn appeared to be one between a national laboratory kind of a manual document that would be kept with notes on experiments and so on, and a

[25]The Dura Report was even reviewed by the house legal counsel in Columbus, Fran Kovac in particular, who reviewed his chronology and would go through and cross out certain things and place them in the confidential files as opposed to the public files. (T 1684)

personal log of what's happening, in which the log would be a bound book where the pages are not easily removed, and each page sequentially numbered when you first received the book, which would be the kind of exhibit that could be entered into a hearing or litigation, saying this is the agency that found they did some sampling on your site. (T 1689-90)

141. I find that Mr. Jayko did not keep such a sample log because at no time on the project did he physically take any samples; that such a log would have been reserved for the

technicians, who actually did the sampling, and that SIFU would have or should have been keeping that type of documentation, because they physically took the samples.[26] (T 1690)

142. Mr. Jayko understood that with regard to environmental matters, what the Director was referring to was the type of field book that would be numbered, and submitted in a proceeding as evidence of a criminal wrongdoing; that, with regard to whether there was any kind of manual or regulatory provision within the OEPA for the keeping of either type of log or chronology, the only thing that he was aware of were the USEPA guidance documents that described how log books should be kept on field sampling, how it was to be conducted, and what other types of information should be recorded, such as date, time of sample, method of preservation, etc.; and that with regard to internal regulations on the keeping of such documents as the chronology, he did not know of any, or of anything prohibiting or encouraging it.[27]

143. In November of 1998, five months after Mr. Jayko had been removed, the OEPA put out a document entitled Sampling Plan and Evaluation of Marion's Drinking Water, informing the public that starting November 30th, the EPA would again test the Marion water supply at the treatment plant and at the River Valley School complex, which would be an ongoing evaluation of the public water supply and a "hydraulic evaluation" of the water line system near the school complex, and listing contacts as Jeff Steers (technical contact), Sophia Antjas (general questions), and Jim Leach (media questions). (CX. EX. 64)

144. The above report referred to a prior report of May 20, 1998, entitled "Summary of Contaminant Sampling at Ohio American Water Company's Marion Public Water System"

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[26] Again, I have never seen a satisfactory explanation to the apparent objection by Ohio EPA management to Mr. Jayko's having maintained such a chronology, or of his use of it in it's submission to the repository, both of which constituted protected activity, and the response to which I find was discriminatory adverse action against Mr. Jayko.

[27] At this point, counsel for the respondent stated he did not believe that "any witness has testified of the quality or lack thereof of Mr. Jayko's log or chronology was either a reason for any decision that was made . . ." (T 1692) He went on to state that the "point of that testimony was based on what was read about it in the Dispatch, it was disappointing to people like Tiell and Schregardus as a whistler blowing documents, because it did not contain a lot of information they would have expected it to." (*Ibid*) The Claimant's counsel objected stating that "witnesses never said that they evaluated this as a whistle blower document. They simply commented on what they thought were the deficiencies. And this is his explanation of what he was doing. That's it." (T 1693) I note that Mr. Hammett's testimony was that he was also "writing too much" to which respondent's counsel responded that "it was Mr. Steers who said that Mr. Jayko ought to come back to him before he wrote some things to avoid miscommunication. He stated that there is a dispute as to how much the log revealed about problems on the sites as a document by itself and who actually read it prior to it becoming an issue on the Dispatch, a month after Mr. Jayko was removed as site coordinator. (T 1694) The fact is that it gets cited negatively in the Dispatch articles, a month after Mr. Jayko had been transferred, and a day or two before he was suspended. (T 1694) It is my opinion that, if you come in reading it cold, it appears to be a reason being offered as to why things happened to Mr. Jayko on which the public, and everyone else, is drawing conclusions, and they are looking for explanations as to the "real deal behind the chronology." I stated to Mr. Decker, "now I guess your statement here is there isn't one," (T 1695) to which he responded, "I guess my statement here is that . . . nobody on our side of the case is alleging that Mr. Jayko's log should have been something other than it was, and that it was a reason for anything bad that happened to Mr. Jayko. Our position is . . . here it is. And it didn't have anything to do with what happened to Mr. Jayko. So why we're debating whether Mr. Jayco should have kept a more detailed or less detailed audit, seems to me, is beside the point." I responded, "I think this is why it's being presented and why I have an interest in it, whether you do or not, Mr. Decker." (T 1695-96) He answered: "I wasn't meaning to object to what you were doing, but to clarify our position so that you would understand it." (T 1696)

summarizing sampling efforts by OAW and Ohio EPA and the results of the monitoring, stating that, with the exception of one family of chemicals which are byproducts of the chlorination process, the supply met the federal drinking water standards, and stating Volatile and Semi-Volatile Organic Compounds (VOCs & SVOCs) had not been detected in the raw and finished water, including the buildings surrounding the campus.

145. Mr. Jayko commented on the part of the May 20th report, which stated that based on the flow direction and perhaps given enough time, perhaps thousands of years contamination from Baker Woods could possibly reach the well field, and that he was taken back by the fact that anyone would print something like that, stating that to him, it was a very deliberate effort to down play the gravity of the situation and thought that it was definitely not substantiated by factual information. (T 1763)

146. The Baker Woods site had involved the use of creosote when logs were dipped into it, and set into a particular area to drip on the ground, which had been in existence for approximately 100 years, and had resulted in excessive contamination in the river and was beyond the well fields, including Benzoa Pyrene (definitely a component of creosote) which does not naturally occur 100 feet down in the well. (T 1763, and see also RX. EX. 48)

Phase III - The May 21, 1998 Pizza Hut, Beer Drinking Incident**:**

I have deliberately separated my findings of fact concerning the Pizza Hut, beer drinking incident, and Mr. Jayko's alleged fraud and deceit in the handling of his request for reimbursement of related travel expenses and resulting ten day suspension, which covered a time period from May 21, 1998 - July 28, 1998, and hereby find as follows:

147. Several things occurred on May 21, 1998, starting with a trip to Marion by Jeff Steers, Dale McLane, and Mr. Jayko, who drove together in the same state car driven by Mr. Jayko; stopping at a building that had been set up for a pre-meeting at the Juvenile Children's Services Building in Marion; attending a meeting there that involved a few local officials, such as the county health department, the Corps of Engineers and their contractor, and individuals from the State Health Department and Ohio EPA. (CX 62[28] - a sign in/ sign out log for that day, JX. EX. 13 and T 1717-19.)

148. The calendar shows a record of Mr. Jayko's time which was made after he got back to the District Office after the meetings; that there was a pre-meeting at Marion; that five hours of the day was charged to the U.S. Army of Corps of Engineers between 11:30 and 4:30 (including travel time); that Mr. Jayko charged seven hours to the Corps of Engineers for a public meeting in Marion, from 4:30 to 12:30, a total of eight hours (one of which was his dinner and not chargeable); and that anything after 4:30 was logged as overtime. (T 1723-24)

[28]The color coded portion appears on Complainant's Exhibit 62, and is reviewed in Respondent's Exhibit 6, at Bates Stamp No. 0049. (The double 00 will be dropped in the discussion). This latter exhibit consists of Mr. Jayko's calendar from May 21, 1998. (T 1721)

149. After the pre-meeting, when it was adjourned for dinner, most of those going to the public meeting went to the Pizza Hut Restaurant just down the street in Marion, for dinner, and were all at the end of a long table, with Mr. Jayko seated at the very end, with no one to his left, and Wes Watson, Project Manager for the Corps, sitting directly in front of him, with whom he had most of his conversation; and across from him was Jeff LeBlanc from the Corp's contractor, Montgomery Watson and someone else on his right. (T 1725)

150. During dinner, all they talked about was that Mr. Watson and he were amateur carpenters with home repairs being made; that Mr. Watson has a motorcycle and Mr. Jayko rides horses. (T 1726)

151. Mr. Jayko did not consider himself to be on the clock, and if there were any conversations concerning the Marion business meetings, they were short and he did not recall their content. (T 1726)

152. They ordered a bunch of large pizzas, and Mr. Jayko ordered two draft beers with his dinner, to which no one at the table objected, including Mr. McClane and Mr. Steers. (T 1727-28)

153. Mr. Jayko did not have a scheduled speaking role at the evening meeting; he was not on the stage, and he was merely going to sit in the audience, take notes and be aware of what happened. (T 1728)

154. They left the restaurant by 5:30 p.m. (T 1728)

155. The walking tour began around 30 minutes before the 7:00 p.m. scheduled public meeting, conducted by Wes Watson, and Mr. Jayko stayed to the back of the crowd, talking with Mike Griffith, one of the citizens that he had dealt with for quite awhile, and then moved to the front to listen to Mr. Watson. (T 1728-30)

156. During the meeting, Mr. Jayko sat in the center section of the auditorium to the far left, maintained notes on the type of business issues that were addressed, and then took notes on the questions that the citizens asked the panel. (T 1730)

157. No remark was made to him at all during the dinner, the tour or the meeting about his breath having alcohol, or his conduct being inappropriate, either by Mr. McLane or Mr. Steers, or anyone else. (T 1728)

158. Following the walking tour, they went into the auditorium where the public meeting commenced, ran late, and adjourned before 10:30 p.m. (T 1729)

159. Mr. Jayko "loitered" in the parking lot for a while talking with Wes Watson, and actually got into the car at 10:30 p.m., heading toward Bowling Green. (T 1729)

160. Both Mr. Steers and Mr. McLane were again in the state car with Mr. Jayko on the drive back, neither of whom, in particular Mr. Steers, said anything about the inappropriateness of his

having consumed the beer at the Pizza Hut at 6:00 p.m., nor did they object to riding in the car with him. (T 370, 373-74, 394, 1729)

161. They arrived back in Bowling Green at about 11:30 p.m., after which he went to his office, and did various things such as unloading materials, and an attache case with Dale McLane; after which he took them into the building; went to his desk and checked his voice mail, and e-mails, and wrote up his notes.[29] (CX. Ex. 23 at p. 2, T 1730)

162. Upon leaving the office for the evening, Mr. Jayko signed out, on the sign in/sign out log; (JT. EX. 13) he testified that when he first made his entry he wrote down 11:30 p.m. and "caught my mistake and wrote the 12:30 on top of it." (T 1733) In a companion exhibit to Exhibit 23, which were the log entries for Thursday, May 21, 1998, the log entries for Friday, May 22, 1998 were also introduced into evidence. (CX. EX. 63)

163. There has been no evidence presented by the respondent that anything other than this account is the truth about what happened regarding the mistaken original entry of 11:30 and immediately catching his mistake and writing 12:30 over it, and his account of the work that he performed between 11:30 p.m. and 12:30 a.m., was without credible contradiction, and adequately accounted for the one hour time period involved.

164. Respondent cited its Exhibit 35, which shows the arrival time for coming back to the office as indicating 11:30 p.m., to support its view that Mr. Jayko may have left at 11:30 p.m., but the card shows actual travel time, not a work day, so the 11:30 p.m. shown in the last column, is the time that Mr. Jayko arrived back at the District Office in Marion, not when he left the office after that.[30] (T 1735-36)

165. Therefore, I credit Mr. Jayko's account, and his account of the time schedule in its entirety from the time of his having left Bowling Green on May 21, 1998, until the time of his leaving the office there at 12:30 a.m. on May 22, 1998, and find no evidence that the change on his Sign-in/ Sign-out Log was anything other than as stated by Mr. Jayko.

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[29] The notes that Mr. Jayko typed up after the meeting consisted of notes of the "pre-meeting" on May 21, 1998, and notes on the public meeting in RVLS (CX. EX. 23). Notes on the pre-meeting consisted of notes on radiation and the soil gas survey by headings. They discussed the radiation survey that at the height of 3 feet was read, with badges being worn on the chest at 1.5 meters (the way people walk rather than sitting down is a meter or less,) they also discussed the radium disk that was found was only an alpha emitter. They discussed drums in a water filed quarry. This gave rise to the question of whether it was combustible with air contact, such as white phosphorus or was it radiation protection. With regard to the soil gas survey, Mr. Jayko stated that one thing that concerned him was that they are constant in taking the first step, conducting the first phase of a phased approach - but are not reaching a conclusive resolution to an issue. (CX. EX. 23 at p. 1) The notes on the public meeting discussed the tour of the back area of the school campus, outside the roped off area, by Mr. Watson. Tour maps were distributed and Steers described what the EPA is doing at both Marion and RVLS. Wagner spoke of the firm numbers from ODH studies, citing 58 cases (cancer) between 1992 and 1996. 91% of which were greater than 45 years of age. Wes Watson described the radiation survey, soil gas survey, and soil testing survey. At RVLS/MED, there is surface water, ground water, sediments testing and consideration for PCBs dioxins/furans. At SOP, the focus would be on explosives, lines, and quarries. The last part of the report consisted of notations of questions from the audience.

[30] This is a sheet filled out by Emelia Martinez, their Administrative Assistant, to track their travel expense report, which is not a time card, but the agency's own form for keeping track of travel time. (RX 35) (T 1735) Respondent's Exhibit 37 and 38 are computer generated time cards to track working hours. (T 1736)

166. To this date, no supervisor ever told Mr. Jayko what, if anything, they thought was improper in the procedure that had been followed and utilized in the time cards.[31]

167. The first indication to Mr. Jayko that he had done anything wrong was when he received a discipline slip handed to Mr. Jayko by Archie Lunsey, based upon a June 4, 1998 memo by Jeff Steers to Ed Hammett, called, Investigation to Recent Conduct of Paul Jayko, (JT. EX. 17) which stated:

> The purpose of this memo is document several recent events which have involved inappropriate conduct or behavior by Paul Jayko in to which management has been a witness. I believe that the conduct exhibited by Mr. Jayko is subject to appropriate discipline per Agency policy and the Bargaining Unit Contract. (JT. EX. 17, T 1739-40)

168. This was followed by three paragraphs each relating to an item that he felt involved inappropriate conduct or behavior subject to discipline, involving, first, the May 21 Pizza Hut/ beer drinking incident described above, where Mr. Steers observed Mr. Jayko consuming alcohol, specifically beer, while the rest of the staff were drinking soft drinks; second, at which at least two beers were consumed; third, confirming that Mr. Jayko did not appear intoxicated but stating that he indicated to Mr. Jayko that he shouldn't be driving a state owned vehicle but he drove anyhow, and "didn't seem to care of my concerns."[32] (T 1740)

169. I credit Mr. Jayko's account that he was "shocked" and "dumbfounded," sitting in his chair in front of Mr. Lunsey's desk "just looking at this thing, wondering what's going on."

170. The testimony of Mr. Steers, as if on cross examination, that he did not say anything to Mr. Jayko about not drinking the two beers at the incident, and that the most he might have said was to ask him if he was ok; (T 370, 373-74, 394, 1729) I find that Mr. Steers did not say anything to him at the time of the incident in the nature of any belief that he was engaged in an infraction of OEPA rules. (FF 161)

171. After the notice, Mr. Jayko spoke with his union representative, Linda Tilse, which resulted in the two of them traveling to Columbus for a pre-disciplinary hearing with Bill Kirk, taking a

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[31](T 1739) This relates to prior testimony that somehow he was trying cover some of the time and I believe, that it relates to his having had the two beers on work time. I want to note for the record here that I completely credit Mr. Jayko's testimony on this point. His demeanor was consistent; he was not hesitant; he was a credible witness on this point, and it is my opinion that he gave an accurate account of the entries that were made in his time sheets. I also conclude that he was, in fact, on his own time, at the time of eating the pizza and drinking the two beers at the Pizza Hut and that there was no rule in existence against such conduct. The fact that he was attending a meeting afterwards was irrelevant if he was not acting as if he was under the influence of alcohol, which he was not. I also note that Mr. Steers, who was with him all of the time and drove back and forth with him mentioned nothing about it at the time, and in my opinion, the action that was taken against him concerning the pizza and beers on "ex po facto" basis was a contrived way of "reigning Mr. Jayko in"" for purposes of the River Valley Schools, Marion investigation. I believe it was retaliatory and violated the Act or Acts that were involved here.

[32] This is contradicted by testimony of Mr. Steers that he did not say anything to him. Steers Transcript (T 372-373). There is no other evidence that he made such a statement. It is not credited.

copy of the sign in/sign out sheet, (JT. EX. 13) a copy of the electronic time card, (RX. EX. 37) and a copy of his personal calendar on which he showed the time, and how he had charged it to the meeting with Bill Kirk, because it appeared that the issue was whether or not he was on the clock during the dinner. (T 1740-43)

172. The documents substantiate that he did not charge the state for the hour of dinner, and he was not on the clock. (T 1741)

173. From Mr. Jayko's calendar it appears that this first pre-disciplinary meeting was held on June 22, 1998. (T 1743)

174. When he first got there, Mr. Kirk's demeanor seemed to be that of a very happy individual, smiling, very jovial and just glad to see them. (T 1741, 2472)

175. I credit Mr. Jayko's account, backed by that of Linda Tilse, that Mr. Kirk had a change in demeanor; that he turned a bright shade of red and became very antagonistic, characterizing it as being "just absolutely pissed;" and that Mr. Kirk did not anticipate that they were going to bring documentation to support his claim. (T 1741-42, 2472; 2482)

176. Before they drove back to Bowling Green, Mr. Kirk provided Mr. Jayko and Linda Tilse with a copy of the above June 4 memo from Jeff Steers which was the first time he ever saw the memo that Steers had written. (T 1742)

177. Linda Tilse later informed Mr. Jayko that as soon as they returned, Bill Kirk called their office a number of times; (T 2474-75; 2480) that he had recommended that Mr. Jayko be investigated for falsification of a receipt as criminal activity, and that the Highway Patrol was going to be notified for further investigation; (T 2478) that it referred the matter to the Highway Patrol on June 24, 1998, (RX 33 p.2) and that the Governor's office advised that the matter concerning an alleged theft of less than $10.00 be handled administratively, *i.e.*, without a formal investigation by the Highway Patrol, although it would help in any investigation, if necessary. (RX 33, p. 1, T 1743-44))

178. On June 25, 1998, Mike Czeczele spoke to USACOE representative Wes Watson and confirmed in a letter to Mr. Schregardus that Mr. Watson felt that the "River Valley Team" would suffer without Mr. Jayko's participation; that he saw Mr. Jayko consume two, eleven ounce beers at the May 21st Pizza Hut dinner; that he saw him leave $15.00 on the table before they left, and that Mr. Jayko had always acted professionally during times that they worked together. (CX 29)

179. On June 25, 1998, Mr. Watson wrote a letter to Linda Tilse documenting the observations that he had done for Mr. Czeczele, and, in addition, confirmed that all of the time periods on May 21st that he had spent with Mr. Jayko, including the break from the pre-meeting at 5:00 p.m. the Pizza Hut dinner, the walking tour meeting at 6:30 p.m., and the meeting thereafter until 10:30 p.m.; that they discussed their hobbies rather than business during that dinner; that Mr. Jayko was not only professional in his behavior, but that he never saw Mr. Jayko exhibit any behavioral evidence of intoxication, lack of coordination, mental acuity or any other type of

behavior evidencing consumption of alcoholic beverages; that his behavior was unquestionably above reproach, and that he was concerned about the potential for turbulence and divisiveness on the investigative team that the situation presented, "within an otherwise exceptionally cooperative and mutually supportive team." (CX 30)

180. On July 13, 1998, the pre-disciplinary hearing "reconvened," and Mr. Jayko had to "explain [his] side of the receipt issue, showing an affidavit that he had people in the division sign, regarding the policy used for submitting blank receipts, which was dated June 24, 1998 and stated:

> Recently, a question has come up regarding the use of an "other than original" receipt accompanying an expense for travel reimbursement. It has been standard practice in the Division of Emergency & Remedial Response (DERR) (NWDO), and supported by our unit supervisor, that if an original receipt for an entitled meal is not available, the employee will substitute a blank receipt. The employee is aware that no reimbursement will be made that is in access of that allowed by the reimbursement schedule, regardless of the amount indicated on the receipt. The DERR employees below can confirm this and has been a customary practice for several years. (CX. EX. 27, T 1745)

181. This document was signed by Mr. Jayko, and four other employees, who were Ed Onyia, Ali Moazed, Ghassan Tafla, and Patrick Heider. (CX. EX. 27, T 1746)

182. Mr. Jayko credibly explained that historically, if an employee was traveling and did not have an actual receipt for whatever reason, they could take a blank, fill in the amount of money that they had spent, and that it could be submitted. (T 1746)

183. He also credibly explained that Bruce Dunlavy had said if an employee is going to use a blank receipt, it didn't look appropriate to fill in "even dollar amounts," so he said to just put down something that is under what you spent, put down a dollar amount and some change; so, Mr. Jayko put down $14.52, which was less than he actually spent, since he actually spent $15.00 at the Pizza Hut. (RX 35, p.3, is a photocopy of a blank receipt that he used for that particular meal; p. 1 is the actual amount reimbursed, $13.00, and page 2 is the agenda of the meeting involved for the reimbursement; T 1747)

184. Mr. Jayko credibly testified, and I so conclude as a matter of fact, that at the time he was not aware or thinking about the fact that the $15.00 amount actually spent included the beer as a prohibited item; that he merely had it as a beverage with the pizza, knowing that the highest reimbursement he would receive was $13.00 for the meal, regardless of what was spent on it,[33] and that he never did cash the check.[34] (T 1748)

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[33]It appears that no one really contested this practice on behalf of management. It is credited. [See Steers/etc. testimony]

[34]Claimant's Exhibit 22 is a photocopy of the check that was issued to him. (T 1749) He testified that he had not cashed it after discussing the matter with counsel (Mr. Muchnicki), so it was not "the appropriate thing to do at that time, given the circumstances." (*Ibid*)

185. On July 30, 1998 Director Schregardus sent the following letter to Mr. Jayko, which stated in part:

> This letter is to inform you that you are being suspended without pay for a period of 10 working days based upon the events described in your pre-disciplinary meetings of June 22, 1998 and July 13, 1998. (JX 24, T 2001)

186. On July 31, 1998, Mr. Schregardus addressed a letter to Governor Voinovich attempting to explain the action taken toward Mr. Jayko, in which he stated, in part:

> [I] want to inform you about the personnel issue with respect to Mr. Jayko which has prompted the media coverage this week. In June, Mr. Jayko was removed from the Marion investigation team while the Agency investigated allegation involving falsifying meal receipts and drinking on duty. This investigation recently concluded and I have suspended Mr. Jayko for 10 days for those activities. Mr. Jayko has had difficulty working with the investigation team and communicating effectively with other team members. Based upon this, when Mr. Jayko returns from his suspension he will no longer function as the site coordinator but will be consulted as needed. (JX 25)

187. I find that in the July 30, 1998 disciplinary letter from Mr. Schregardus, Mr. Jayko was being given the ten day suspension for all of the allegations discussed over both sessions, regardless of whether he had a reasonable explanation for any of them, and despite the fact that the respondent, acting through Mr. Kirk, had failed to acknowledge in those "Pre-disciplinary meetings" which of them had merit, and which did not, and then adding to the allegations, on two different occasions when evidence was presented that they were without foundation; the first being when Mr. Kirk added the fraud, deceit and theft allegations in claiming reimbursement for expenses without a proper receipt, and the second being when he added the claimed reimbursement for an alcoholic beverage as part of the allegations.

188. In addition to the above evidence presented by Mr. Jayko, I credit his testimony that, at the time he submitted his expense report, he was unaware of any written policy that prohibited alcohol as being part of a meal since he did not travel frequently;[35] that the first time he saw it's Policy on Reimbursible Expenses, (RX 33) was during the litigation; that he relied on Emelia Martinez, his Administrative Assistant, to handle such matters, and that Mr. Kirk advised Mr. Jayko that it was his responsibility to have a better handle on it.[36]

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[35]Respondent's Exhibit 53 shows his travel reimbursement requests for 1997 and 1998, which do not include the May 21 incident. (T 1760) In that time period, he submitted documents for reimbursement on three occasions other than the May 21st one. (*Ibid*) Other than those cases, where he had travel requests for 1997 and 1998 dealing with Marion, he had taken some courses in 1992 or 1993 at Kent State for geophysics study, but the rest all deal with Marion. He did not have occasion to travel since that original study to the Marion travel. (T 1761)

[36]While I agree that Mr. Jayko had an obligation to have knowledge of the applicable regulations, the presence of Mr. Czeczele, who was the former Acting Director of the Agency, as well as Mr. Steers, his immediate supervisor, placed them both in the position that they too were charged with the same knowledge, and in the circumstance, had an obligation to say something to him if they believed that Mr. Jayko was engaged in any sort of a chargeable offense in violation of Ohio EPA's policies. Neither objected to Mr. Jayko's drinking of two beers with

189. I find that, considering that there is no evidence that there was any other reasonable rule of OEPA other than that of Mr. Dunlavy designed to cover circumstances in which either specific receipts are not given for small amounts or in which one bill is presented and split among a number of participants without specific receipts being given to them, Mr. Dunlavy's rule was reasonable in light of the omission or ambiguity in the rules; that, under the circumstance, Mr. Jayko had a right to rely on that rule for his travel reimbursement submission, making his request for a $14.52 reimbursement, instead of the full amount of $15.00 a reasonable one, and that he had a right to request an amount over $13.00, knowing that the maximum he would receive would be $13.00, since the rule limits the amount reimbursed rather than the amount requested.

190. I also find, as a matter of fact that there may or may not have been an inclusion of two beers in the requested reimbursement; that no one has ever produced the original check to established what, if any portion of the check included the two beers; that Mr. Jayko did not cash the reimbursement check, and that, therefore, Mr. Jayko never, in fact, received monetary reimbursement for the two beers that he drank at the Pizza Hut on the evening of May 21, 1998 from funds of the State of Ohio.

191. I find that there is no evidence Mr. Jayko had ever previously submitted any inaccurate requests for reimbursement, or that he had ever received any sort of a warning for submitting such incorrect travel reimbursement requests.

192. I also find, that, even if it could be established that a portion of the request for reimbursement included the two beers, this circumstance, at the most, required affirmative action at the lower-most level of management; since I have also found that he did not drink two beers on state time; that he did not work, attend a public meeting or drive a state car while intoxicated; that his conduct did not constitute fraud, deceit or theft, and that management had no substantial evidence to conclude that he did; that the inclusion of alcoholic beverages on the travel voucher, if it took place, was the sole possible violation; that this should have, at the most, warranted some sort of a verbal warning in the graduated disciplinary system since he had never engaged in that sort of conduct, and that he should have been given the opportunity to either reimburse or contest whatever paltry sum may have been involved after recognizing that he had paid for more than his share, and would have only been reimbursed for a portion of the total amount that he actually paid.[37]

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the pizza in front of them, nor did they object to his contribution of $15.00 to the dinner check, which was above the norm as per the testimony of Wes Watson, and obviously intended to cover any costs that he might have incurred over then shares of the others. It was also evidence, in and of itself, of an absence of intent to engage in theft, fraud or deceit, even though the travel voucher was submitted after that date.

[37]Most contributions averaged $6.00, according to Mr. Watson. Mr. Jayko paid $15.00, and claimed $14.52, knowing that he would only be reimbursed for $13.00, the maximum reimbursed for such a dinner. No one has specifically stated the actual cost of the beers, and there is no evidence that they were in fact included, or what the cost was. If they were $1.50 - $2.00 for an eleven ounce draft, then that was $3.00 - $4.00 for the beers, with the rest a large tip, as Mr. Watson acknowledged Mr. Jayko having said, leaving a possible maximum of $2.00 that would have been applicable to one of the two beers, after the $15.00 was reduced to $13.00, or one of the two beers for which reimbursement was not warranted. Of course, while he did submit the travel reimbursement, and received a check for

193. I conclude that by adding to the allegations against Mr. Jayko as an outcome of matters presented in the pre-disciplinary hearing procedure followed by Mr. Kirk, this constituted a violation of basic principles of due process, and a misuse of the contractual grievance procedure, by adding new allegations to the existing allegations once he had actually presented exculpatory evidence; each time "upping the ante" on Mr. Jayko with new allegations that had not been previously presented, and that he had yet to meet, one of which was the addition of the allegation on fraud and deceit, then calling it theft, and then, in the final ten day suspension letter of July 28, 1998, adding the inclusion of the reimbursement for the two beers, which was revealed at the hearing.

194. I conclude that the way that Mr. Jayko was treated through-out the incident by notifying the Highway Patrol before even working through the incident with Mr. Jayko, may only be explained by the disfavor in which he was held by the management of OEPA based upon his otherwise protected activity as site coordinator for the RVS.

195. I, therefore, conclude that Mr Jayko's ten day suspension for the alleged Pizza Hut, beer drinking and fraud and deceit reimbursement misconduct, was without substantial and reasonable foundation; that it was motivated by the general disregard in which Mr. Jayko was held for his differing points of view on the direction of the investigation; that this condition existed because of his protected activity in furtherance of his own deeply held convictions on how the investigation should proceed with the evidence already discovered, and that his suspension was, at least in part, motivated by that activity, and that he would not have been suspended but for his protected activity.

196. The OEPA Work Standards Policy, adopted in 1997 pursuant to Section 124.34 of the Ohio Revised Code (ORC), states that employees must , "not be intoxicated by alcohol or drugs while on the job or on state property;" and that employees operating a "state owned vehicle" must not do so, "under the influence" of "alcohol or drugs." (CX 38, pp. 1 & 2)

197. The OEPA Discipline Policy, Guidelines, provide for progressive stages of discipline for, "Reporting to work under the influence of alcohol or consuming alcohol while on duty," which may begin with "suspension or removal," and, Misuse or unauthorized use of state vehicles, which may begin with an "oral or written" disciplinary action. (CX 38, p. 4)

198. I find from the following testimony of those present at the May 21, 1998 Pizza Hut, beer drinking incident, that no evidence was presented that Mr. Jayko was either intoxicated or acting under the influence of alcohol, or that any OEPA work standards were violated by Mr. Jayko when he had two beers before the public meeting, based upon: (1) the consistent credible testimony of Mr. Jayko which I have credited throughout; (2) the testimony of Mr. Watson which is the most credibly detailed description of Mr. Jayko's appropriate conduct there, and lack of manifestation of any conduct that he was acting under the influence of

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$13.00, he never did cash the check, so he never received any reimbursement at all, so he is short nearly $10.00 over the matter. Again, I find no substantial evidence to warrant the ten day suspension.

alcohol, and (3) that of Mr. Steers, who, in accepting Mr. Jayko's statement that he was "fine," (even if he did say something) thereby permitted him to drive without objection, and verified that he was not reporting to work under the influence of alcohol, or driving a state vehicle while under the influence of alcohol.

199. I find that the position of Mr. Steers, that he was charging Mr. Jayko with drinking before a public meeting, rather than drinking on state time, or property, does not allege a violation of any known OEPA rule; that the pre-disciplinary meetings of Mr. Kirk with Mr. Jayko primarily involved the question of whether he was drinking on state time; that the evidence was presented solely on the "state time" point; and that there is, therefore, no substantial basis for finding a violation of agency rules in Mr. Jayko having consumed two beers before a public meeting.

200. By July 28, 1998, the above cited protected activity also included the filing of the charges in the present case, the timing and effect of this conduct leads me to further conclude that the suspension was in retaliation for the filing of those charges, despite OEPA management's vehement protests to the contrary, which I discredit.

Phase IV - June 1, 1998 through June 30, 1998 Removal as Site Coordinator:

201. On June 1, 1998, Mr. Czeczele officially began his new job at the OEPA NWDO in Bowling Green, Ohio, pursuant to his expected move from his position as Acting Chief of DERR in Columbus to his new position as a as the new Environmental Supervisor, between Mr. Steers and Mr Jayko. (T 1159, 1179)

202. Also, on June 1, 1998, following a two day meeting with USACOE, represented by Wes Watson, the Corp's contractor; Montgomery Watson (unrelated to Wes Watson), and the ODH,[38] in which they discussed the timing and necessity for an ecological risk assessment at RVS, but placed it on the "back burner" for the time being, Mr. Jayko drafted a three point memorandum, to Mr. Czeczele and asked him to, "Please check on the following three items:"

> (1) The ability of the Agency to arrange for aerial photography of the former Scioto Ordnance Plant. These photographs will provide the best asset for locating former installation buildings and lines. This project must be expedited in order to support the rapidly moving USACOE work plan for the area.
>
> (2) Investigate the necessity and practicality of involving the Attorney General's Office in the decision making process which the OEPA and the Ohio Department of Health are currently taking.

[38]Mr. Jayko could not recall how much participation Mr. Czeczele had in the meetings as he was still in the transition between moving from Columbus, Ohio to Bowling Green, Ohio changing districts, and did not sit in all of the meetings. (T 1700).

(3) Investigate the need and necessity of the OEPA developing data concurrently with the USACOE which can be used to support the ecological risk assessment.[39] (JT. EX. 15, T 1698-1702)

203. After Mr. Czeczele's conversation with Mr. Jayko on June 1, 1998, he recounted it in a memo to Mr. Steers, stating that he asked Mr. Jayko to fill in a form requesting aerial photography of the Scioto Ordnance site; that Mr Jayko suggested that he should do it to learn about those things; that he, in turn should do it; that Mr. Jayko questioned him about what his role was, with an exchange about it; that Mr. Jayko suggested that Mr. Czeczele needed to gain Mr. Jayko's respect; that if he had to ask how to do that, it was not a good sign; but that, "whatever I asked him to do, he would do;" that Mr. Czeczele told him to think for himself, manage the site, and keep him informed; that Mr. Steers was concerned about Mr. Jayko putting everything in writing; that they should talk before doing so; and, on questioning whether he wanted to be working on the project, Mr. Jayko responded that he gets paid every two weeks whether he was working on the Marion project or something else. (JX 16)

204. As a result of Mr. Jayko's memo, was called into Bruce Dunlavy's office, along with Archie Lunsey, and was told that the memo was not well received by management; that it was an embarrassing memo, and that the overall perception or tone was that it was not well received. (T 1703)

205. Subsequently, Mr. Czeczele let Mr. Jayko know that it was Mr. Steers and Mr. Hammett who were upset with it, feeling that this was another memo that they felt made them look foolish, and if they didn't do some of the things stated, they were going to look as if they were neglecting their responsibility or remiss in their duties; facts which were verified by Mr. Steers, albeit, for claimed differing reasons, but admitting that he did not know whose job securing the aerial photography would be between Mr. Czeczele and Mr. Jayko. (T 449-53; 595-96, 1703-04)

206. Insofar as the ecological risk assessment was confirmed, it was agreed by the Corps, the Ohio Department of Health, and Ohio EPA Risk Assessment staff, that the top priority for the investigation would be to address the public health issues, and that, while it was ongoing, evaluate the feasibility to perform an ecological risk assessment, the language of which was included in the final work plan for the Scioto Ordnance Plant. (CX. EX. 66, T 1701)

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[39]Mr. Jayko explained that with regard to the ability of the EPA to arrange for aerial photography of the Ordnance Plant, they had recently conducted an "on the ground recognizance" at the plant. (T 1698) The physical boundaries of the plant are massive in the order of 12,000 acres and within are various munition lines for recognizance. Some areas the former buildings had been raised and the grass was tall causing them to possibly miss remnants of facilities they were looking for. He suggested to both Mr. Watson and Mike Czeczele, who was there with them, that perhaps the EPA could use a level of effort contract for aerial photography to support work that the Corps of Engineers was going to do. As he was asking the agency to pay for work to support the Corps, rather than the agency pay for work to support the agency, he felt that it needed approval from a manager and that how they approached it was going to determine how much money we spent. (T 1699)

207. With regard to the contact with the Attorney General, he stated that he discussed it with Mr. Steers, and that the project had an attorney assigned to it, who investigates the need for AG involvement. (CX. EX. 66, T 1700-01)

208. Since no particulars or instructions had been given to Mr. Jayko on to how to interact with Mr. Czeczele, Mr. Jayko used as a basis for the new relationship with Mr. Czeczele, the one that he had maintained with Archie Lunsey, which was a very close with his staff, assisting where possible, and would be there to work with you rather than simply provide oversight.

209. This mind-set may have contributed to some misunderstandings at the beginning, which were reflected in the reaction to Mr. Jayko's June 1 memo asking him to check on the three items; first, either as a manager who would have the authority to make some decisions, or have him be the first link in the chain of command to the people that would make them; and second, assuming that he would probably want to make some of the actual work provisions and get physically involved in some of the work that was going on.

210. Mr. Czeczele later told Mr. Jayko that he did not do that, kind of work, as he was there simply to oversee and to supervise. (T 1706)

211. Mr. Czeczele felt that Mr. Jayko was directing him to do work, and Mr. Jayko felt that was not his intention, since making such a request with Archie Lunsey should not cause that kind of disturbance. (T 1706-07)

212. Mr. Czeczele had stopped by his cubicle, and told Mr. Jayko that he thought that this was a directive from him to fill out the template to get the aerial contract, and that he was not getting the respect he felt he deserved, apparently, Mr. Jayko thought, from the group, and remembered telling him that just because he was previously the acting chief of the division and was now a group leader, people were not just going to give him their respect, since it was an older crowd he was dealing with, and they want to see a little proof before they bestowed their blessings on him. (T 1707-10)

213. Mr. Jayko said that he thought that Mr. Czeczele immediately felt that he was rendering his opinion on him and that he did not respect him, and that was not what he had intended. (T 1710)

214. Mr. Jayko confirmed that he said something about earning respect; that Mr. Czeczele asked him what he should do in order to earn his respect; that he told him basically that if he had to ask, that was not a good sign and that people would see through him; and that he was not aware, at the time, how offended Mr. Czeczele was from the conversation. (T 1710)

215. Mr. Jayko and Mr, Czeczele had a follow-up conversation when he came back; that Mr. Jayko had talked to Jeff Steers about the conversation; that Jeff Steers had taken some things out of

context, and that he remembered replying to Mike, saying that he had actually made a big step forward, at least in his eyes, by having the personal courage to come back and actually tell him something like that; to which Mr. Czeczele replied that he was relieved that they had, and had worked out what he perceived to be a problem, and that they then had an "amicable relationship," finally telling Mr. Czeczele that he would do whatever Mr. Czeczele asked him to do. (JX EX. 16, T 1711)

216. At that point, Mr. Jayko thought that he and Mr. Czeczele had resolved their differences; that he was looking forward to working with him on the project, and that they did not have any further disagreements. (T 1711)

217. After his removal as site coordinator, Mr. Jayko approached Mr. Czeczele and asked questions about why he had been removed, to which Mr. Czeczele replied that he did not know the particulars, but that the directive "came from upstairs," indicating that Steers and Hammett had made the decision.[40] (T 1711-12)

218. In another memo to Mr. Steers by Mr. Czeczele , captioned "Responses to Inquiries of 06/01/98," dated November 2, 1998, with regard to the three items raised, and he stated that concerning the aerial photography based upon Mr. Jayko's requests, he contacted Pam Wilson in the DERR Central Office contracts; informed them of when he was available; filled out the request and forwarded it to "Carl" on 6/8/98 for his review; told him to make changes that he felt were necessary, and forwarded it to the Central Office, (CX. EX. 66) which I consider evidence of the fact that differences between Mr. Jayko and Mr. Czeczele had finally been resolved, long before Mr. Jayko's transfer.

219. Respondent also raised an issue concerning Mr. Steers having observed Mr. Jayko's behavior in watching a "South Park" TV episode video on June 3, 1998 with several others, after having been previously cautioned against so doing by him, when he ducked into the conference room to ask whether anyone had been contacted by NBC's Dateline, to which Mr. Steers did not say anything, either to Mr. Jayko, or to any of the others present, and did not check to see whether they were on their 15 minute break allowed by the collective bargaining agreement. (T 1336-37)

220. I find that, due to the unrelated subject matter of the alleged "South Park" TV infraction, and the failure of Mr. Steers to raise the issue either at that time, or until after the incident had taken place, either to Mr. Jayko until well after the incident, or to any of the others present at all, that

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[40]Mr. Jayko recorded the conversation, and attempted to offer it into evidence. Respondent objected to the use of the tape recording or the transcript. Complainant claims that it is primary evidence of an admission against interest; that it was a non-hearsay use of primary evidence, and that, therefore, hearsay objections did not apply. (T 1712-14) Complainant's counsel later cross-examined Mr. Czeczele on each element of the recorded conversation without Mr. Czeczele's direct reference to the transcript of the recording, and he confirmed all of the essential elements of the conversation. (T 1360-62) With the exception of one point, which was clarified by use at the bottom of page 1 of Exhibit 33, Mr. Czeczele confirmed what he had said he had done, consistent with his deposition. (T 1362) I reserved ruling on the matter. It is now my ruling that the current status is that the information contained in the transcription of tape recording is duplicative, and unnecessarily burdens the record. The offer of Claimant's Exhibit 33 into evidence is denied.

it has no relevancy or weight in my consideration of Mr. Jayko's removal as site coordinator or to the alleged Pizza Hut, beer drinking or reimbursement infractions.

221. From the comparative behavior and demeanor on the witness stand, consistent with what I have observed about Mr. Jayko's own consistency and demeanor throughout the hearing, I credit Mr. Jayko's version of the discussion and events that took place on June 1, 1997, over that of Mr. Czeczele.

222. Even in Mr. Czeczele's memo of June 1, 1997, wherein he recounts his own version of the encounter with Mr. Jayko, he acknowledges that Mr. Jayko told him that he would do whatever Mr. Czeczele told him to do, as is his basic, undeniable characteristic as demonstrated throughout the course of events during the Marion investigation, and at the hearing, and I consider the matter between them to have been resolved.

223. I specifically disregard Mr. Jayko's quip in response to Mr. Czeczele that implied that he would not take a proactive role in the investigation because he gets paid every two weeks whether he's working on this or something else, for the simple reason that his actions throughout the investigation were anything but those of a person who merely put in his time: through his active investigation and advocacy, he ultimately put his entire job and career on the line, and there was, and continues to be, no reason to believe that he would do otherwise in seeing it through to its completion.

224. The Jeff Steers memo to Ed Hammett of June 4, 1997, recounted the above Pizza Hut/ beer drinking/alleged receipt falsification issue, the June 1st confrontation with Mr. Jayko as characterized by Mr. Czeczele, the June 3rd television viewing incident, and another matter of disagreement, previously unmentioned, involving the King Rd. Landfill project, which had been the subject of a Jayko report but not acted upon. (T 1739)

225. For reasons discussed in detail above,[41] I do not give the first three any weight, and the fourth, regarding the King Rd. Landfill project is subject to the same disposition as others preceding the Marion investigation since the RVS site coordinator position was extended to Mr. Jayko on the basis of my finding that he had a "clean record" at the time of his assignment to that position.

226. To the extent that the June 4, 1997 Steers memo to Hammett served as a purported, legitimate basis for Mr. Jayko's removal as a site coordinator for the Marion investigation, I give the letter no weight at all.

227. I find that Mr. Jayko's June 1, 1997 memo to Mr. Czeczele on his first day on the job as Environmental Supervisor by leaving it on his chair, was a completely appropriate internal method of communicating what he thought should be done over the next few days or weeks, but that the conversation between Mr. Jayko and Mr. Czeczele of that date, as recounted by the June 1st memo of Mr. Czeczele was more heated and demonstrative of the damage that had been done by failing to brief Mr. Jayko and Mr. Czeczele on their respective roles.

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[41] See prior discussion of the June 4, 1998 memo regarding the May 21, 1998 Pizza Hut, beer drinking incident at paragraphs 156 - 157, *supra*.

228. From observing the demeanor of both of the participants on the witness stand in describing what had taken place when a new level of supervision had been inserted between him and Mr. Steers without direction on how they were to proceed, that Mr. Jayko's reaction was to be expected, and those of Mr. Czeczele's constituted an understandable immediate response under the circumstances, but which were accelerated into an overreaction by Mr. Steers and Mr. Hammett that was both inappropriate and unwarranted; and concerning which, Mr. Dunlavy had the proper view to take .

229. I also find that the actions of Mr. Steers and Mr. Hammett in letting Mr. Jayko know through Mr. Czeczele they were upset with his internal memo, and failing to distinguish the legitimacy of the memo from the conversation between Mr. Jayko and Mr. Czeczele, had the same effect upon Mr. Jayko as was the case with his October 15, 1997 memorandum, in that it chilled the exercise of his protected right to remain free in the expression of his opinions about what should be done on the Marion project to protect the health and welfare of Marion residents and RVS students.

230. Other June, 1997 memoranda, summarized in Appendix C attached hereto, contributed to the highly charged atmosphere described previously by Mr. Jayko in the meeting at the District Office, (CX. EX. 24, 25 and 26) each with instructions on how to deal with Dateline, NBC's investigation of the problem of Marion and RVS, which Mr. Jayko saw early June of 1998 when the atmosphere regarding media relations or media contacts was fairly tense and was "probably heightened" by the notification of the arrival of Dateline, NBC.

231. Since the June 10, 1998 memo acknowledges the possibility of finding a significant amount of radiation, as a possible scenario in its Public Affairs Strategy (RX. Ex. 26, p. 4; RX. 26 Summary) - Appendix D, hereto. I find that Mr. Jayko's apprehension about sources of radiation as a possible cause of leukemia, was no less justified than that of the Corps, and, again provides justification for finding a substantial basis or reason for his concerns as an alleged whistleblower under the ERA.

232. Early in June, 1998, Mr. Steers asked Mr. Jayko if he had heard that Tim Sandler of Dateline was coming to do a story, and, since Mike Czeczele had shown him a copy of the Hertzer memo (CX 24, Appendix D summary), he acknowledged a taped reply telling him that all of their media contacts were supposed to be going through either Jeff Steers or Beth Gianforcaro. (T 1786-87)

233. Complainant's counsel asked whether Mr. Jayko had ever disobeyed the directives about not talking to the press, and he responded that he had not; confirming only that he had received inquiries from the press wanting to talk about his views concerning the Marion case, for example from Randy Edwards of the Columbus Dispatch, the above message from Dateline's Tim Sandler, to which he returned messages that they should go to either Jeff Steers or Beth Gianforcaro. (T 1787-90)

234. In response to another question as to whether he had ever been accused of being the source of leaks of information concerning the Marion case to the media, he stated that he had, and that

Ed Hammett had called him to his office when the above cited November 17, 1997 newspaper article was printed in the Columbus Dispatch, captioned, Drinking Water Linked to Leukemia Still Unproven, under the by-lines of Jill Rippenhoff and Randall Edwards; (CX. EX. 56); that an article, Bernie Clark, Manager of Enforcement and Water Quality at OEPA, had previously announced that the Ohio Department of Health was the lead agency because of the high rate of leukemia deaths in Marion County; that the history of the site, in particular the river's problems, was set forth in the latter article, citing the creosote and other chemicals such as benzopyrene in the Little Scioto River, which has three times the PAH levels of most contaminated sites; that they quoted Paul Jayko's 1992 statement: "The raw water intake from the Little Scioto River is located within one-quarter mile of the most highly contaminated area of the river;" (CX 56, p. 2; CX 48) ODH had issued an advisory in 1992 against swimming, wading or catching fish from the 4-mile stretch of river; that the same year Mr. Jayko had asked his supervisors to pay for an independent contractor to investigate the Baker Wood creosote plant that had been closed nearly 40 years ago; that they stated that they suspected that much of the PAH contamination in the Little Scioto had come from the thick lining of creosote on the river's bottom; that Mr. Jayko was quoted as saying, "I wanted to find out if those PAHs are still leaking there, and if they are, are they moving?"; that the article notes that his request was not approved; that Mr. Clark stated that the testing determined existing conditions and did not prove that there had never been contamination of the drinking water, and that Jeff Steers had been quoted as saying "We still need to clean up the Little Scioto River. It's a river in need of repair, but we don't have the resources to clean it up." (*Ibid*)[42]

235. I find that Mr. Hammett's reaction to the article was immediately biased and accusatory toward Mr. Jayko, rather than investigative and supportive of Marion's key team member to that point in time; in contrast with the lack of evidence that Mr. Steers was likewise confronted by Mr. Hammett for his quotation.

236. Mr. Steers took the lead in branding Mr. Jayko, not a "team player," because Mr. Jayko wanted a more extensive investigation, and was not willing to accept the limitations imposed by the OEPA on it. (T 346)

237. Mr. Steers admitted that this occurred since he was under the directive of Mr. Schregardus to tell reporters his position that there was no evidence linked to leukemia in the Marion site, and he did not want messages conveyed to the public that the site was a dangerous site. (CX 44; T 348, 585)

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[42]Mr. Jayko was called in to discuss the quotes in the article with Ed Hammett on November 15, 1997. (T 1789) He could tell that he was "agitated." His tone was "accusatory", and he wanted to know if he had talked to the press about it. Mr. Jayko responded that he hadn't talked to them about it since probably 1992 or 1993 about that area and that the information was readily available in the public file for anyone to do a file review. (T 1789-90) He went on to state that Mr. Hammett specifically wanted to know about a Division of surface water, and water quality study that had been done, which pointed out all the contaminants in the river, and he wanted to know who else had seen the document. (T 1790) Mr. Jayko told him that perhaps countless, even thousands of people had seen it since it has been out for years and had been one of the vehicles for a discussion of a number of surface water conferences. (*Ibid*)

238. While Mr. Steers did not have any objections to Mr. Jayko's technical work, and was unable to name a time when Mr. Jayko was not participating in the investigation, he was bothered by Mr. Jayko's internal memos, because they received some distribution outside the agency, to ODH (whose members were part of the investigation team!) and he felt that they were embarrassing to the OEPA team.

239. Mr. Steers maintained that the site coordinator transfer was unrelated to personnel matters, *i.e.*, the Pizza Hut disciplinary matter, but his primary reason for approving the realignment/reorganization was the conflict between Mr. Jayko and Mr. Czeczele, quoting Mr. Czeczele to have said, "It's either him or me." (T 618)

240. Mr. Steers was unaware of any plan by Jayko to talk to NBC Dateline, and made no mention of "under-staffing" problems refered to by Lunsey as a reason for the reorganization. (T 626)

241. Archie Lunsey, who was Mr. Jayko's supervisor immediately before Mr Steers, was opposed to his removal as site coordinator, feeling that that Mr. Jayko's immediate knowledge of the site would be hard to duplicate in a short period of time, and he also did not perceive any deficiencies in Jayko's job performance. (T 196-98)

242. Considering his performance reviews, Mr. Lunsey stated that Mr. Jayko had received three recognitions including an Outstanding Employee Award, Public Employee of the Year Award and most recently, he received recognition in May of 1999 for his performance within the NWDO. (T 199-00)

243. Mr. Lunsey also addressed the June 4, 1998 memo from Mr. Steers to Mr. Hammett, which alleged that Mr. Jayko had failed to inform his "supervisor" of the submission of the King Road Landfill project, testifying, as Mr. Jayko's supervisor at the time of that project, that the allegation was false. (T 178-79)

244. As Mr. Jayko's supervisor at the time of the Kings Mill Landfill project, and based upon his own forthrightness and demeanor during his testimony, I credit the testimony of Mr. Lunsey, and discredit that of Mr. Steers as stated in his June 4, 1998 memo, giving no weight to this point in Mr. Steers' memo, or to Mr. Hammett's reliance on it.

245. Mr. Lunsey testified that Mr. Steers expressed concerns about Mr. Jayko's interoffice memos which he felt could lead the public to infer that the OEPA was failing to do something; that people in the agency suspected that Jayko was leaking information to the media, namely, the Columbus Dispatch, and that he was never told why Jayko was removed from the Marion project, but that the common perception of the NWDO was that Jayko was removed for the beer drinking incident. (T 180, 184)

246. Prior to working as his supervisor on June 1, 1998, Mr. Czeczele testified that he had problems with Mr. Jayko, namely, lack of participation in conference calls, (which I have discredited as not having been part of the consideration when they made him site coordinator of the RVS portion of the Marion project), and as stated above, in Mr. Jayko's June 1, 1998 memo

requesting aerial photos of the Marion site, he was bothered by the memo because he did not want Mr. Jayko telling him what to do. (T 1180-81)

247. When he showed the above memo to Mr. Steeers, he told Mr. Czeczele that you had to be careful about what you put in writing about Marion, and he asked Mr. Czeczele to caution Mr. Jayko about what he put in writing; after which Mr. Czeczele confronted Mr. Jayko about it, and Mr. Jayko told him that Mr. Czeczele had not earned his respect. (T 1387-88)

248. Mr. Czeczele testified that he and Jayko got off to a really bad start, but that Mr. Jayko told him that he would do whatever he wanted him to do and that he did not act insubordinate after that. (T 2318-19)

249. Mr. Czeczele testified that Mr. Jayko was removed because of the realignment plan, and that he never requested that Mr. Jayko be removed from the Marion project, stating that, "I may have had differences or communication problems that, you know, were difficult. But I would have worked through them. I mean, the real reason, to me, was realignment." (T 2337)

250. In explaining the realignment/reorganization plan, which Mr. Czeczele stated that he had brought up for purposes of clarifying the chain of command *before* June 1, 1998, he testified that the Remedial Response Group, which Archie Lunsey ran, was understaffed and that Mr. Jayko would help the under staffing problem; that Steve Snyder, who already was being supervised by Mr. Czeczele, could assume the Marion project since his job duties were less than originally thought, and that Mr. Czeczele's personal goal in the realignment was to have a clear chain of command, which could have involved more direct supervision over Mr. Jayko. (T 2322-23)

251. In early June, Mr. Hammett claimed that he did not want to transfer Mr. Jayko, and thought the problems between Mr. Jayko and Mr. Czeczele would be worked out; that in late June, early July, although he was unable to recall a specific incident which changed his mind, he felt that it was clear to him that the situation between Mr. Czeczele and Mr. Jayko was not working, and that he then changed his mind and decided to transfer Mr. Jayko. (T 2389-90)

252. Mr. Hammett claims that he made the ultimate determination to transfer Jayko, deciding that Mr. Jayko's conduct was very similar to what he had personally observed as reported to him in terms of the Dura investigation on a prior project; that he had difficulties drawing opinions and positions out of Mr. Jayko, who would not be totally forthcoming, and that he had "periodically" expressed that it didn't make any difference what he did, he was going to get paid every two weeks no matter what. (T 2392-93)

253. Near the end of the hearing, Mr. Hammett was called as a witness by the respondent to, among other things, explain the determination to transfer Mr. Jayko as site coordinator. (T 2433-40)

254. Mr. Hammett testified on cross examination, that he had worked on the Dura Avenue project with Mr. Jayko by sitting in on discussions with the agency team, to be made aware of what was happening there, and claims that the "impression" he got was that Mr. Jayko was not contributing to the decisions that were being made, as was being alleged against him on the

Marion project, so he would ask Mr. Jayko periodically for an impression or opinion about what was being done, and that he did "not really" give his opinion, and that this allegedly involved his "withdrawal" from that project in a manner similar to what was being alleged concerning the Marion project. (T 2408-09)

255. At this point I asked Mr. Hammett how Mr. Jayko had gone from all good to all bad on the Dura project, all at one time; to which he admitted that he was a very competent individual, with a lot of skills and talent, and that he had done a good job in overseeing the project, but that when it came to the next phase involving the team's interaction with attorneys and others, he did not participate, while admitting that he did not have a specific point or documentation of the condition. (T 2410-12)

256. Mr. Hammett admitted that while he insists that he did talk to Mr. Jayko's supervisors and urged them to counsel him on his participation, he did not talk to him directly, and there is no documentation of this objection to Mr. Jayko's participation, either on the Dura project or on other prior allegations of lack of participation in projects. (T 2412-13)

257. For the reasons previously stated, in particular the lack of any documentation of evidence in the record that outstanding allegations of lack of participation was considered as any part at all in the appointment of Mr. Jayko as site coordinator on the RVS portion of the Marion project, I discredit the testimony of Mr. Hammett on this point, and give it no weight.

258. I have already determined that the comment or quip by Mr. Jayko to Mr. Czeczele about it not mattering what he did, "he was going to be paid anyway," was just that, a quip; that it was belied by his actual attention to the investigation and lack of complaints by Mr. Czeczele; that it has been discounted by me because of that attention, and is, therefore, given no weight in support of Mr. Hammett's determination about Mr. Jayko's transfer.

259. Most importantly, in transferring Mr. Jayko, Mr. Hammett claimed that he wanted to resolve the supervisory conflict between Mr. Jayko and Mr. Czeczele, when even Mr. Czeczele testified that it had been resolved, and he did not want Mr. Jayko transferred. (T 2394)

260. Mr. Hammett also testified about discussions of the realignment of DERR during late June and early July, among the OEPA supervisory staff, but was unable to "recall" the extent to which he had made his recommendation, who participated in the realignment decision and what the exact recommendation was. (T 2391-92; 2403)

261. With respect to the discipline issue, Mr. Hammett continued to maintain that the site coordinator reassignment and Pizza Hut, beer drinking, travel reimbursement disciplinary suspension were two separate issues, which I have also otherwise discredited herein.

262. Mr. Hammett professed that he was uncertain whether discussions to transfer Mr. Jayko had started in May, but that when the transfer of Mr. Czeczele to the NWDO occurred on June 1, 1998, they were trying to delineate the responsibilities of Mr. Lunsety and Mr. Czeczele, and discussed how they would reorganize, possibility not having Mr. Jayko work on the Marion

investigation, but, without explaining why, other than the fact that differences were arising between Mr. Jayko and Mr. Czeczele at that time. (T 2387-88)

263. At the time of the preparation of the June 4, 1998 memo to Mr. Hammett, Mr. Jayko was clearly involved in the Marion investigation, and Mr. Hammett said that he had no firm position; that Mr. Dunlavy felt that an arrangement could be worked out between Mr. Jayko and Mr. Czeczele, and he told Mr. Dunlavy that that was "fine" with him. (T 2388-90)

264. While Mr. Hammett could not recall a specific incident, when he returned from a week trip in June, he felt that it had not been worked out, and that he wanted to make a change in responsibilities, in order to remain certain tha Mr. Czeczele would be able to remain active in the Marion investigation. (T 2390-91)

265. In terms of his own explanation for the reassignment of Mr. Jayko, Mr. Hammett stated: that, in the above discussion, he had given the principle reasons for the action, and that the one that was uppermost in his mind was that:

> I had a supervisor and an employee that was not cooperating with the supervisor, and a supervisor that I very much needed involved in the Marion investigation. (T 2394)

266. Mr. Hammett verified, at this point in his testimony, that he forwarded the June 4, 1998 memo from Jeff Steers to Mr. Kirk, in Columbus, and that he hand delivered copies of communications for Mr. Kirk regarding the disciplinary investigation and action, but had no direct involvement in the discipline. (T 1742)

267. When asked what Mr. Czeczele was doing in June with regard to his new position in the Marion investigation, he could not recall any specific facts other than the June 4, 1998 Steers memo, stating that when he returned from his trip in June the state of the facts had not improved, so that, therefore, they made the decision to make the reassignment at that point, "But, I don't have specific facts." (T 2399).

268. Mr. Hammett, when asked whether he had had any communications with Mr. Schregardus about the transfer of Mr. Jayko, despite feeling strongly that he should make the change, could not recall having had such a conversation, but insisted that he never denied having had such a conversation. (T 2401)

269. I find that this testimony of Mr. Hammett, bridging as it should have done, the most crucial period being covered in his testimony between the forwarding of the June 4th memo and Mr. Jayko's transfer as site coordinator, coming as it did, closely on the heels of Mr. Czeczele's transfer to the NWDO on June 1, 1998, was deliberately evasive, and lacking in the presentation of any reasonable basis for the transfer of Mr. Jayko from this critical position in the Marion investigation at that time.

270. Mr. Czeczele himself had negated the reason for the transfer, (CX EX. 66) and both Mr. Lunsey, who had been Mr. Jayko's immediate supervisor prior to the arrival of Mr. Czeczele, and Mr. Dunlavy, who was one level above the one person advocating the transfer, and Mr.

Czeczele all felt that he should not be transferred for the sake of the Marion investigation. (T 2326)

271. Having discredited the basis for the June 4th Steers memo, and having found that Mr. Hammett has been unable to provide any specific facts that would have warranted the transfer of Mr. Jayko after that date, I find that, in fact, Mr. Hammett had no reasonable basis for his transfer of Mr. Jayko from his position as a site coordinator in the Marion investigation.

272. Mr. Schregardus testified, contrary to Mr. Hammett, that he was involved in the decision regarding Mr. Jayko's reassignment. (T 692-95)

273. Mr. Schregardus was directly responsible for suspending Jayko for drinking/"falsifying receipts" incident, based upon Mr. Kirk's report, maintaining that the suspension had nothing to do with Mr. Jayko's comments about the Marion investigation.

274. The letter of Mr. Schregardus to Governor Voinovich regarding the two matters is very confusing, but does indicate that there may have been a relationship between the two when he states, after describing the 10 day suspension for the beer drinking/ receipt falsification issue:

> In June, Mr. Jayko was removed from the Marion investigation team while the Agency investigated allegation involving falsifying meal receipts and drinking on duty. (JX. EX. 25)

275. I find that the reasons for Mr. Jayko's removal as site coordinator and his disciplinary action for the beer drinking incident and reimbursement were connected in the mind of Mr. Schregardus, that this was verified in his testimony (T 692-695), and that it justifies an inference that the decision to discipline Mr. Jayko was influenced by the transfer and its reasons, which I have found to have been for Mr. Jayko's protected activity.

276. Mr. Schregardus did admit that Mr. Jayko's October 15, 1997 memo embarrassed him before the ODH Director because he was not aware there was a testing problem while the Director of ODH was aware of it. (T 814-15)

277. Mr. Schregardus testified that he understood that Mr. Jayko's removal was not due to a disciplinary reason, but was related to a reorganization of the Marion project, and that it was due to a "confidential personnel reason," which was that he believed Mr. Jayko was not communicating well with the Marion team. (T 670, 676)

278. When the holes in Mr. Hammett's testimony regarding his reliance on the June 4th Steers memo with no specific facts thereafter, are weighed against his claim that he made the final decision to transfer Mr. Jayko, followed by Mr. Schregardus testifying that he was not involved in the decision to transfer Mr. Jayko, yet offered reasons for that transfer favorable to Mr. Hammett, i.e., that it was not due to a disciplinary reason, when he was involved in a disciplinary reason which I have rejected; and then followed that statement that the reason for the transfer was a "confidential" personnel reason, I find the testimony about his non-involvement to be implausible, and an unwarranted attempt to shield himself from any involvement in what was

one of, if not the, major decision involved with the new reorganization, basically saying without substituted basis, that he was not involved in approving the reorganization itself!

279. Mr. Dunlavy did not want Jayko transferred, (T 943) and spoke with Mr. Czeczele about working things out with Jayko, while praising Jayko's work performance. (T 935, 939; 2491-92)

280. Mr. Dunlavy claims that Jayko was transferred under the pretense of a "regorganization;" which was to ensure that an argument could be made, or justification could be made for removing Mr. Jayko from the Marion case; (T 2501; 2516-17; 2523) that Mr. Czeczele, Mr. Lunsey, Mr. Steers and possibly Mr. Hammett were involved in the decision to have a reorganization as a justification for Jayko's removal; (T952) that the justification was necessary because Mr. Steers believed that it would be unseemly or inappropriate or improper to say that the problem was that Mr. Jayco was perceived to be a potential or actual pipeline for information to the media that might be embarrassing to the agency; (T 2525) that discussions of the reorganization of the DERR occurred before the end of June which related to rationalizing the chain of command; (T 2518) that Mr. Jayko was removed before the final discussions of reorganization; that Mr. Czeczele expressed that he felt his supervision was hampered in that a person who was a site coordinator for Marion was not his supervisee on the table of organization; (T 2527)and that Dunlavy surmised that the removal of Jayko would prevent him from talking to the media because he would know less about the Marion project, would have fewer meetings with the public and would have less opportunities to meet with the media. (T 2531; see, also, 941, 948 & 951)

281. Mr. Dunlavy also discussed general dissension among many workers because Mr. Hammett and Mr. Steers often left out middle and front managers and site coordinators in making decisions, and that the morale was low and there was general conflict. (T 2496-97)

282. In discussing the specific issues management had with Mr. Jayko, Mr. Dunlavy stated that Mr. Jayko wanted more extensive sampling to be done there in Marion; (T 940) that when management had determined to handle it another way, Mr. Jayko had begun to withdraw somewhat from involvement, to be less vocal in his participation in meetings, and to manifest his frustration or dissatisfaction by participating less in the oversight process; (T 941) that management was frustrated with Jayko's memo writing because they were accessible to the public and would expose his ideas which conflicted with those of the agency's; (T 941) that Mr. Steers' reasons for wanting Mr. Jayko gone were his declined participation in the Marion project and that he would be a conduit to the media for information about what the internal processes of the agency considering the site were. (T 940-42)

283. Mr. Dunlavy said that Mr. Steers provided Mr. Lunsey and him with some thoughts about what might be an explanation for making this change in personnel assignments and transferring Mr. Jayko, and that it would be to clarify the chain of command; but that the clarification of the chain of command was certainly not the primary reason and perhaps not a reason at all for Mr. Jayko's transfer. (T 950-53)

284. I credit the testimony of Mr. Dunlavy in full; first, because he had a great deal to loose as a supervisor within the OEPA by testifying so strongly in Mr. Jayko's defense when the key questions were asked of him by the undersigned rather than by counsel for the complainant; (T 2523-25) and second, because the most damaging part of Mr. Dunlavy's testimony to OEPA was delivered spontaneously, without hesitation, and with credible demeanor, on questioning by the undersigned, as well as by counsel for both parties, near the close of the hearing, after having being called both as if, on direct examination, on cross examination, on redirect examination, and on recross examination, for several rounds of such examination.

285. Even though he had employed Mr. Muchnicki to be his counsel on another matter, as was unhesitatingly revealed when questioned by the respondent's counsel, (T 956-61)[43] no evidence was introduced to discredit his testimony, and I affirm my determination to credit this testimony in full.

Phase V - Post - June 30, 1998**:**

286. After Mr. Jayko had been taken off the case, probably around August, September, or October of 1998, he was asked by Mr. Steers about a particular aerial photograph dated 1961 that was taken of the Marion campus, River Valley Schools; that, according to Mr. Steers, the press had gotten hold of the photograph, and it was causing quite a flap; that it showed a disturbed area that existed in 1961, possibly 3-5 acres in size, as one of the disposal areas for waste materials that the Army had placed there; that the RVS Junior High School building was built right on top of the disturbed area; that Mr. Steers wanted to know if he had ever seen it; that Mr. Jayko told him he had not, but that he had seen many historical photographs and this particular one was not familiar; and that Mr. Steers continued to quiz him on who he had talked to outside the agency concerning this photograph, to which he responded that he hadn't talked to anybody because he hadn't seen the photograph before. (T 1791-93)

287. When asked what he knew about the existence and circulation of the photograph prior to his removal, he responded that he knew there were historical photographs gathered during the investigation that came from many different sources; that some of them were available at the Ohio Department of Transportation, some at the National Archives, and some solicited from records that the Corps of Engineers maintained. (T1793-94)

288. Concurrently with the above inquiry, Mr. Jayko received a call from Kevin Jasper, Wes Watson's boss at the Corps, who also asked if he had ever seen the photo before, and he reiterated that this was one that he hadn't seen, and was hoping it was one that he had missed, after which Mr. Jasper asked if the Lawhon contractor had seen them, to which Mr. Jayko said they may have, giving him the name of Rick Darr, one of the contractors, and his phone number. (T 1794-95)

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[43]Counsel for both parties raised possible attorney/client privelege issues that never reached the point of a specific objection to a specific question in Mr. Dunlavy's testimony. Absent such specific objections, and recognizing that Mr. Dunlavy otherwise continued to testify without further objection on such issues, the attorney/client issues are deemed to have been waived by both parties.

289. After his removal, Mr. Jayko did not have any other role regarding the Marion sites, other than, after a MED archive search report was received by the USCOE, he was asked by Bruce Dunlavy to review it and to answer certain questions by September 21, 1998, which among other things,[44] encompassed the 1961 photograph and reminded him that this was the only Marion River Valley activity assigned to him, and if he received phone calls, etc. to transfer them to Mike or Steve. (JX. EX. 30; T 1800)

290. I find that the several instances of questioning of Mr. Jayko about possible leaks to the Columbus Dispatch and NBC Dateline, as well as possible leaks of aerial photographs, concerning which they had no substantial timely evidence that Mr. Jayko was responsible, demonstrate substantial evidence of an unwarranted and unjustified paranoia about him arising solely from the fact of his differences over how to proceed with the investigation, and an irrational fear that his differences would prompt him to reveal confidential information that was related to the investigation when there was no substantial evidence that he was doing so, further chilling the exercise of his protected rights under the whistleblower statutes, even after his removal from the Marion investigation.

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[44]- What does the report contain and communicate? Present a summary of the report briefly analyzing its content and the nature in importance of significant features.

- Is the report complete? That is based on past records, and the information and knowledge already held by the Agency, is there anything of significance missing from the report? If so, prepare a briefing outlining the missing information.

- How can we (or other regulatory agencies) view the report to more effectively focus on future investigations?

- What impact does this information have on the determination of whether remediation is necessary, if so, what remediation might be effective?

REMEDIES:

Reinstatement:

291. Mr. Jayko does desire reinstatement to the same position of site coordinator that he had at the Marion, Ohio site, since he believes that he has the capability of taking over that job and doing it, and has maintained contact with the public file, so he knows the things that are occurring. (T 1829)

292. A number of the citizens have maintained phone contact with him, letting him know the types of things that are going on from their perspective, including various citizens, such as the Krumanaker's, who have provided him with information that they were hesitant to provide to the Ohio EPA; the Griffith's who have kept him up-to-date on activities with the Restoration Advisory Board, and Larry Starcher, a resident of Marion, who indicated that his wife had already died of cancer; that he had cancer, and that they had called the EPA a number of times shortly after Mr. Jayko was taken off the case, but after he called the EPA a number of times, he could never get anybody to listen to him. (T 1831)

293. Mr. Jayko testified that he also takes time on his own time to pull files on Marion and to look at them. (T 1830)

294. Mr. Jayko presented a Columbus Dispatch article dated July 24, 1999, which had as its headline Search for Cancer Widens - Investigators seek River Valley alumni,[45] that was accepted into evidence to support Mr. Jayko's testimony as to why he wanted to return as site coordinator, and which followed a statement by the ODH that it needed to find out how many graduates of RVS since 1965 had other forms of cancer, as requested by other cancer victims in the area, and part of the investigation that began in 1997.

295. Mr. Jayko, also felt that he and Mr. Indian at ODH had enjoyed a good working relationship and he would look forward to going back to work with him on the case. (T 1835)

296. In a series of questions by the undersigned regarding Mr. Jayko's testimony about returning to work as site coordinator at the Marion site, I noted that he had testified that the situation at work had impacted him to the point where it was difficult for him to go back to work, and go to work each day, to which he responded that he had maintained his excitement about the job, and that while there was less incentive and less motivation on the projects that he had at the time of the hearing, there was motivation involved in the Marion case. (T 1836)

297. I asked him to assume that I ruled in his favor (without so ruling at this point) and to assume that I did order his reinstatement to that position, and asked whether it was his belief that he could "operate in that position and overcome the problems that you're having even working on your present positions, working again as the Marion site coordinator?" to which he responded:

[45] It should be noted that this newspaper article was accepted into evidence for the sole purpose of Mr. Jayko's demonstration about why he would like to return to the position of site coordinator for the Marion site.

> I think I would do a very good job .... I don't have the same level of motivation for . . . backwater projects. I think that I have still maintained the excellent job that I have always done. You know, my supervisors are so very happy with the work I do on those projects. (T 1837)

298. Mr. Jayko feels that with regard to Mr. Czeczele, who would be his immediate supervisor on that particular project, he felt that they had reached an understanding before he was pulled off the project; that he thinks he could work well with Mike, and that while it was speculative, he would "give it the best I could." (T 1837-38)

299. With reference to contacts with the media, he recognized that he might have "disagreement" but felt that he was sure "that there is some manner that working through our public affairs office, I could make sure that . . . the information that was necessary, was put out, and that he already was able to take factual information, without any opinion added to it or any spin or speculation, and provide it to the media. (T 1839-40)

300. I asked him to assume that it would be a legitimate managerial position to make all media contacts through one specific person, and asked whether he could live with that, to which he stated that "if it is a legitimate order, I . . . followed orders for the last 17 or so years in the military, I think I can probably continue to follow orders if they are legitimate orders." (T 1840)

301. I then told him to assume that it was a legitimate order, but asked what if he decided that it was not, to which he responded that he had never been in a situation where he needed to make a decision as to whether or not something is legitimate or not, and not had the ability to seek out some type of resource to provide that answer, such as one of their in-house staff attorneys, and he stated that, he was interpreting legitimate to mean "lawful," to which he would get a reading on it. (T 1841-42)

302. I noted the big gray area between the two where managerial discretion comes into play, (and he stated that he did not have a problem in dealing in the gray area following the order) as long as it is not unlawful. (T 1842)

303. I found Mr. Jayko's responses to these questions to be direct, honest and credible, and have concluded that he would be able to handle reinstatement to his former position as site coordinator, on the Marion, Ohio project for the OEPA.

304. Mr. Jayko testified, and I credit his testimony that, he considered the work to be a privilege, a challenge to him, and a use of the "abilities and the talents;" that he believed he had to be a "very constructive benefit to Marion and the people that live there;" (*Ibid*) he does not get that kind of feedback from the jobs he is presently performing; that the present problems "present perhaps more of an eye sore than an immanent health threat;" (T 1828) and do not involve "the same type of challenge or the same commitment." (T 1829)

305. The only areas that Mr. Steers found problems to his reinstatement as Marion site coordinator were having to be "brought back up to speed," (T 632) siting information collected by the

Army since his transfer; access to issues under military rules; the replacement of Mr. Snyder, and working with Mr. Czeczele, (T 632-634) none of which I find to be a bar to his reinstatement. Mr. Dunlavy had a similar opinion. (T954)

306. I specifically discredit respondent's protests to the contrary in this regard, for the reasons stated by Mr. Jayko.

307. It is my opinion that Mr. Jayko is entitled to be reinstated and to resume his commitment.

Damages:

308. In terms of direct damages to Mr. Jayko by his having been reassigned as site coordinator and suspended for the pizza incident, he received a two-week suspension (a 10 business day suspension for which he would have grossed approximately $2,000.00. (T 1802 & see stipulations.)

309. In addition, Mr. Jayko had to take leave without pay in order to attend the depositions or hearings in the present matter, and at the time of his testimony on July 28, 1999, he had accumulated approximately a month of work without pay, for which he used either vacation time or had been in actual non-pay status, or that he used a month of leave status. (T 1803)

310. The first week of the hearing, he used a combination of comp time he had earned, a personal day, and some vacation. (T 1803)

311. There was also some unpaid leave that he had to charge to his timecard, all of which accumulates to approximately 30 days as an estimate. (T 1804)

312. In addition, he had to pay support costs for both of his attorneys, Mr. Muchnicki and for Mr. Kohn, and for the deposition transcript, travel, airplane, hotel, lodging, meals and other expenses, and for Mr. Watson's video tape deposition and the transcripts from the present proceedings as additional costs. (T 1804)[46]

313. Mr. Jayko testified that he also lost approximately 10 hours per week average in overtime, which would have been accumulated on that case, and which also resulted in the loss of a supplemental vacation balance or comp time balance that he could have used, (T 1808) calculated at time and one half the normal rate. (Respondent stipulated to this calculation. T 1808)

314. In terms of potential for future employment, etc., Mr. Jayko feels that he has been "impacted by the message that Ohio EPA has put out and that the press has picked up," since several articles actually accused him of being a drunk and then of being a thief, which would impact his

[46] This information was received over counsel for respondent's objection, since I decided to take information on any costs or damages that respondent felt were not included in either category, damages or costs, which will be decided upon post hearing petitions for costs and attorneys fees that are not permitted as damages. (T 1806-07)

potential for securing employment in a similar field, and contractors are well aware of the case. (T 1810)

315. As examples, he discussed the matter with Alan McDonald of Mid-West Environmental Consultants, Al Ruffle with the City of Toledo (which Toledo is involved with Lucas County), in an environmental service. (T 1810)

316. In addition to the above, Mr. Jayko felt that "it would be safe to say that there is not a chance in the world that I will ever see anything other than the position that I currently hold."[47] (T 1811)

317. Another example involved Diane McClure who walked by and said she thought that he had been fired; and (T 1816) another was a union steward, Patricia Tebby, who also felt the same.

318. In terms of what Mr. Jayko observed, he stated that "Almost immediately after filing my Complaint, there began a very noticeable separation of many people . . .. For instance, Dale McLane, who I used to socialize with during work on a very regular basis, would become immediately stand-offish from me, would stop going to lunch with me;" (T 1817) and another supposedly stated "if you talk to Jayko, you're going to get dragged into court." (*Ibid*)

319. Representatives would come from the Attorney General's office into our District Office to interview people, and there was a heightened anxiety among people, people realized ... if they talked to him that they were going to be interviewed or they felt that they would be dragged into court. (T 1818-19)

320. He stated that the nervousness that some people experienced over this entire affair, just truly exacerbated the situation and the climate, the atmosphere in our district; that people became even more and more removed from him, and the longer the interviews went on, the more isolation that he felt. (T 1819)

321. Patricia Tebby came back and stated that Mr. Decker had interviewed her, and that she came back to him, and she said, that the comment was made that if Jayko had just not made an issue of the 10-day suspension, you know, they wouldn't have had this big problem. (T 1820)

Emotional Damage:

322. In terms of the emotional damage, the first was when he was notified that the State Highway Patrol was going to conduct a criminal investigation which "had a very adverse impact" on him; since, until that time, he considered himself to be a law abiding individual and certainly was worried about any police organization interviewing him. (T 1821)

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[47] Mr. Jayko testified that a contemporary in the agency had indicated that Mr. Jayko was viewed as "one of the greatest villains in the agency." To this I sustained an objection and the record will be stricken.

323. The emotional stress of the year was extremely significant, involving lost sleep, putting his life on hold for a year, not knowing how things would be resolved, and the monetary issue that has caused a tremendous amount of stress between his wife and him. (T 1821)

324. Mr. Jayko stated, and I credit his statement, that he has liquidated every mutual fund, which was the basis for his savings and investments, and that his wife is now being forced to liquidate her assets. (T 1821)

325. He stated that the emotional stress has played as heavily on his wife, as it has on himself, citing the time when he showed her the Columbus Dispatch article captioned EPA investigator accused of boozing on job, (CX. EX. 37), and he returned from cleaning stalls in a barn that he had for horses, when she was crying and was extremely upset. (T 1822)

326. Mr. Jayko's wife also works for the state, and she just could not believe that the agency would do something like that; wondering what the state government would do "when they don't approve of you're [what you're doing and when]." (T 1822)

327. With regard to allegations about his military career where he is with the Branch of Artillery of the Special Forces, (Green Berets), he has to maintain a top security clearance in order to do his job because he works with nuclear weapons, and background inspections are done on all officers that can be very encompassing. (T 1823)

328. He is now in consideration for promotion to Lieutenant Colonel, the implication from the ten day suspension for the Piazza Hut, beer drinking incident, that he was an individual with a substance abuse/alcohol problem, and he was charged by theft while in government office, which could actually terminate his security clearance - just the implication of it. (T 1823)

329. With regard to the appearance of losing his status of a Green Beret, he had worked very hard for it, believed there was nothing that he had ever done that equaled that in the military, and from his standpoint, it would be "unfathomable, that anybody would actually pull that from him," (T 1826) which could happen from the allegations being made against him by the OEPA.

330. I credit Mr. Jayko's deep concern about his military career and his reputation in it, and find that the nature of the allegations made against him in this regard, especially those related to the Pizza Hut, beer drinking incident where the matter was referred to the Highway Patrol for an investigation of theft in office, to be so contrived, unwarranted and without merit, as to warrant, not only a determination that they are without merit, and an overt act in abuse of discretion but a determinate that it was a deliberate act, intended to harm Mr. Jayko.

331. In terms of adverse effects from being pulled from the River Valley School site, he likewise lost the position that he felt was probably the pinnacle of anything he had done in the EPA; believing that it was "the highest calling that anybody in the EPA could become involved with, to be able to have the opportunity to help people who had such a great loss," when it was jerked out from under him. (T 1827)

CONCLUSIONS OF LAW:

Applicable Law:

As discussed above, the present case has been brought under the employee protection provisions of seven environmental Acts. These "whistleblower" provisions are designed to protect employees from retaliation for protected activities such as complaining, testifying, or commencing proceedings against an employer for a violation of one of these federal statutes. *Devereux v. Wyoming Association of Rural Water,* 93-ERA-18 (Sec'y, October 1, 1993). A complainant can assert jurisdiction under all of these statues in the same proceeding, if the complainant has participated in activities in furtherance of the objectives of all the statues. *See, Jenkins v. U.S. Environmental Protection Agency*, 92-CAA-6 (Sec'y, May 18, 1994); *Minnard v. Nerco Delamar Co.*, Case No. 92-SWD-1, (Sec'y, Jan. 25, 1994). Respondent opposes federal jurisdiction, contending that the Marion project is, basically, a State of Ohio project; that the investigation was a State investigation, and that Paul Jayko was a State employee of a State agency involved in the project, before actual involvement of U.S. Government agencies. The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. *See, Devereux, supra, and Tyndall v. U.S. Environmental Protection Agency,* 93-CAA-6, 95-CAA-5 (ARB, June 14, 1998). For reasons more particularly set forth herein, I find Mr. Jayko had either begun proceedings, or was about to begin, proceedings under the provisions of all seven Acts and will proceed accordingly.

The purposes and employee protections of the seven environmental Acts are as follows:

> The Clean Air Act ["CAA"] aims to "protect and enhance the quality of the nation's air resources." 42 U.S.C. 7401(b). The Act states that "[n]o employer" may discriminate with respect to compensation, terms, conditions or privileges of employment, of any employee who has "commenced caused to be commenced, or is about to commence a proceeding" under the Act, or testified, or is about to testify in any proceeding, or who has "assisted or participated or is about to participate in any manner in such a proceeding or in any other action in "carrying out the purposes of the act." 42 U.S.C. 7622(3).
>
> The objective of the, Safe Drinking Water Act ["SDWA"], 42 U.S.C. 300j-9, a subdivision of the Public Health Service Act, ["PHSA"], is to promote safe drinking water. It also states that "[n]o employer" may discharge or otherwise discriminate against employees who have engaged in any of the same actions as those forth in the CAA, or have assisted in a "proceeding to carry out the purposes of this subchapter."
>
> The primary purpose of the The Toxic Substances Control Act ["TSCA"], 15 U.S.C. 2622, is to "assure that chemical substances and mixtures do not present unreasonable risks of injury to health or the environment." It also states that "[n]o employer" may discriminate against a person because that person has taken any of the same actions as those listed in the CAA, to carry out the purposes of the TSCA, except that there is no specific reference to "a proceeding for the administration" of the Act. 15 U.S.C. 2601(b)(3). Subsection 2602(2)(B)(iv) exempts "special source material," "special

nuclear material" and "byproduct material" as defined by the Atomic Energy Act (42 U.S.C. 2014) from the ambit of the statute.

The purpose of the Solid Waste Disposal Act ["SWDA"], 42 U.S.C. 6971, is to "assure that hazardous waste management practices are conducted in a manner that protects human health and the environment [and to] minimize the generation of hazardous waste." 42 U.S.C. 6902(a). The Act prohibits any "person" from firing or otherwise discriminating against any employee who has "filed, instituted or caused to be filed or instituted any proceeding," under the Act, or testified, or is about to testify in any proceeding in any proceeding resulting from the administration of the act." 42 U.S.C. 6971(a).

The objective of the Comprehensive Environmental Response, Compensation and Liability Act ["CERCLA"], 42 U.S.C. 9601, *et seq*. is to prevent the release of hazardous substances into the air or water. Similar to the SWDA, it prohibits any "person" from firing or otherwise discriminating against any employee who has provided information to a State or Federal Government, filed instituted or caused to be filed or instituted any proceeding under the Act, or has testified in "any proceeding resulting from the administration or enforcement" of the act. 42 U.S.C. 9610(a).

The The Federal Water Pollution Prevention and Control Act ["WPCA"]commonly referred to as the Clean Water Act ["CWA"], 33 U.S.C. 1251, is designed to "restore and maintain chemical, physical, and biological integrity of the Nation's waters." The Act also prohibits any "person" from firing or otherwise discriminating against any employee that has filed, instituted, or caused to file or institute , or has either testified or is about to testify concerning proceedings under the Act. 33 U.S.C. 1367.

The Energy Reorganization Act ["ERA"], 42 U.S.C. Section 5851, addresses "whistleblower" protection against harassment and retaliation by an "employer" for employees involved in the nuclear industry, who, inaddition to the other protections set forth in the six other Acts: (1) notify their employer of an alleged violation, (2) oppose a practice that would be a violation of the Atomic Energy Act of 1954, or (3) testify before Congress or any Federal or State agency regarding a violation of the Atomic Energy Act of 1954.

Similar to the wording of the CAA, SDWA and the TSCA, it states that "[n]o employer" may discharge or otherwise discriminate against any employee with respect to compensation, terms, conditions or privileges of employment because the employee engaged in the above activities, or has assisted or participated or is about to assist or participate in any manner in such proceedings as those listed, "or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954." The other three Acts state that, "[n]o person" may engage in such discriminatory conduct against an employee for protected conduct.

The ERA differs from the other six Acts in that, once the complainant establishes a prima facie case, the employer must establish by clear and convincing

> evidence that it would have taken the same unfavorable action, i.e. taken its unfavorable action for a legitimate, nondiscriminatory business reason, as it would have taken, in the absence of the employee's protected activity, rather than merely "articulating" or stating the legitimate business reasons for the action, as is the case with the other six Acts. Another difference is that the employer may be directed to "abate" certain effects of the employer's unfavorable personnel action (which means that the discriminatee may be ordered reinstated with back pay) except compensatory damages, pending court review of the final decision of the Secretary of Labor.

The implementing regulations governing employee complaints under all seven of these statues 29 C.F.R. Part 24, provide at 29 C.F.R. §24.1 that "No Employer" may discharge or otherwise discriminate against any employee who has:

> (1) Commenced, or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the Federal statues listed in Section 24.1 or a proceeding for the administration or enforcement of any requirement imposed under such Federal statute;
>
> (2) Testified or is about to testify in any such proceeding; or
>
> (3) Assisted or participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such Federal statute, ... (Emphasis added)

- or, under the ERA, and by interpretation of the Secretary under the other six Acts, has notified the employer of, or, on notice to the employer has refused to engage in, any action prohibited by the Atomic Energy Act of 1954, or has testified concerning any of the provisions of the Acts in any federal or state proceeding, as stated in the above 1992 amendments. 29 C.F.R. Section 24.2(a)-(c).

In addition, as also stated above, 29 C.F.R. §24.7(b) states that a determination of a violation of the ERA may only be made under the statutory provisions that the "protected behavior or conduct was a contributing factor in the unfavorable personnel action..," and that the respondent has not demonstrated, "by clear and convincing evidence that it would have taken the same personnel action ..." as it would have taken without such protected behavior. The rule provides that, upon finding a violation of the ERA, if applicable, the determination "shall" contain a recommended order "that the respondent take appropriate affirmative action to abate the violation, including reinstatement to his or her former position, if desired, together with the compensation (back pay) ...[etc.] ... and, when appropriate, compensatory damages," with the compensatory damages not effective until final decision by the Administrative Review Board. 29 C.F.R. §24.7(c)(1)&(2).

Under the SWDA or the TSCA, "exemplary damages may also be awarded, where appropriate." 42 C.F.R. §24.7(C)(1).

Standards for establishing violations of the Acts:

Related to the establishment of jurisdiction under one or more of the seven environmental Acts, a complainant in a "whistleblower" case must first establish that the respondent is an "employer" under the provisions alleged to have been violated under the Acts, understanding that an "employer" is a "person" under the SWDA, the CWA and CERCLA, and that he or she may satisfy the initial burden of establishing a prima facie case of discrimination by showing the following:

(1) The "employer" is subject to the Act; 29 C.F.R. §24.2(a); ERA: 29 C.F.R. §24.5(b)(2)(ii)

(2) The complainant engaged in protected activity; 29 C.F.R. §24.2(b)(1)-(3): ERA: 29 C.F.R. §24.2(c)(1)-(3) and 29 C.F.R. §24.5(b)(2)(iii)

(3) The complainant was subjected to an adverse employment action; 29 C.F.R. §24.2 (a)&(b)

(4) The employer was aware (ERA: "knew") of the protected activity when it took the adverse action, ERA: 29 C.F.R. §24.5(b)(2)(ii), and

(5) An inference is raised that the protected activity was the likely reason for the adverse employment action. (*i.e.* ERA: the protected activity was a contributing factor in the unfavorable personnel action. 29 C.F.R. §24.5(b)(2)(iv)

See, Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995); *Mackowiak v. University Nuclear Systems, Inc.*, 735 F. 2d 1159 (9th Cir. 1984); *Carroll v. Bechtel Power Corp.*, Case No. 91-ERA-46 , slip op. at 11 n.9 (Sec'y Feb. 15, 1995), *aff'd sub nom., Carroll v. United States Dept. of Labor,* 78 F.3d 352, 356 (8th Cir. 1996).

In general, under established case law, once having established the employer/employee status, the employee must establish his prima facie case, and under the ERA, that it was a contributing factor to the unfavorable personnel action. The respondent may rebut the complainant's prima facie showing by producing evidence that the adverse action was motivated by legitimate, nondiscriminatory reasons. Under the ERA, the respondent must produce clear and convincing evidence to establish a legitimate, nondiscriminatory reason for its action, while it may merely articulate the legitimate, nondiscriminatory reason under the other six statutes. Complainant, then must counter respondent's evidence by proving that the legitimate reason proffered by the respondent is false or a pretext for the prohibited discriminatory reason. See, *Yule v. Burns International Security Service*, Case No. 93-ERA-12 (Sec'y May 24, 1994)(Slip op. at 7-8). This burden now applies to the seven environmental Acts under the jurisdiction of the Secretary of Labor, including the entire analysis of the burdens of production, proof and shifting obligations in a Title VII, Civil Rights action under 42 U.S.C. Section 2000e cases to the relevant environmental "whistleblower" cases, as established under *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) and *Burdine, supra*, through *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 113 S.Ct. 2742 (1993).

From the outset, under *Yule*,, the complainant maintains the burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. *See, St. Mary's*

Honor Center v. Hicks, supra; Darty v. Zack Company of Chicago, Case No. 82-ERA-2 (Sec'y Apr. 25, 1983) (Slip op. at 5-9) (citing *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089 (1981)). Additionally, with specific relationship to the ERA, the Secretary stated in *Thompson v. TVA*, 89 ERA 14, (Sec'y July 19, 1993) that, under *Hicks*, after the employer establishes its legitimate non-discriminatory rebuttal, the first determination that must be made is whether the evidence shows that the discriminatory reason is more likely the motivation for the adverse reason. Simply stated, the complainant continues to bear the burden of proving allegations of discrimination by a preponderance of the evidence.

This view is no different than what has recently been clearly restated by the United States Supreme Court in its review of *Hicks* in, *Reeves v. Sanderson Plumbing Products, Inc.* ___ U.S. ___, (Case No. 99-536, June 12, 2000), wherein the Court assumes (without deciding) application of the *McDonnell-Douglas/ Hicks* standards to court analysis of alleged violations under the Age Discrimination in Employment Act (ADEA). Indeed, the Court in *Hicks*, adopted its prior 1981 standard as set forth in *Burdine, supra*, that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff," 450 U.S. 253, as now reinforced in *Reeves, supra*.

In any case, here, weighing the impact of settled case law and the rules set forth at 29 C.F.R. Part 24, which codifies the above case law rules, the Ohio EPA has articulated what is facially a "legitimate non-discriminatory" business reason for the unfavorable personnel, or adverse, action, in that it would have taken the same personnel action against Mr. Jayko as it would have taken without such protected behavior. This business reason consisted of its removal of Mr. Jayko as site coordinator from the Marion project as part of a reorganization combined with difficulties in the relationship between Mr. Czeczele and Mr. Jayko as a reason for the site coordinator transfer. It also maintains that the ten day suspension for the Pizza Hut, beer drinking offenses, either on the job or before a public meeting, and for the falsification of his travel voucher in relation thereto, was appropriate, non-discriminatory discipline for this conduct.

While the "legitimacy" and "non-discriminatory" basis for the two actions is called into question by Mr. Jayko's challenge to it as either lacking credence or constituting a pretext for the action, under either the ERA or the other six burden shifting/ production standards, the result is the same: the prima facie case, burden shifting analysis drops away, and Mr. Jayko continues to have the burden of establishing whether the evidence shows that the discriminatory reason is more likely the motivation for the adverse reason. In other words, he still must establish that his protected conduct remained a contributing factor in his unfavorable personnel or adverse action, and he was discriminated against in violation of the applicable statutes by a preponderance of the evidence.

For the reasons set forth herein, I find that Mr. Jayko has met his burden of establishing a substantial, reasonable basis for his belief that his conduct of the investigation was subject to the "whistleblower" protections of all seven environmental statutes, and that he has established violations of those seven statutes by a preponderance of the evidence. I present the following step-by-step analysis solely for the purpose of order in understanding the various principles involved in evaluating the mountains of evidence here, which consists of some 2,560 pages of testimony and three feet of documentary evidence presented over a two week time period, and not for the purpose of trying to parse statements of law on the burden shifting obligations. The Complainant's ultimate burden of proof

to establish his allegations of violations of the Acts by a preponderance of the evidence, is the paramount standard. [48]

1. OEPA as an "Employer," subject to the Acts:

a. The Eleventh Amendment:

Respondent argues that it is not subject to the "whistleblower" provisions claiming "immunity" pursuant to the Eleventh Amendment to the Constitution of the Unites States. Respondent's argument lacks merit. First, an administrative court is not the proper forum to raise such constitutional concerns. *See, Thakur v. State of New Mexico Environmental Department Construction Programs Bureau,* 1998-WPC-5 (ALJ Oct. 21, 1999). Furthermore, courts have ruled that the Eleventh Amendment does not preclude administrative action against states pursuant to complaints of private individuals. *See, Ellis Fischel State Cancer Hospital v. Marshall,* 629 F.2d 563 (8th Cir. 1980), cert. denied, 450 U.S. 1040 (1981). *Tennessee Dept. of Human Services v. United States Department of Education,* 979 F.2d 1162 (6th Cir. 1992). In addition, respondent fits into the Acts' definition of a "person" who is subject to liability. *See, Jenkins v. U.S. Environmental Protection Agency,* 92-CAA-6 (sec'y May 18, 1994); *McMahan v. California Water Quality Control Board, San Diego Region,* 90-WPC-1 (Sec'y July 16, 1993).

Accordingly, respondent is subject to liability under the Acts and is not shielded by immunity.

b. Definition of an "employer" under the Acts:

(1) "Employer":

Under 29 C.F.R. § 24.2 (a) the complaining employee must establish that the alleged discriminating employer is an "employer" subject to the Acts. For the ERA, 42 U.S.C. § 5851, to be applicable, it must be determined if: (1) OEPA is an employer, and (2) there is a sufficient nexus of the complainant's protected activity and respondent's adverse action to constitute a violation of the ERA. *McNeal v. Foley Co.*, 98-ERA-5 (ALJ Jul. 7, 1998).

Respondent, OEPA, maintains that the provisions of the Acts have not been invoked by Mr. Jayko as a state employee, working for the State of Ohio, and that, in order to be an "employer" subject to the provisions of the ERA, it must be a licensee of the NRC or a contractor or a subcontractor of a licensee of the NRC, under the provisions of the ERA. To the contrary, complainant proposes that any employee of any employer that deals with any element of the protections of the respective Acts, including the ERA, is subject to their respective provisions. When dealing with the ERA, complainant also contends that even if this is not the case, the Defense State Memorandum of Agreement (DSMOA)between the Department of Defense and the OEPA constitutes such an ERA

[48]See, ALJ's comment in *Niedxielski v. Baltimore Electric, Co.,* 2000-ERA-4 (July 13, 2000), to the effect that, "working through the prima facie case is useful since the ultimate burden of proof still involves many of the elements covered in the prima facie analysis...."

agreement, thereby rendering it a contractor, subcontractor or contractor of a licensee under the provisions of the Act.

For reasons that follow, it is my opinion that all seven of the above environmental Acts have been clearly invoked by Complainant Jayko, against his employer, Respondent, OEPA, due to the scope of his investigation into the causes of leukemia in Marion, Ohio. His investigation commenced on June 26, 1997, with his retrieval of the federal and state military and corporate history of the Marion, Ohio sites, prior federal and state clean-up activities, tests that resulted in a significant clean-up in 1989, and the results of tests that had been performed in the area related to its water supply since the early 1990's. It included federal and state reports and actual evidence of the ability to store and to use materials that had at least some potential of having produced harmful effects on the public health and safety of Marion residents. These materials included contaminants such as radiation, toxic chemical and hazardous wastes and materials, and other pollutants that had either been or might have been introduced into the air, water and/or the environment in the area, thereby having provided a "reasonable basis"for continuing with the investigation. *See, Appendix A, hereto, for summaries of these reports, and discussions at Fns. 5 & 6, and related text at FF 22 - 27 p. 9, supra.*

With specific regard to the ERA, first, I find that the provisions of the ERA are not restricted to licensees or contractors or subcontractors of the NRC, for the following reasons. As of 1992, new Subsection 210 of the ERA, 42 U.S.C. § 5851(a)(2) carries over some of the language of old paragraph 42 U.S.C. § 5851(a) and states:

> The term "employer' includes - -
>
> > (A) a licensee of the Commission or an agreement State under section 274 of the Atomic Energy Act of 1954 (42 U.S.C. 2021);
> >
> > (B) an applicant for a license from the Commission or such an agreement State;
> >
> > (C) a contractor or subcontractor of such a licensee or applicant . . . . (Emphasis added.
> >
> > (D) a contractor or subcontractor of the Department of Energy that is indemnified by the Department under section 710 d. of the Atomic Energy Act of 1954 (42 U.S.C. § 2210(d)) .." but not contractors under E.O. 12344.

It is my opinion that the above plain language of § 210, which appears in the 1992 amendments to the original Act, is clearly not restricted to licensees or contractors or subcontractors of licensees of the NRC, nor on the question of whether Ohio is an "agreement State." Also, there is no stated limit on the term "includes," despite certain pre-1992 court disagreements with Secretary rulings on this point.

Initially, the Secretary found an employer-employee relationship under the ERA, where former employees worked for one company which had a contract with the TVA, a licensee of the NRC. *Hill v. TVA*, 87-ERA-23 (Sec'y May 24, 1989) at 3. The "NRC Regulations specifically contemplate that licensees, while retaining ultimate responsibility for safety and quality assurance, 'may delegate to others, such as contractors, agents, or consultants, the work of establishing and executing the quality

assurance program.'" *Hill v. TVA*, 87-ERA-23 (Sec'y May 24, 1989) at 3 (quoting 10 C.F.R. Part 50, App. B Criterion I. (1988)). In *St. Laurent v. Britz, Inc.*, 89-ERA-15 (Sec'y Oct. 25, 1992), an employee-employer relationship was found where the employee was supervised directly by the respondent but was overseen by the contractor.

However, in a pre-1992 amendment case, the Fourth Circuit rejected the view of the Secretary, and concluded that the term "including," in the language, "No employer, including a Commission licensee, . . ., may discharge any employee . . . ," was not inclusive, but exclusive. *Adams v. Dole*, 927 F.2d 771, 777 (4th Cir. 1991). It stated that by using the term in the manner it did, Congress was not merely giving an example of types of employers, but was instead identifying "a consistent class of persons related only to the NRC and NRC licensees, thus tending to restrict the general term "employer". *Id.* at 776. That court was very specific in holding that the ERA did not cover employees of DOE contractors because in 1978, when "§ 210 was enacted . . . , the DOE already had in effect its own internal provisions protecting whistle-blowing activities." *Adams v. Dole*, 927 F.2d 771, 776 (4th Cir. 1991).

In 1992, Congress enacted the above amendments, Pub. L. 102-486, §2902(a), designated the existing opening paragraph as paragraph (1) striking out the clause, "including a Commission licensee, an applicant for a Commission license, or a Contractor or applicant for a Commission license or applicant," after the term "No employer," and added subparagraphs (A)-(C), redesignated former subparagraphs as (D)-(F), and added subparagraph (2), thereby separating the employer prohibitions from the licensee/ contractor/ subcontractor language in subparagraphs and which are now specifically "included" in 42 U.S.C. §5851(a)(2). It also included in subparagraph (2)(D), contractors or subcontractors of the DOE who were indemnified by the DOE and were not covered by Executive Order No. 12344.

By the 1992 amendments to the ERA, Congress clarified the coverage of existing "whistleblower" protection provisions to include as "employers," those employers of employees involved in any activity under the ERA or AEC, and established a separate paragraph to include the Nuclear Regulatory Commission, and (NRC)licensees, contractors, subcontractors of licensees, or applicants therefore. (H,R. No. 101-474(VIII), reprinted in 1992 U.S. Code Cong. & Admin. News 1953, 2296-2297).

Reflecting the legislative history is Appendix A to Part 24 (FR #98-2922, filed Feb. 6, 1998). It reinforces that history by stating:

> The ERA makes it illegal for *an employer covered by the act* – including a licensee of the NRC . . . , an applicant for a licensee, a contractor or subcontractor of a licensee or applicant . . . – to discharge or otherwise discriminate against an employee in terms of compensation, conditions or privileges of employment because the employee or any person acting at an employee's request performs a protected activity. (emphasis added)

Using all three documents, 42 U.S.C. § 5851, the legislative history to HR #102-474 and Appendix A of Part 24, it may be concluded that Congress meant to cover the actions of all employers and employees who would be involved in any phase of any "proceeding" involving the investigation and/or potential cleanup activity of any potential nuclear waste covered by the ERA and Atomic Energy

Act of 1954. I find that this includes reasonably based investigations such as that of Mr. Jayko, regardless of whether it ultimately revealed nuclear sources covered by the Atomic Energy Act of 1954 or not, since the continuing objective in this investigation would have to be to rule such substances in or out as a cause of leukemia arising from the military activity at the Scioto Ordnance Plant and the Marion Engineer District FUDS sites in Marion, Ohio; that the first prong is, therefore, met; that the OEPA does meet the definition of an "employer," and that, being a licensee, contractor or subcontractor is not necessary for the ERA to be applied to its activities in the investigation in Marion, Ohio.

As an additional consideration is that, if the ERA "whistleblower" provision provides protection only to those employees of commission licensees, applicants, contractors or subcontractors who pursue quality and safety investigations and complaints, but denies Mr. Jayko, an investigator, that same protection, it would be contrary to the intent of Congress in bringing safety and quality problems to light and resolving them before accidents or injuries occur. *Hill v. TVA*, at 6.

The second prong permits ERA jurisdiction if there is some "nexus between the activity for which protection is claimed and a goal, objective or purpose of the Atomic Energy Act of the chapter of which Section 5851 is a part." *McNeal v. The Foley Co.*, 98-ERA-5 (ALJ Jul.7, 1998) at 10. *See, Van Beck v. Daniel Construction Co.*, 86-ERA-26 (Sec'y Aug. 3, 1993) at 3 ("in order for jurisdiction to attach under §5851, a nexus must be established between the alleged protected activity and the objective or purpose of the ERA"). As stated above, an investigation to rule covered materials under the Atomic Energy Act of 1954 "in" or "out," is covered.

Respondent maintains that the ERA applies to employers that deal with the construction or operation of nuclear facilities (Respondent's Motion to Exclude Evidence, pg 2, May 21, 1999, previously denied), which it claims it is not, and that there is not a sufficient nexus between Mr. Jayko's activity and the purpose of the ERA. This strict interpretation of using the Act only for nuclear facilities would defeat the purpose of the Act and courts have interpreted "the statute broadly to implement its 'broad, remedial purpose.'" *American Nuclear Resources v. US Dept. Of Labor*, 137 F.3d 1292, 1295 (6th Cir. 1998) (quoting *Mackowiak v. University Nuclear Systems, Inc.*, 735 F.2d 1159, 1163 (9th Cir. 1984). The ERA statute is designed to "protect workers who report safety concerns and to encourage nuclear safety generally." *American Nuclear Resources v. U.S. Dept of Labor*, 134 F.3d 1292, 1295 (6th Cir. 1998). "[C]ourts have held that the ERA protects many types of acts that implicate safety. For example, the ERA protects an employee who files internal reports concerning regulatory violations." *Jones v. TVA*, 948 F.2d 258, 264 (6th Cir. 1991).

Generally, there is a nexus if "the complainant's concern implicates a nuclear safety hazard or the complainant . . . reasonably believe[s] there is a nuclear-related safety hazard." *McNeal v. The Foley Co*, 98-ERA-5 (ALJ Jul. 7, 1998) at 11. I find that Mr. Jayko's investigation invokes the broad remedial purposes of the ERA; that his actions implicated the public health and safety meant to be included within the scope of the ERA; that OEPA is an "employer" (or a "person") under the seven Acts, including the ERA, and that there is a sufficient nexus to the purposes of the ERA to extend coverage to Mr. Jayko's activities thereunder. Therefore, 42 U.S.C. §5851, and the other six protective provisions of the respective Acts, are all applicable in the instant case.

(2) The DSMOA - NRC "licensee," "contractor"or "subcontractor" of a licensee, or an "applicant" therefore:

I find that under the 1992 Defense State Memorandum of Agreement (DSMOA), while the OEPA is not a direct NRC "licensee," "contractor" or "subcontractor" of the NRC, or a "contractor" or "subcontractor" of a licensee of the NRC, or an "applicant" therefore, OEPA's functions in relation to the U.S. Government's role at FUDS sites under CERCLA (and therefore the other environmental Acts) directly involve the State and its affected employees in CERCLA covered proceedings, as governed by the following terms of the DSMOA, and testimony related thereto:

a. Pursuant to a July 18, 1989, invitation addressed to interested States by the United States Department of Defense (DOD), the Ohio Environmental Protection Agency (OEPA) entered into a Department of Defense and State Memorandum of Agreement (DSMOA) on September 10, 1992, which provided that the DOD and the OEPA approved the agreement:

> In order to expedite the cleanup of hazardous waste sites on ... DOD installations within the State of Ohio and ensure compliance with the applicable State Law and Regulations of the State .... (RX 93, p. 3)

b. Attachment A to the DSMOA, included FUDS and sites on the National Priorities List under CERCLA at that time, plus those that might be submitted for emergency treatment upon notice to the DOD by the State. (*Id. @ p. 5*)

c. Under cover of a letter from the Department of the Army (DOA) of May 27, 1998, the DOA agreed to an amended list of sites under DSMOA Attachment A, specifically including as Item No. 31, the Marion Engineering Depot (MED) where the River Valley Local Schools (RVLS) were located, and Item No. 46, the Scioto Ordnance Plant, a much larger FUDS site, part of which was located within a few hundred feet of the MED. (RX 93, p. 23; RX 129-131)

d. By the testimony of Wes Watson Investigator for USACOE, and OEPA Supervisor, Jeff Steers, the role of OEPA under the DSMOA is to enforce and ensure consistency with the federal clean-up program, involving thereunder, the two State of Ohio cabinet agencies, OEPA and the Ohio Department of Health (ODH), the USACOE and the Agency for Toxic Substances and Disease Registrar (ATSTR), a branch of the Center for Disease Control (CDR), for the U.S. Government. (FF 11; RX 93)

In addition, the DSMOA provides for reimbursement from the United States Department of Defense to OEPA for "cleanup of hazardous waste sites on ... DOD installations within the State of Ohio...." This provision is not limited in the types of contact or preliminary activities that might involve the "cleanup of hazardous waste sites" on such installations, even though the ultimate responsibility for the cleanup would lie with USACOE.

In any case, based upon any findings by the OEPA (or ODH) that might have determined that there were existing conditions involving radiation, Ohio Agencies would have been reimbursed for their involvement in clean-up activities.

In addition to the language of the DSMOA, the following must be considered when analyzing the DOD or the USACOE's NRC license obligations, if ANY, under the ERA/ AEC. 42 U.S.C. § 2140 states that:

> Nothing in this subchapter shall be deemed-
>
> > (b) to require a license for the manufacture, production or acquisition by the Department of Defense of any utilization facility authorized pursuant to section 2121 of this title, or for the use of such facility by the Department of Defense or a contractor thereof.

Also, on March 26, 1999, the Director of the NRC ruled, In the Matter of, *United States Army Corps of Engineers*, Case No. DD-99-07, that the USACOE was not required to obtain a license from the NRC to engage in cleanup activities. The Director cited §121(e)(1) of CERCLA, pursuant to which USACOE engages in such actions at FUDS sites under the Formerly Utilized Sites Remedial Action Program (FUSRAP)[49], which states that, "[n]o Federal, State, or local permits shall be required for the portion of any removal or remedial action conducted entirely on site, where such remedial action is selected and carried out in compliance with this section." 10 C.F.R. §300.400(e). He concludes that the provision waives any NRC license requirements that would apply to USACOE activities at FUSRAP sites pursuant to CERCLA. The Director notes that the USACOE, as a branch of the U.S. Department of Defense, was specifically designated by Congress to be the "lead agency" in passing the CERCLA, 1999 appropriations Act.[50]

The Director also noted, however, that in *United States v. Denver*, 100 F. 3d 1509 (10th Cir. 1996), the court held that CERCLA preempted a Denver zoning ordinance which was in conflict with EPA's remedial order, stating: "[T]o hold that Congress intended that non-uniform and potentially conflicting zoning laws could override CERCLA remedies would fly in the face of Congress's(sic) goal of effecting prompt cleanups of literally thousands of hazardous waste sites across the country." *Id.* at 1513, citing, *Ohio v. USEPA*, 997 F.2d 1520 (D.C. Cir. 1993), upholding a number of provisions in EPA's revision of the National Contingency Plan (NCP), including Section 121(e)(1). (The exemption provision is not discussed in that case.)

However, the above license exemption provision and the NRC Director's determination, do not address what happens when the DOD does enter into some kind of an agreement, such as the DSMOA for FUDS sites, where actual cleanup of hazardous waste sites is clearly anticipated in accordance with the CERCLA provisions, when Mr. Watson and Mr. Steers both testified that,

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[49]Established under the Energy and Water Appropriations Act, 1998, Pub. L. No. 105-62, 111 Stat. 1326 (1997).

[50]The Director also noted that all aspects of the interrelationship of responsibilities between the Department of Energy (DOE) and the USACOE under the FUSRAP program involving the overlap of the various Acts have not been addressed, and are the subject of discussions between the agencies for a memorandum of understanding to clarify their respective roles. DD-99-07 at p. 4.

> the DSMOA is to enforce and ensure consistency with the federal clean-up program, involving thereunder, the two State of Ohio cabinet agencies, OEPA and the Ohio Department of Health (ODH), the USACOE and the Agency for Toxic Substances and Disease Registrar (ATSTR), a branch of the Center for Disease Control (CDR), for the U.S. Government. (FF 11)

When gamma rays were first detected on the RVS campus, based at least in part upon Mr. Jayko's reports, an ODH order was issued directing the removal of the contaminants. There were also discussions on October 14, 1997, in which ODH Supervisor of Radiation Protection, Ruth Vandergrift informed Mr/ Jayko that, "there were too many radiologic unknowns and suggested that such radioactive contaminants may have been in the area [by virtue of the Manhattan Project] and that improper disposal may have occurred historically, leaving the potential that they could have gotten into the water shed." (FF 49) As a result, Mr. Jayko's six "concerns" memo of October 15, 1997, repeated such concerns, and orders were issued from the ODH regarding the cleanup, following these OEPA reports.

It is my conclusion that while the DSMOA subjected the DOD to having to reimburse OEPA for its expenses related to any of the radioactivity cleanup activities that might result from its involvement in the Marion investigation, and to that extent may have rendered the OEPA a contractor of the DOD, it did not make it a licensee of the NRC, or a contractor or subcontractor of a licensee under the Act, or an applicant therefore.

What the DSMOA does, however, as an evidentiary consideration in this case, is to focus attention on the relationship between such a State investigator/ employee as Mr. Jayko, whose work brings him into daily contact with basic determinations about the potential hazards connected with such FUDS waste sites under the FUSRAP program, and to the extent to which CERCLA controls the cleanup of those sites, whether the DOD or the USACOE was considered a licensee of the NRC or not. Section 121(f) provides for direct "substantial and meaningful involvement by each State in the initiation, development and selection of remedial actions to be undertaken in that State," 42 U.S.C. §9621(f), while §121(d)(2) details the interrelationship of the provisions of CERCLA with the other five Acts. Here, the very specific employee protection provision set forth in §110(a) of the Act, 42 U.S.C. §9610(a), states:

> No person shall ... discriminate against ... any employee ... [who] ... has provided information to a State or to the Federal Government, filed, instituted or caused to be instituted any proceeding under this chapter ...

In particular, I find that, when known causes of leukemia include both radiation and other chemicals and hazardous wastes, and the factual history of the Marion site includes known federal military FUDS sites that have involved Atomic Energy Commission property ownership and possible Manhattan Project, nuclear weapon activities, with the discovery of other existing, more current radiation sources,[51] this has provided a substantial, reasonable basis for Mr. Jayko to continue an aggressive investigation of the sites with the protections of all the Acts, including the ERA, regardless of

[51] If only in the start-up phase, and even though the sites did not hold any known NRC/AEC licenses. (FF 34)

the outcome of sampling and testing that followed. History or traces of other known hazardous materials and/ or carcinogens such as PAHs, PCBs, tetrachloride, trichloroethylene and others found at the sites, even though supposedly removed by 1989, (FF 24 & 27) also provided a substantial, reasonable basis for the continuance of his investigation under all of the other Acts. Traces of various contaminants, including some gamma rays that turned out to be from benign sources, continued to be demonstrated in current sampling through the time periods of alleged protected activity at the hearing.

In Mr. Jayko's further investigation, he has either directly investigated, recommended or caused to be investigated and reported upon, potential violations of the seven environmental Acts at various Marion, Ohio sites. Therefore, it is also my opinion that, Mr. Jayko had a reasonable, substantial basis to take, and did take, these and other actions to protect the air, water and the health and safety of the citizens affected by the environment in the area, consistent with his findings and conclusions regarding his investigation, and thereby tended to either expose or prevent present or future violations of the seven environmental Acts, regardless of the results of particular tests in either finding or negating existence of particular contaminants. As a consequence of his actions under these Acts, and the properly alleged discriminatory adverse actions taken by OEPA management against him in relation thereto, there is jurisdiction under all seven Acts, including the ERA, which will be specifically discussed, herein.

In either case, whether dealing with the raw wording of the individual Federal Act protection provisions, or with the evidentiary effect of the DSMOA, it is my opinion that the nexus of the alleged adverse action to protected activity under the ERA has been established by Mr. Jayko, and that an appropriate violation of the ERA has been alleged.

2. Protected activity:

a. General Rules:

The environmental statutes at issue protect an individual's participation in activity which furthers the respective statutory objectives. *See, Jenkins, supra.* In other words, the Acts protect the reporting of environmental or safety violations. *See, Johnson v. Old Dominion Security,* 86-CAA-3,4-5 (Sec'y May 29, 1991). Protected activity is broadly construed under the environmental whistleblower protection acts. *See also, Guttman v. Passaic Valley Sewerage Commission,* 85-WPC-2 (Sec'y March 13, 1992). Concerns that "touch on" the environment can be considered as "protected activity." *See, Dodd v. Polysar Latex,* 88-SWD-4 (Sec'y 22, 1994).

Internal complaints are also considered, pursuant to the seven environmental acts, as "protected activity." In *Herman v. Morrison Knudsen Corp.*, 94-CER-2 (ARB June 28, 1996) the Board held that "[i]nternal safety complaints are covered under the environmental whistleblower statues in the Eighth Circuit, the Fifth Circuit and every other circuit. See, Amendments to the ERA in the Comprehensive National Energy Policy Act of 1992 (CNEPA), Pub. L. NO. 102-486, 106 Stat. 2776." The Board further noted that the "[t]he only current exception to this rule is for cases filed in the Fifth Circuit under the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S.C. Section 5851 (1988), prior to October 24, 1992." *See, Dodd, Supra* (CERCLA & SWDA); *Reynolds v. Northeast Nuclear Energy Co.,* 94-ERA-47 (ARB Mar. 31, 1996) (ERA); *Passaic Valley Sewerage Commissioner's v. United States Department of Labor,* 992 F.2d 474 (3d Cir. 1993)

(CWA); *Wagoner v. Technical Products, Inc.*, 87-TSC-4 (Sec'y Nov. 20, 1990) (TSCA); *Guttman v. Passaic Valley Sewerage Commissioners,* 85-WPC-2 (Sec'y Mar. 13, 1992).

As an investigator for OEPA, Mr. Jayko's position was not unlike that of the Nuclear Regulatory Commission quality control inspector in *Mackowiak v. University Systems, Inc., supra,* who was terminated for a "bad attitude," when he issued reports regarding possible falsification by an NRC contractor. *See, discussion at p. 67, supra.*

In addition, an informal complaint, such as verbal communication, constitutes "protected activity." *See, Nichols v. Bechtel Construction, Inc.,* 87-ERA-44 (Sec'y Oct. 26, 1992) (employee's verbal questioning of foreman about safety procedures constituted protected activity), *appeal dismissed,* No. 92-5176 (11th Cir. Dec. 18, 1992); *Dysert v. Westinghouse Electric Corp.,* 86-ErA-39 (Sec'y Oct. 30, 1991) (employee's complaints to team leader protected); *Crosier v. Portland General Electric Co.,* 91-ERA-2 (Sec'y Jan. 5, 1994) (complainant's questioning his supervisor about an issue related to safety constituted protected activity). In this vein, respondent's argument that there must be a formal "proceeding" in order to initiate protected activity is incorrect. Indeed, the environmental "regulations make it clear that a formal proceeding is not required in order to invoke protection of the Act." *Kansas Gas & Electric Company, v. Brock* , 780 F.2d 1505 (10th Cir. 1985), 92 L.Ed.2d 724, 106 S.Ct. 3311 (1986).

To constitute protected activity, the substance of the complaint must be "grounded in conditions reasonably perceived to be violations of the environmental acts," it is insufficient to show that the environment may be negatively impacted by the employer's conduct. *See Minard v. Nerco Delamar Co.,* 92-SWD-1 (Sec'y Jan. 25, 1994); *Decresci v. Lukens Steel Co.,* 87-ERA-13 (Sec'y Dec. 16, 1993) (the environmental whistleblower provisions are intended to apply to environmental and not other types of concerns.).

b. Inspectors:

While the raising of concerns regarding reasonably perceived violations of the respective statutes constitutes protected activity, *see, Johnson v. Oak Ridge Operations Ofc., U.S. Dep't of Energy,* ARB Case No. 97-057, Sept 30, 199, slip op. at 10-12; *Sutherland v. Spray Systems Environmental,* Case No. 95-CAA-1, Sec'y Dec., Feb. 26, 1996 and *Melendez v. Exxon Chemicals Americas,* ARB No. 96-051, July 14, 2000, slip op. at 10-11, it is clear that actual violations need not be proven to have occurred. *Diaz-Robinas v. Florida Power and Light Co.,*, Case No. 92-ERA-10, Sec't Dec., Jan. 19, 1996, slip op. At 11. N. 7, and *Melendez, supra.*

This is important when considering "whistleblower" allegations by inspectors. The environmental Acts prohibit discrimination against inspectors based upon competent and aggressive inspection work, and even "doing their jobs too well." Inspectors must be free in a general sense from identifying safety and quality problems. *Mackowiak v. University Nuclear Systems, Inc.,* 735 F. 2d 1159, 1163 (9th Cir. 1984). As a site coordinator investigator for OEPA, Mr. Jayko's position was not unlike that of the Nuclear Regulatory Commission quality control inspector in that case. Indeed, *Mackowiak* involved an investigation by the NRC of a third party, UNSI. Mr. Mackowiak was terminated for a "bad attitude," purportedly expressed in a request for information that questioned a

contractor's possible falsification of rod control documentation. NRC first transferred and then discharged him for his positions.

Affirming the Secretary's finding that the ERA protected quality control inspectors from retaliation based upon their internal safety and quality control complaints, the *Mackowiak* court noted that the rationale for protecting such inspectors is stronger than with other "workers" since they "play a crucial role in the NRC's regulatory scheme," which requires such contractors and licensees to give the inspectors the "authority and organizational freedom" required to fulfill their roles as independent observers..." of the processes they were inspecting. (Siting, 10 C.F.R Part 50, App. B at 413) The opinion emphasized that there might be possible conflicts with their employers in identifying problems that might cause "added expense and delay," but did not justify their exclusion from coverage. Such conflicts apparently did play such a role in the present case, in OEPA management's frequent references to its budgetary constraints in opposing Mr. Jayko's air, water and radiation sampling proposals.

When Mr. Jayko was asked whether he thought that the OEPA had engaged in violations of the Acts, he said, "No." However, he also stated that he believed that the spirit of the Acts had been violated. This position was cautious. It was also ambiguous, and certainly not binding on the undersigned, since he believed that the respondent had violated the employee protective provisions of the Acts, or he would not have filed the present action. Therefore, I have resolved one ambiguity in the question and answer to have not included the employee protection provisions as violations, and as something that they both understood.

Direct environmental violations remain for consideration. However, there are at least two kinds that could have been committed by the OEPA, in which it could have engaged in prohibited activity: Its own environmental actions, which would involve its own sampling, testing and reporting, and possibly the operation and care of its own facilities; and the actions of other third parties, such as the U.S. Government, corporations and other persons. In terms of its own possible direct environmental protections - *i.e.*, falsifying results of samples that would show elevated levels of contaminants, I have found insufficient evidence on the record that OEPA engaged in that kind of conduct, despite the fact that there were major differences over the effect of results of certain water samples and the placement of air monitoring equipment that could have been the subject of argument that such results were hidden from the public. I interpret Mr. Jayko's answers to mean that he knew of no such direct environmental violations by OEPA.

However, it is also my opinion that the continuing purpose of Mr. Jayko's investigation was to "rule in" or "rule out" excessive levels of contaminants prohibited under those statutes by other third parties, as the cause of the high rate of leukemia in the area. These could have included the U.S. Government, or the owners of private sites such as the Baker Wood creosote plant. Consistent with *Mackowiak,* OEPA's interference or adverse action would result in the finding of a violation of the employee protective provisions by the OEPA, without a direct environmental violation by it. I conclude that this is what actually happened in this case, and, due to the ambiguity in both the questions and the answers regarding Mr. Jayko's opinion on whether OEPA violated the Acts, I give the direct violation questions and answers no weight. I do find, however, that both the actual wording of the employee protective provisions were violated by the OEPA, and the spirit of the environmental provisions were violated when it interfered with Mr. Jayko's investigation, also consistent with *Mackowiak*.

In this case, Mr. Jayko engaged in protected activity, as listed specifically below. Indeed, his actions concerned the objectives of the statutes under which he is pursuing his "whistleblower" claim. Specifically, he was promoting extensive investigative approaches for the Marion site to ensure that the public had not been exposed to hazardous pollutants governed by the seven relevant statutes. It is well settled that reporting potential statutory violations internally to management is protected activity under the employee protection provisions. *See, e.g., Guttman v. Passaic Valley Sewerage Commissioners*, Case No. 85-WPC-2 (Complaints to management that sampling method of monitoring industrial waste treatment system users was "meaningless and unreliable" constituted protected activity), aff'd No. 92-3261 (3rd Cir. Apr. 16, 1993); *Wagner v. Technical Products, Inc.*, case no. 87-TSC-4 (Bringing safety issues to immediate supervisor was protected activity under the TSCA.)

c. Specific "protected activities":

Mr. Jayko's protected investigative activity consisted of at least, but was not limited to, the following:

(1) I find, consistent with *Mackowiak, supra,* that Mr. Jayko's investigation itself, commencing with his appointment as site coordinator for the Marion project in June, 1997, and all of the related activity to that investigation, constituted protected activity; that every item that he reduced to writing, and every statement, report and request that he made to management with regard to the investigation, whether formal or informal, was protected, and that each act of management that interfered with that investigation, and was in response to that protected activity, constituted a continuing violation of the environmental Acts.

(2) In the reports resulting from Mr. Jayko's initial investigation from June 26, 1997 through August 7, 1997, I have found specific protected activity. (FF 21-31) The first report was dated August 1, 1997 from Paul Jayko to Ed Hammett, District Chief, NWDO, entitled Cancer Cases, River Valley School District, Marion, Ohio, recommending, "in the strongest possible way" that an "immediate" LOE investigation of the RVS grounds and property be commenced through an LOE contractor, since RVS buildings were built on the ground of a former military installation. The report stated that it was highly probable that disposal of carcinogenic solvents, along with the burning and burying of unknown materials took place on soils that were either immediately adjacent to the school or then a part of the school athletic fields. It warned that the River Valley Schools would resume their academic calendar on August 26, 1997, thereby placing 1,000 plus individuals into a situation of unknown risk,[52] and that the only way of assuring that the students, faculty, and staff at the RVS are not returning to an area of "eminent risk" would be to conduct environmental sampling of soils, air, surface and ground waters, there. (CX 60; FF 22)

This was followed by another report of August 8, 1997, to Robert Indian of ODH, which repeated much of the history set forth in that of August 1st, regarding the Scioto Ordnance Plant and the Marion Engineer Depot. (RX 113 and summaries of the histories set forth in Appendix A) Both

[52]It is my determination that, in stating that school was to begin on August 26, 1997 and the 1,000 students of RVS were being placed into a "situation of unknown risk," Mr. Jayko invoked specific health and safety concerns under the environmental Acts in his memo to Mr. Hammett.

histories recounted as possible contaminants, radioactive materials, carbon tetrachloride and trichloroethylene, and an unidentified, on site, disposable area. (FF 23-24) The August 8th report concluded with the fact that he had confirmation of following:

> [N]ot all of the materials that had been toxic, radioactive or hazardous materials were removed from the former sites; that they remained there until as late as 1989, and that while once discovered, and removed, it is uncertain whether there are any other sources of toxic or hazardous materials remaining at the site. (FF 27)

(3) I have found that, from September 11, 1997 - October 10, 1997, Mr. Jayko had continuous daily involvement in the investigation, including contacts with the various departments of Ohio EPA, ODH and the Corps, and these included input to the formation of the Lawhon Plan, the draft proposal of which was presented for comment on October 10,1997 in a meeting with Lawhon and others in Westerville, Ohio (JX 18, p. 19 - 31) and a draft of Robert Indian's report which was also discussed by ODH Directors with the Ohio EPA Director in Columbus, on that date. (FF 46) I also found that on October 14, 1997, Mr. Jayko had discussions with his Supervisor, Jeff Steers, Supervisor of the Drinking Water program, Doug Scharp, and Supervisor of the ODH Bureau of Radiation Protection, Ruth Vandegrift, about a plan of Ohio American Water to send Drinking Water Program representative Majewski, to Marion to collect samples that day, and the requirements that EPA had from a chemical and radiologic standpoint, including alpha, beta and gamma rays, that he wanted covered. (FF 48) All of these activities constituted protected activity.

(4) As stated above, I have also found Mr. Jayko's six "concerns" memo of October 15, 1997, to be specifically protected activity, (FF 58) and that management's reaction to it constituted an independent, potential violation of the environmental Acts. (FF 53 and fn. 16) This reaction to Mr. Jayko's memos to that point in time constituted evidence of the commencement of the retaliation against Mr. Jayko for those protected activities, culminating in his removal as site coordinator, and the ten day suspension which followed that removal two days after filing his complaint in the present matter, both of which have been found to have violated the seven environmental Acts as set forth herein.

(5) The maintenance of Mr. Jayko's chronology of the investigation was, also, clearly protected activity, as was the generation of his status reports, updates and monthly reports to Mr. Dunlavy, for which he testified without contradiction that he utilized the chronology. I find that OEPA Management's treatment of Mr. Jayko for maintaining his chronology of the Marion investigation, and his proper releasing of it with the public papers to the Marion investigation repository upon the direction of the Central Office to do so, constituted a series of openly hostile acts in retaliation for what was otherwise a proper, protected activity and procedure for a conscientious investigator with the stature of Mr. Jayko during a critical investigation such as the Marion investigation. (FF 139 - 143 & fns. 25 - 26 related thereto.)

(6) On January 23, 1998, Mr. Jayko addressed a memo to all of the team members, containing sixteen of his areas of concern that might require further investigation, including its expansion to include other forms of cancer and illnesses other than leukemia. (JX 9; FF 109) I concluded that Mr. Steers subsequent memo of January 29, 1998, to stop all disconnected info so that anything we say is said with the "bigger picture spin on it" and to stop all contacts with the media (of which none were demonstrated by Mr. Jayko) was a direct result of that memorandum. (CX 18; FF 113) This, and the

failure to provide a copy to him demonstrated OEPA's attempt to exclude him from the processes of the Marion investigation, an adverse action in response to his protected activities.

(7) Between January and June 1998, Mr. Jayko continued to engage in protected activities and conduct, including the following: (a) a second January 23rd memo in which Mr. Jayko disagreed with a letter regarding one from Mr. Krumanaker concerning a statement that no evidence had been found of problems in the Marion drinking water, in which Mr. Jayko challenged its accuracy because trihalomethanes (carcinogens at certain levels) had been detected in the August 1997, sampling at RVS; (FF 112) (b) his April 2, 1998 oversight of the USACOE trenching (sampling) operation at the RVS which revealed concentrations of solvents and other organic chemicals that found that, while not in excessive concentrations, were at a depth of only three feet in an area regularly saturated with water, and he was then left out of a conference call around April 9, 1998, that was to address whether there was a risk at RVS and associated topics concerning these matters (FF 127-130), and (c) his response to the Columbus directive in late April, 1998, to gather all documents in his possession regarding the Marion investigation to be turned over to the repository in the Marion library, which he did, including his chronology, and was later questioned heavily on it, (FF 132-143 although there was nothing wrong with it). (FF 143, fn. 26)

(8) Likewise, Mr. Jayko's June 1, 1998, three point memo to Mr. Czeczele regarding the aerial photos was protected activity, (JX 15; FF 203) and I have found that management's openly hostile reaction to it, (FF 204-206) as later documented in the June 4, 1998 memorandum from Mr. Steers to Mr. Hammett, to have been similarly violative of the environmental Acts.

3. Adverse Action:

An "adverse action is simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." *Stone & Webster Engineering Corp. v. Herman,* 1997 U.S. App. LEXIS 16225. "Adverse action" encompasses any discrimination with respect to an employee's compensation, terms, conditions or privileges of employment. *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983). In addition, a transfer to a less desirable employment position, even with no loss of salary is prohibited. *Carter v. Electrical District No. 2 of Pinal County,* 92-TSC-11 (Sec'y July 26, 1995); *Martin v. The Department of the Army,* 93-SDW-1 (Sec'y July 13, 1995). For example, in *Delaney v. Massachusetts Correctional Industries,* 90-TSC-2 (Sec'y Mar. 17, 1995), the Secretary determined that the complainant's job transfer was less desirable, even though the new job had the same pay and benefits, because his new responsibilities did not match his qualifications and therefore posed a threat to his job security. *Id*. However, an employee's subjective opinion that the new job is less desirable is not enough to sustain a finding of "adverse action." *See Pillow v. Bechtel Construction, Inc.,* 87-ERA-35 (Sec'y July 19, 1993) (complainant's reassignment was not adverse despite his complaints because it was not the worst assignment for workers, other workers volunteered for this position and employer offered a legitimate reason for the transfer - the complainant was good at this task and it needed to be completed).

I find that, in addition to the individual adverse actions discussed above in response to individual acts of protected conduct and activity, the present transfer constituted a specific adverse action, much more than something unpleasant in Mr. Jayko's case warranting specific remedies, which warrants a specific remedy or remedies. It resulted in a substantial change in his terms and conditions of

employment, in which he was not only transferred, but stripped of the most important project in his OEPA career; one that involved not only his Marion project involvement but of duties, responsibilities and prestige that mark advancement in such a position, and the relieving of which constituted an effective demotion within his site coordinator position. In addition, it cost him the perks attendant to such a position, including lost benefits such as overtime and other lost time.

The Sixth Circuit, in *DeFord v. Secretary of Labor,* 700 F.2d 281 (6th Cir. 1983), *supra,* considered the following factors in determining that the job transfer constituted a demotion for the complainant: (1) the new job was far less attractive and prestigious; (2) his new tasks were below proven capabilities; (3) he no longer had supervisory responsibilities; (4) the new job included certain clerical functions; (5) he was moved to a less desirable office and (6) he would remain "invisible" and was not permitted to sign his name to documents. *Id*. Applying the *DeFord* findings to Mr. Jayko, his new job was far less attractive and prestigious; its tasks were below proven capabilities, and he was rendered, and would remain, "invisible."

Complainant alleges the following discriminatory acts, or "adverse actions": (1) removing Mr. Jayko as the Marion site coordinator and assigning him to a less meaningful site; (2) loss of overtime pay as a result of being removed from the Marion Site; (3) suspending Jayko for ten work days for the Pizza Hut, drinking/ "falsifying receipt" incident; and (4) sending a letter disparaging Jayko to the River Valley families and governor. I find that Mr. Jayko has established each of those alleged adverse actions, as well as the adverse actions in response to his protected activity, as set forth in the prior section, but that the primary adverse actions were the site coordinator transfer and the ten day suspension.

In addition to the above specific findings of adverse actions set forth in the discussion of protected activity, I would add the following as a type of conduct that is recounted throughout the findings of fact which constituted discriminatory adverse conduct and/or evidence of discriminatory conduct, as the background for the specific violations as alleged:

a. On Nov. 15, 1997, the Columbus Dispatch wrote an article embarrassing to the OEPA, mentioning Mr. Jayko's 1992 LOE contract request, and he was called into Mr. Hammett's office and questioned in an openly hostile manner by Mr. Hammett for it, while there is no evidence that others were treated in such a manner for the article. (FF 94-98)

b. Respondent believed that Jayko was leaking information to the media, which he was not. Two days after NBC Dateline, expressed interest in Marion in November 1997, Mr. Jayko was sent a memo telling "everyone involved in anything Marion," not to engage in any discussions to public/media unless coordinated with PIC. (CX. EX. 14; FF 99) Mr. Jayko's activity in merely responding to Dateline representative Sanders on whom to contact for information at OEPA was clearly protected activity. Mr. Hammett's hostile, accusatory reaction to the article, was not a protected exercise of management discretion.

c. On January 29, 1998, Mr. Jayko was again not copied with key memos from Mr. Steers regarding matters significant to him as the site coordinator, about being back "in charge of the whole thing," and wanting no contacts with the media from the staff. In the second, Mr. Steers stated that he

wanted "to stop all disconnected info so that anything that we say is said with the bigger picture spin on it," while down playing the Lawhon studies as just raw data. (FF 113-114)

d. Mr. Jayko was also deliberately shut out of the conference calls discussed in April 9, 1998 e-mails between Kevin Jasper of USACOE and Mr. Steers regarding risks at RVS, about which Mr. Jayko would have peculiar, detailed knowledge. Mr. Jasper asked Mr. Steers whether he wanted Mr. Jayko included in the calls. Mr. Jayko was excluded, for he never received either the first, or a second one in which the OEPA was complimented for its close work with USACOE, and even though Mr. Jayko was an integral part of that cooperation. He never heard of the resulting meeting. (FF 128-130) I find that the direct question about Mr. Jayko's inclusion, and the fact that he was excluded, demonstrates that the exclusion was, indeed, deliberate. From this, absent a legitimate explanation that has never been given for this adverse action, I find that the only reason for the exclusion was Mr. Jayko's protected activity.

4. Knowledge of Protected Activity:

Respondent's knowledge of a protected activity at the time of its adverse action, is an essential element of the complainant's prima facie case. *See, Morris v. The American Inspection Co.,* 92-ERA-5 (Sec'y Dec. 15, 1992), slip op. At 6-7. Complainant has easily sustained this burden. Respondent assigned Mr. Jayko the duty of site coordinator for the Marion project. Its officers called him to task for the October 15, 1997 and June 1, 1998 memos. Jayko's LOE request regarding the Baker Wood site was published in the Columbus Dispatch (quoting Jayko) on November 15, 1997, and he was immediately confronted by Mr. Hammett in a very hostile manner, with no evidence that he ever acknowledged Mr. Jayko's legitimate explanation that the quotes came from the 1992 investigation. Mr. Jayko sent the interoffice memos to the same OEPA management that made the decision to transfer Mr. Jayko. Furthermore, there is substantial testimony demonstrating that respondent was fearful of what Mr. Jayko would say to the media about the investigation. (Tr. 2525-26). The three (six, sixteen and three "point") memos, were communicated directly to members of management. Its response was immediate and continuous, right from its response to the first six point memo in October of 1997, through the time of his transfer at the end of June 1998, and then punctuated by the ten day suspension in July. In addition, Mr. Jayko's treatment, not only before the above actions, but continuing after them, for release of his chronology to the public repository for the Marion investigation, is manifest because the chronology became known to the public at large. Mr. Jayko had not only the right, but the obligation to release that chronology.

5. Motivation:

A complainant must produce sufficient evidence to raise an inference that the motivation for the adverse action was his protected activity. Temporal proximity between the whistleblowing activities and the adverse actions is sufficient to establish a prima facie case. *Tyndall v. U.S. Environmental Protection Agency,* 1993-CAA-6, 1995-CAA-5 (Administrative Review Board, June 14, 1996), citing *County v. Dole,* 886 F.2d 147 (8th Cir. 1989); *Bartlik v. United States Department of Labor,* 1996 U.S. App. LEXIS 394, 1996 Fed. App. 0021P (6th Cir. 1996). However, in *Hadley v. Quality Equipment Co.,* 91-TSC-5 (Sec'y Oct. 6, 1992), the Secretary indicated that although a sequence of events occurring in a short period of time may invoke an inference of causation, it is still necessary to examine the events as a whole in determining whether the ultimate question of whether a complainant

has proved by a preponderance of the evidence that the retaliation was a motivating factor in the adverse action. In other words, an administrative law judge may decline to find retaliation, notwithstanding the short proximity of events, if other facts show that complainant would have been fired had he not engaged in the protected activity. *Hadley, Supra* (employee engaged in a stream of obscene behavior immediately prior to adverse actions by employer) ; *Jackson v. Ketchikan Pulp Co.*, 93-WPC-7 (Sec'y Mar. 4, 1996) (complainant was fired for being out of his work area rather than his protected activity even though there was temporal proximity between the protected activity and discharge).

While Mr. Jayko's June 28, 1998 transfer as site coordinator was slower in its effect, it came closely on the heels of the rather immediate response of management to his June 1, 1998 memo to Mr. Czelczele, and the resulting June 4, 1998 memo from Mr. Steers to Mr. Hammett concerning that memo, and other descriptions of alleged misconduct which have been previously discredited herein. In fact, Mr. Hammett relied upon the discredited June 4th memo to justify Mr. Jayko's transfer as site coordinator.

These actions followed a chain of OEPA management conduct that began on October 15, 1997, with the hostile confrontation immediately after receipt of that memo, the explanations for which, I have discredited. (FF 53 & fn. 16) It continued with other such conduct, the tempo of which was consistent with actions of Mr. Jayko during the course of his investigation, such as arbitrary decisions not to include Mr. Jayko in certain Marion project conversations and the distribution of certain memoranda in which he had a direct interest, some of these were not seen until the present litigation. (FF 53, 55, 59, 64-66)

6. The "legitimate and non-discriminatory" business reasons:

The respondent has the burden of producing evidence to rebut the presumption of disparate treatment established by complainant's prima facie case, by presenting evidence that the alleged disparate treatment was motivated by legitimate, nondiscriminatory reasons for the adverse action. *See, Texas Dept. of Community Affairs v. Burdine, supra,* 450 U.S. 248 (1981) (Title VII case). This must be established by clear and convincing evidence under the ERA, and by merely articulating or stating that evidence under the other six environmental Acts. In either case, the complainant retains the ultimate burden of proof. He must establish by a preponderance of the evidence that respondent's adverse actions constituted discrimination for complainant's protected activity. Here, it is that Mr. Jayko's protected activity was the motivating factor in respondent's decision to transfer complainant and imposing the ten day suspension for the Pizza Hut drinking allegations and the accompanying alleged falsification of travel receipts. *Dysert v. Westinghouse Electric Corp.,* 86-ErA-39 (Sec'y Oct. 30, 1991); *See Texas Dept. of Community Affairs, Supra.*

In a nutshell, respondent presents the following as its justification for the "adverse action," of the June 29, 1998 decision to reassign Mr. Jayko to sites other than the Marion, Ohio RVS, MED and SOP sites: that the reassignment was the result of a "reorganization" of the NWDO DERR and prompted by the difficult relationship between Mr. Czeczele and Mr. Jayko, namely his difficulty in supervising Mr. Jayko, and that Mr. Czeczele was unable to establish a clear chain of command under the existing structure; and that the Pizza Hut drinking/ falsification ten-day suspension was solely motivated by respondent's election to so discipline Mr. Jayko for OEPA rules violations.

In this regard, I have made the following ultimate findings of fact:

1. Mr. Hammett had no reasonable basis for Mr. Jayko's transfer based on the discredited June 4th memo from Mr. Czeczele to Mr. Steers. This was the only factual basis actually presented by Mr. Hammett. By his own testimony, he admittedly had no specific facts that would have warranted such a transfer after that date. (FF 272)

2. Mr. Hammett's testimony with regard to his lack of recall on communicating with Mr. Schregardus about Mr. Jayko's transfer was found to be deliberately evasive and lacking in the presentation of any reasonable basis for the transfer. (FF 270) At any rate, he did admit to supplying the entire June 4, 1998 Steers/ Hammett memo to Mr. Kirk as part of the Pizza Hut incident. Therefore, Mr. Kirk and, as a result Mr. Schregardus, knew all of the reasons that were used for Mr. Jayko's transfer when he made his report to Mr. Schregardus recommending the disciplinary suspension. In addition, Mr. Schregardus admitted knowing that he understood that Mr. Jayko's removal was not due to a disciplinary reason, but was related to a reorganization of the Marion project, and that it was due to a "confidential personnel reason," which was that he believed that Jayko was not communicating well with the Marion team. (FF 279) This information was all included in the June 4th memo.

3. The testimony of Mr. Schregardus of not being involved in the decision to transfer Mr. Jayko has been found by me to be to be implausible, and an unwarranted attempt by Mr. Hammett to shield him from any involvement in what was to be the major decision of the new reorganization. (FF 279)

4. Mr. Dunlavy's testimony regarding the transfer of Mr. Jayko on the pretense of reorganization has been credited in full, due to his consistent testimony and demeanor, the fact that he had a lot to lose as a member of management by testifying in Mr. Jayko's defense on this point, and because his testimony was delivered spontaneously, on questioning by the undersigned, rather than by prior questioning by the complainant who called the witness, and after his cross-examination by the respondent. (FF 286)

5. I also find that there is no other reasonable explanation for the adverse action of Mr. Jayko's transfer other than discrimination for his protected activity, and that he would not have been so transferred but for that protected activity. This is based upon the fact that the reasons for the transfer are premised upon the testimony of Mr. Hammett which I have discredited, along with his reliance on the June 4, 1998 Jeff Steers memo, to which I have given no weight, in their attempt to establish a legitimate, nondiscriminatory reason for Mr. Jayko's transfer, (whether Mr. Schregardus played any direct role in the transfer or not). It is supported by the testimony of Mr. Dunlavy, regarding the transfer of Mr. Jayko on the pretense of the reorganization, which I have credited in full for the reasons set forth herein. I therefore find the proffered explanation for the transfer to be a pretext for the real reason - his protected activity as set forth above, and summarized below, in detail.

I find that respondent did not establish by clear and convincing evidence that it had a legitimate, nondiscriminatory reason for Mr. Jayko's transfer from his position as site coordinator for the Marion project, or for his ten day suspension for violation of legitimate OEPA rules against drinking alcoholic

beverages either on OEPA time or before public meetings, or for the submission of inappropriate vouchers for reimbursement of travel expenses in conjunction therewith, within the meaning of the ERA. Within the provisions of the other six acts, I find that while business reasons were articulated which it contended were legitimate and nondiscriminatory, respondent did not establish that they were either legitimate or nondiscriminatory, and to the extent that they might have been so considered I find that those assertions constituted a pretext for the real discriminatory reasons, as set forth below.

7. The transfer reasons as pretext:

Once the respondent articulates a legitimate, nondiscriminatory basis for its action, or establishes it under the ERA, the focus shifts to the issue of whether such basis is merely pretextual and that the respondent's action was based on a discriminatory motive. The complainant,

> may demonstrate that the reasons given were a pretext for discriminatory treatment by showing that discrimination was more likely the motivating factor or by showing that the proffered explanation is not worthy of credence. . . In order to determine that [the complainant] has established discriminatory intent in regard to this adverse action by the [respondent], however, "[i]t is not enough. . . to disbelieve the employer; the fact finder must believe the plaintiff's explanation of intentional discrimination."

St. Mary's Honor Center, supra, 113 S.Ct. at 2749, 125 L.Ed. 2d at 424.

The main OEPA management figures behind the alleged "adverse action" tell different and conflicting stories. The primary people who supervised Mr. Jayko and were involved with the decision to reassign and/or discipline Mr. Jayko for his actions, were: Don Schregardus, the Director of the OEPA, who was responsible for disciplining Mr. Jayko for the "drinking/falsifying receipts" incident; Ed Hammett, the Chief of the Northwest District ("NWDO") of the OEPA, who ran the Division of Emergency Remedial Response ("DERR"), and was the one who made the ultimate decision to reassign Mr. Jayko; Jeff Steers, who was the Assistant Environmental Administrator of the DERR - NWDO, and Mr. Jayko's immediate supervisor, until the introduction of Mr. Czeczele on June 1, 1998, and who worked under Mr. Hammett; Bruce Dunlavy, who was Environmental Manager of the DERR-NWDO and worked under both Mr. Hammett and Mr. Steers; Archie Lunsey, who worked as the Environmental Supervisor of the DERR-NWDO and, prior to Mike Czeczele, supervised Mr. Jayko; and Mike Czeczele who replaced Mr. Lunsey as supervisor over Mr. Jayko, and began to officially work in this capacity on June 1, 1998, reporting to Jeff Steers. To illustrate the general hierarchy, the following names are in order of management authority:

Mr. Shregardus
Mr. Hammett
Mr. Steers
Mr. Dunlavy
Mr. Lunsey/Czeczele
Mr. Jayko

In sum, Mr. Schregardus testified that Mr. Jayko was removed due to "personnel confidential problems," namely, Mr. Jayko's communication problems with the Marion team. (T 670, 676). He testified that he was unaware of any "reorganization." Mr. Hammett testified that removed Mr. Jayko due to the conflict between Mr. Czeczele and Mr. Jayko. (T 2394) Yet, he was unable to "recall" what the realignment/ reorganization of the Marion project entailed or who was involved. (T 2391-92; 2403) Mr. Steers testified that Mr. Jayko was removed because Mr. Czeczele threatened that it was "either him or me." (T 618) Yet, Mr. Czeczele testified that he could work with Mr. Jayko; and that Mr. Jayko told him that he would do whatever he wanted to do, and that, Mr. Jayko did not thereafter refuse to follow any orders. Mr. Dunlavy specifically testified that the reorganization/ realignment of the Marion project was a pretense for removing Mr. Jayko and that the real reason was Mr. Steers' frustration with the memo writing and the fear of Mr. Jayko was acting as a conduit to the media. (T 2516, 2564, 2525-26) Mr. Lunsey claimed that he was not told the exact reasons for Mr. Jayko's removal. (T 198) He did testify that Mr. Steers was concerned with Mr. Jayko's interoffice memos. (T 180) Mr. Dunlavy was against removing Mr. Jayko from the project. (T 187). Mr. Czeczele then contended that Mr. Jayko was removed to "clarify the chain of command" and to help Mr. Lunsey with his under staffed group, the Remedial Response Group. (Tr. 2337). As indicated above, he did not request Mr. Jayko's removal and would have worked through the problems with Mr. Jayko. (Tr. 2337). [53]

[53]Mr. Steers also testified that Mr. Jayko was not participating in conference calls and meetings, concerning which I find that he was participating, but gradually limiting his comments and observations. However, I also find that any such limitation in these calls and meetings by Mr. Jayko, especially after January 7, 1998, was caused by the effects of his treatment by OEPA management and to the above chain of events, and not due to any misconduct on the part of Mr. Jayko.

The various reasons produced by the managers discussed above are not consistent and do not reveal a convincing justification for Mr. Jayko's removal. Respondent's "legitimate, non-discriminatory" reasons for removing Mr. Jayko from the Marion project, the reorganization and conflict with Mr. Czeczele, crumble under scrutiny and fail to establish either by clear and convincing evidence or any other standard, that the real reason for the transfer was either legitimate or non-discriminatory. Therefore, I am unable to conclude that Mr. Jayko's protected activities were not involved in respondent's decision to remove Mr. Jayko. They were. Consider the following evidence:

First, it is not clear what this alleged "reorganization/ realignment" of the NWDO DERR was, and how this affected Mr. Jayko's transfer. Since Mr. Czeczele's assignment was already in place, the only real "reorganization" that I am able to detect was Mr. Jayko's removal and replacement by Mr. Snyder. While Mr. Czeczele discussed it in terms of clarifying the chain of command and helping Mr. Lunsey with an understaffed group, he did not discuss the reorganization in terms of resolving a conflict with Mr. Jayko. Mr. Steers discussed the reorganization in terms of the volatile relationship between Mr. Czeczele and Mr. Jayko, although Mr. Czeczele's testimony undermines any continuing volatility in the relationship.

Mr. Schregardus testified that he was not aware of any reorganization at all!

As stated above, Mr. Dunlavy said the reorganization was just a pretense, or an excuse for the real reason why Mr. Jayko was being removed - to prevent a "pipeline" to the media. Mr. Lunsey discussed the action as a "realignment," first testifying that some discussions had occurred before Mr. Czeczele acted as supervisor over Mr. Jayko. He then stated that the discussion of Mr. Jayko's role in the realignment/reorganization did not occur until *after* he was removed.(T 248, 249).

Second, Mr. Steers' and Mr. Hammetts' primary reason for moving Mr. Jayko, the serious conflict with Mr. Czeczele, is not supported by the record. Indeed, in the first few days after Mr. Czeczele's new assignment, there was conflict between the two, but the evidence does not indicate a serious conflict. Moreover, Mr. Czeczele's testimony shows that he only supervised Mr. Jayko on the Marion project a short time for these alleged supervisory conflicts, from June 1, 1998 until June 29, 1998, and that they were working out their problems. Beyond that, Mr. Hammett could testify to no specific points, outside of the discredited, June 4th memorandum from Mr. Steers to Mr. Hammett. Mr. Czeczele did testify that he worked with Mr. Jayko prior to the supervisory role, but the only problem he testified to was lack of participation in conference calls.

Ironically, when Mr. Jayko was "active" with his June 1, 1998 memo regarding the aerial photos, Mr. Czeczele was bothered by this overactive participation! Furthermore, Mr. Czeczele testified that he and Mr. Jayko had worked out the dispute over the aerial photos. More importantly, Mr. Czeczele verified under oath that Mr. Jayko told him that Mr. Jayko would do whatever he wanted him to do, and then testified that Mr. Jayko was not acting insubordinate. This is hardly the mark of insubordination in such a stressful situation.

Of key importance to this discussion, however, Mr. Czeczele never requested that Mr. Jayko be removed from the Marion project and stated that he was willing to work through any problems with Mr. Jayko. Mr. Czeczele's main concern was having direct supervision over someone, a concern he expressed *prior* to working with Mr. Jayko, and admitted that it would be fine if that direct supervision was over Mr. Jayko. (T 2377). That is what he wanted out of any realignment or reorganization.

From Mr. Hammett's perspective as the decision maker in removing Mr. Jayko, he was unable to name many incidents of discord between Jayko and supervisors, much less, a "long pattern of behavior" after the June 4th memo.[54] He was unable to recall any "specific facts" about problems with Mr. Jayko's performance in June. He just recalled "that the level of . . . relationship had not improved. And therefore, we made the decision to make the reassignment at that point. But I don't have specific facts." (T 2399). I conclude from his testimony, that Mr. Hammett's main source of information about Mr. Jayko's problems was the June 4, 1998 memo (3 days after Mr. Czeczele became supervisor), which was directed by him to Mr. Steers in order to document the "problems" with Mr. Jayko. The memo alleged the drinking incident, Mr. Jayko's lack of participation in the Marion project, the aerial photography conflict with Mr. Czeczele, and Mr. Jayko's two occasions of watching television on "state time." (JX-17). Mr. Hammett admits that this memo was written only three days after Mr. Czeczele worked as a direct supervisor over Mr. Jayko. (T 2415). Mr. Hammett claims that he was unaware that Mr. Lunsey and Mr. Dunlavy did not want Mr. Jayko to be transferred. (T 2444). However, as stated above, I have discredited the entire June 4th memorandum for reasons discussed above, and give it no weight.

Mr. Schregardus, who stated that he did not know about the reorganization, also testified that Mr. Jayko was transferred due to a "confidential personnel reason", namely, Mr. Jayko's communication problems with the Marion team. (T 670, 676). Directly contrary to the reasons stated by Mr. Hammett for the transfer, Mr. Schregardus did not understand Jayko's removal to be related to a reorganization of the Marion project. (T 670). Yet, in a July 31, 1998 letter from Mr. Schregardus to Governor Voinovich, he stated that with regard to the recent "personnel issue" prompting media coverage:

> In June, Mr. Jayko was removed from the Marion investigation team while the agency investigated the allegation involving falsifying meal receipts and drinking on duty. The investigation recently concluded and I have suspended Mr. Jayko for 10 days for those activities. Mr. Jayko has had difficulties working effectively with the investigation team and communicating effectively with other team members. Based upon this, when Mr.

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[54]Mr. Hammett claimed other incidents of discord between Jayko and other supervisors on recall at the end of the hearing, but was unable to name them specifically. (T 2418). For the first time in his testimony, also at the end of the hearing, Mr. Hammett stated that Jayko's former supervisor, Ms. Gerber, had problems with him in 1996 because he did not adequately record his activities and when he did "the projects were not progressing satisfactorily." (T 2458-59). Mr. Dunlavy testified that he talked to Jayko about this "problem," and Jayko responded that he backed down in participation because his ideas were not being listened to or addressed. (T 2485). Moreover, respondent has failed to submit any documentary evidence on the Dura project (the source of this allegation that Jayko has had previous problems). (T 2417-20). I have specifically given no weight to pre-June, 1997 conduct on the part of Mr. Jayko, on the basis that it was not documented in any evaluations of him, and he was assigned the key Marion site coordinator position anyway -in other words, on the basis of a "clean" record. (FF 20)

> Jayko returns from his suspension he will no longer function as the site coordinator but will be consulted as needed. (JX 25)

This memorandum belies the fact that Mr. Jayko was transferred on June 29, 1998, due to the "realignment" or "reorganization," wholly apart from the investigation of the Pizza Hut incident, and, basically links the two.

Mr. Hammett, who made the ultimate decision to transfer Mr. Jayko, claimed that he was transferred to resolve the conflict between Mr. Czeczele and Mr. Steers. Mr. Hammett was unable to recall what the realignment discussions entailed. In other words, Mr. Hammett did not associate the realignment of DERR with Mr. Jayko's conflict with Mr. Czeczele! Essentially, he could not remember what the realignment/reorganization was. Mr. Steers contended that Jayko's transfer was due to the conflict between Mr. Czeczele and Mr. Jayko- the threat "either him or me." Mr. Steers testified that Mr. Jayko was not a "team player," and discussed a realignment/ reorganization of the Marion project, but only in terms of the supervisory "conflict."

On the other hand, Mr. Dunlavy and Mr. Lunsey did not want Mr. Jayko transferred and Mr. Dunlavy testified that he was removed under a pretense of "reorganization." Mr. Dunlavy claimed that Mr. Jayko was removed due to his controversial internal memos and, in this vein, to prevent him from talking to the media. He also claimed that a "clarification of the chain of command," between Mr. Czeczele and Mr. Jayko, was not the primary reason or reason at all for Mr. Jayko's removal. Mr. Lunsey testified that he did not know why Mr. Jayko was removed from the Marion project. He did not want him removed due to his knowledge about Marion and his well-received performance. Mr. Lunsey also testified that Mr. Steers expressed concern about Mr. Jayko's interoffice memos which may have lead the public to believe that the OEPA was not doing something. He further said that the "common assumption" of the NWDO was that Mr. Jayko was removed due to the beer drinking incident. (T 199).

Mr. Czeczele testified that Mr. Jayko was removed due to the "realignment" which was not described in terms of removing Mr. Jayko because of an internal conflict between himself and Mr. Jayko. In fact, Mr. Czeczele stated that he did not request to remove Mr. Jayko and that he "may have had differences or communications problems that, you know, were difficult. But I would have worked through them. I mean, the real reason, to me, was realignment." (T 2337). Mr. Czeczele's view of realignment was to have Mr. Jayko work with the Remedial Response Group under Mr. Lunsey because this group was understaffed, and which, apparently, would not have precluded necessary Marion project responses. (T 2337) He also said that he did want a clarification of the chain of command (*i.e.* to directly supervise someone) even before starting his job as supervisor on June 1, 1998, which he did not get. He said that the clarification of the chain of command could have involved Jayko remaining on the Marion project, as long as he had direct supervision. (Id.)

Again, it is my conclusion that the reasons given by OEPA management for the transfer of Mr. Jayko (reorganization/ realignment) were conflicting and ultimately, not credible. On close analysis, the fracture in respondent's proffered reasons for the transfer indicate that those reasons were not only a pretext for the real discriminatory reasons for the transfer, Mr. Jayko's protected investigative activity, but that the action was deliberate, and intended to chill those actions in violation of all seven environmental Acts.

8. The suspension for alcohol use and reimbursement as pretext:

On May 21, 1998, Mr. Jayko consumed two eleven ounce draft beers at a Pizza Hut before a public meeting. One restaurant check for an undetermined amount, which is not in evidence, was presented to the table and split among the group that ate there. There is no evidence in the record that any other checks or receipts were issued by Pizza Hut.

USACOE representative Watson stated in a letter of June 25, 1998, (CX 30) that he divided up the check, at $6.00 each, and that Mr. Jayko contributed $15.00 to cover the two beers and a tip. On return to the OEPA office, Mr. Jayko filled out an expense receipt for $14.52, though he could only be reimbursed for $13.00. He did not submit the original receipt, since he did not have one. He did submit what is called a "duplicate receipt" for $14.52, pursuant to a practice and local rule described herein. No one submitted the original check, and the exact total or inclusions in it are not known. Mr. Jayko was initially charged with OEPA rule violations in drinking the two beers on OEPA time.

A pre-disciplinary hearing was held on June 22, 1998. The meeting was attended by OEPA Human Resources Director, Mr. Kirk, and by Mr. Jayko who was accompanied by a union steward, Ms. Linda Tilse. Mr. Kirk charged Mr. Jayko with consumption of beer on state time and operating a state vehicle after drinking. Mr. Jayko presented documents to show that he was not drinking on state time.

After the meeting, Mr. Kirk reviewed the travel expense report and noticed that the attached receipt was not a Pizza Hut receipt. (Er. Ex. 35) Mr. Kirk sent a memo to Mr. Schregardus and Mr. Jayko on June 23-24, 1998, informing them that he had encountered additional violations, (Er. Exs. 40, 41) and summarily referred the matter to the Ohio State Highway Patrol (OSHP) for suspected "illegal activity." He did not provide Mr. Jayko an opportunity to explain suspected violations, or even the option of withdrawing the travel reimbursement request or contesting it, before the OSHP referral. The OSHP returned it to OEPA as an alleged offense under $10.00, and recommended that the matter be resolved administratively.

A second pre-disciplinary conference was held on July 22, 1998, with the new allegations that Mr. Jayko had claimed more reimbursement than that to which he was entitled, and had submitted a false receipt, the one that had been referred to the OSHP and returned by it.

On July 24, 1998, Mr. Kirk submitted a pre-disciplinary report to Mr. Schregardus recommending that Mr. Jayko be suspended for 10 days for 3 infractions: (1) consuming alcoholic beverages on government time; (2) violating the policy requiring that travel expense reports be supported by receipts; and (3) seeking travel expense reimbursement in excess of the amount to which Jayko was entitled. The report confirmed that in Mr. Jayko's 6.5 years of employment, he had not been disciplined. Based upon the seriousness of all three infractions, he recommended a ten day suspension. (RX 48)

On July 30, 1998, Mr. Schregardus suspended Mr. Jayko for ten days "based upon the events described" in his two predisciplinary meetings with Mr. Kirk, to be effective August 3 -17, 1998. (JX 24) The suspension was imposed 2 days after the July 28, 1998 complaint was filed in the present action.

I find that the suspension was in retaliation for Mr. Jayko's protected activity, since respondent has failed to establish by either clear and convincing evidence, or to overcome Mr. Jayko's evidence that the business reasons of the suspension were pretext and neither "legitimate" nor "non-discriminatory." Accordingly, I find that Mr. Jayko did not:

- consume alcoholic beverages on state time.

- violate the policy requiring that travel expense reports be supported by original receipts.

- violate the policy regarding travel expense reimbursement in excess of the amount to which he was entitled, and the inclusion of the two beers in the reimbursement application was both *de minimis and* unintentional

a. Consuming alcoholic beverages on state time:

It is my finding that there is no rule prohibiting consumption of alcohol on personal time, or before a public meeting. The only limitations are, that the OEPA employee, "not be intoxicated by alcohol or drugs while on the job or state property," (RX 32-1); not be "operating a state owned vehicle under the influence of alcohol or drugs," (RX 32-2), and not be "reporting to work under the influence of alcohol, or consuming alcohol while on duty," (RX 32-3), with a similar rule for drugs. No evidence was either taken or introduced on Mr. Jayko's blood alcohol level, which would have demonstrated the degree to which he might have been under the influence of alcohol or intoxicated, and, crediting the testimony of Mr. Watson, he showed no signs that he was acting intoxicated or under the influence of alcohol. I find that he was not acting under the influence of alcohol.

While Mr. Steers did not charge Mr. Jayko with drinking on duty, just that he was drinking before a public meeting for which there is no evidence of any OEPA rule violation, Mr. Kirk and Mr. Schregardus did charge him with drinking on duty - on "state time," the allegation which I have found is not supported by the evidence.

There is a dispute as to whether Jayko was really on duty when drinking. Mr. Steers did not ask Mr. Jayko if he considered himself on "duty." (T 391-392) Mr. Kirk, who ran the disciplinary proceedings, admitted that Mr. Jayko would not be on work time if he started his work day at 8:00 am with a ½ hour lunch break and worked until 12:30 am. (T 2257) Respondent is arguing that Mr. Jayko worked from 8:00 a.m. until 11:30 p.m. with an hour lunch break, so that the Pizza Hut dinner was on state time, a discrepancy of 1.5 hours. I have credited Mr. Jayko's testimony on this point, finding that he worked from 8:00 a.m. on May 21st , to 12:30 a.m. on May 22nd, and found that he was not on state time when he drank the two beers, basically, some time between 5:00 p.m and 6:30 p.m. (FF 148-167, and footnote 30)

Mr. Steers, as Mr. Jayko's supervisor and the most immediate member of management on the scene, was with Mr. Jayko when he was drinking the beers and he did not say anything to him about it. He also let him drive when knowing he drank the two beers, without saying anything about that. Mr. Steers admitted that he could have told Jayko to stop drinking but did not. Since he could have immediately acted upon the drinking and driving matters, and since Mr. Jayko was neither intoxicated

nor exhibiting any other signs of bad behavior, I find that Mr. Jayko was treated differently than he would have been, but for his protected activities.

I also find, based upon the testimony of Mr. Jayko and the letter of Mr. Watson, that Mr. Jayko's conduct in drinking two beers on personal time, before the 6:30 public meeting, was insufficient evidence to conclude that it constituted a "failure of good behavior," under its "Guidelines," (RX 32) as additionally alleged in respondent's brief. (R. Brief, at 84-85)

b. The OEPA policy requiring that travel expense reports be supported by original receipts:

Mr. Jayko did not violate the policy regarding receipts for travel reimbursement. There is substantial evidence that Mr. Jayko's supervisor, Mr. Dunlavy, had adopted a policy of permitting the use of "blank" or "duplicate" receipts to fill a gap or ambiguity in the rules where there have been no individual checks or receipts issued by the restaurant, or only one which is subsequently split by the group, thus permitting employees to utilize such documents. This is supported by testimony of Mr. Jayko and Mr. Dalton, as well as the statement signed by four other employees, Ed Onyia, Ali Moazed, Ghassan Tafla, and Patrick Heider. (CX. EX. 27). I find that the use of non-original receipts is accepted practice within Mr. Dunlavy's area of supervision at the OEPA. (FF 181-184)[55] Also confirming both the ambiguity and the practice, if OEPA's policy had been strictly enforced, none of the OEPA Pizza Hut participants, other than one who might have submitted the original check for the table, would have been reimbursed for their $6.00 submissions. There being no evidence to the contrary in the record that those submissions were denied, or denied based on the policy (including those of Mr. Steers and Mr. McLane), it must be inferred that they were reimbursed pursuant to the supervisor's policy, and that Mr. Jayko's submission did not violate the OEPA policy.

c. Seeking travel expense reimbursement in excess of the amount to which he was entitled in violation of an OEPA rule:

Mr. Jayko's action in seeking travel expense reimbursement in excess of the amount to which he was entitled to be reimbursed, was not a violation of the OEPA rule for which suspension was warranted. Mr. Jayko spent $15.00 at the Pizza Hut dinner. He submitted a travel reimbursement form for $14.52. OEPA issued a check for $13.00, the maximum allowed under the day travel reimbursement policy. Under the circumstances of this case, and recognizing that the inclusion of alcoholic beverages is a separate matter,[56] I find that the deduction from $14.52 to $13.00 was the sanction. A ten day suspension on top of it, with a 6 ½ year record of no prior offenses, was not warranted.

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[55]The fact that other employees took the "fifth amendment" on this matter is not relevant. Mr. Jayko and Mr. Dalton confirmed this practice without contradiction, and I credit their testimony on it.

[56]The $2.00-$3.00 beer inclusion as set forth in footnote 37, is a separate matter, and is discussed below. By actual calculation, subtracting the $1.52 in the $14.52 request above the $13.00 allowance, which was partially disallowed, it results in only a 48 cents to $1.48 difference, as the alleged wrongful alcohol reimbursement. While this assumes that the beers were included in the restaurant check, in the absence of the original, it is not known for certain what the actual amount of the alcohol reimbursement was.

OEPA has not established that Mr. Jayko violated any rule that a travel reimbursement submission or request for more than the permitted maximum, but either at or below the actual amount spent, could be submitted or "sought" for reimbursement. *i.e.*, No one from management contested the practice of submitting a travel reimbursement form for an amount higher than what a person could be reimbursed. (FN 32, FF 185) Having actually spent more than the $14.52 claimed, Mr. Jayko did not "falsify" any receipt under Mr. Dunlavy's rule discussed above, and the OEPA rule only prohibits "reimbursement" beyond the $13.00 maximum for the circumstance. This "reimbursement" limit was honored in the issuance of the $13.00 check.

I credit Mr. Jayko's testimony that, at the time he submitted his request for the $14.52 reimbursement, he was not aware or thinking about the fact that the full amount actually spent included the two beers as a prohibited item. He felt that he had merely consumed them as his beverage with the pizza, knowing that the highest reimbursement he would receive was $13.00 for the meal, regardless of what was spent on it,[57] and that he never did cash the check.[58] (FF 185) He would have been entitled to reimbursement for some kind of a drink anyway, and the difference makes the actual amount between such a drink and the $2.00-$3.00 or 48 cents to $1.48 difference after the $1.52 deduction from the $14.52 claimed, infinitesimal.

Conceding that any infinitesimal amount might constitute a technical violation of the no alcohol reimbursement policy, I find any that any infraction involved with the inclusion of the two beers by Mr. Jayko to be *de minimis*, and totally unintentional. Considering , again, his 6 ½ year record of no prior offenses, there is insufficient evidence on the record that these two factors were either mentioned or considered in the suspension recommended by Mr. Kirk and issued by Mr. Schregardus. In this, I also consider all of the items discussed in the two pre-disciplinary hearings, and the accelerated search for other violations that followed Mr. Jayko's submission of contrary evidence.

As another point, which might not excuse a violation but would definitely impact a penalty under these circumstances, since he had an excellent work record with no prior disciplinary actions, and did not do much traveling, I credit Mr. Jayko's testimony that he was unaware of any written policy prohibiting the reimbursement of the cost of alcoholic beverages at meals; that he never saw the Policy of Reimbursable Expenses until the litigation, and that he relied on his administrative assistant to handle such matters. I also credit Mr. Kirk's statement to Mr. Jayko after the incident that it was his responsibility to have a better handle on it. (FF 189) However, there was no evidence which indicated that Mr. Jayko had ever previously submitted inaccurate requests for travel expense reimbursement or that he was ever warned about submitting incorrect requests. (FF 192)

Mr. Jayko should have been given the opportunity to either contest the matter or reimburse any amount owed, before being referred to the OSHP as an alleged "theft." At the most, a demand for refund of the difference could have been made, or an inquiry and demand that he not cash the check

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[57]It appears that no one really contested this practice on behalf of management. In light of the fact that there was no other policy covering circumstances where no individual receipt was received, it is credited. [See Steers/etc. testimony]

[58]Claimant's Exhibit 22 is a photocopy of the check that was issued to him. (T 1749) He testified that he had not cashed it after discussing the matter with counsel (Mr. Muchnicki), so it was not "the appropriate thing to do at that time, given the circumstances." (*Ibid*)

until the matter was resolved. After that, at the most, he might have been given a verbal warning in the progressive discipline process. (FF 193) I reject respondent's position that the circumstance warranted a ten day suspension, when its real position is that a ten day suspension was warranted for all of the alleged misconduct. Since all but the *de minimis*, unintentional inclusion of the two beers has been discredited, the latter standing alone, could not warrant the ten day suspension.

Respondent compared Mr. Jayko's "falsification" of receipts with other employees who actually committed fraud and were intentionally defrauding OEPA. I find that these "comparisons" were not comparable. (EX 7-25) Mr. Kirk and other employees of respondent have engaged in much more egregious activities and their punishments were less severe (i.e. disparate treatment). (Tr. 2125, 2127-28, 2133-38). There is no evidence that any of these were referred to the OSHP.

With management adding new allegations to the old ones after Mr. Jayko presented exculpatory evidence, management violated a basic principle of due process and misused the contractual grievance process. (FF 194) I find not only a failure of due process in this procedure, but that Mr. Jayko simply would not have been treated that way under any other circumstances, primarily consisting of his protected activity. This is based upon the above findings, including the timing of the initial charges and the final suspension, both within a few days of demonstrations of protected activities, the lack of substance in the accompanying allegations, and his overall treatment throughout the time period, with a blatant failure to consider his 6 ½ year, good, discipline free work record.

4. Timing:

The timing of the "incident" in relation to the initiation of the disciplinary action has been considered in reaching my conclusions. The incident occurred on May 21, 1998. However, with no credible explanation for the delay, Mr. Steers did not do anything about it until three weeks later, after Dateline had contacted him about the Marion site investigation, and Mr. Hammett had confronted Mr. Jayko about it. (FF 225-227) Only then did Mr. Hammett have Mr. Steers draft the discredited June 4th memo, mixing the alleged drinking offense with several others discussed above. I therefore find that there is sufficient evidence to infer that the drinking incident had been deemed insignificant by Mr. Steers, and I conclude that but for the Dateline incident, it would not have been raised. Significantly, the additional delays in processing the matter, compounded by the additional allegations as Mr. Jayko met individual allegations, resulted in the imposition of the ten day suspension by Mr. Schregardus, two days after filing his complaint regarding his transfer as site coordinator.

By the timing of the actions, from initiation of disciplinary procedures shortly after the Dateline incident through the imposition of the suspension two days after the complaint filing, both of which directly followed these protected activities, when combined with the discrediting of the entire disciplinary procedure and suspension, leaves no other choice but to conclude that the suspension was imposed for those protected activities, in violation of all seven Acts.

Summary and Conclusions Regarding the Alleged Violations:

It is clear from the above, by a preponderance of the evidence presented by Mr. Jayko, that OEPA held him in particular disfavor for reasons that may only be attributed to his vigorous prosecution

of the Marion investigation: his challenges to management to do a full investigation to find out the causes of the leukemia, leaving, "no stone unturned," while OEPA management wanted to do something graduated and far less effective. This resulted in his transfer from the Marion site, and then OEPA punctuated its control over him by imposing the ten day suspension, two days after filing his complaint for the transfer discrimination.

With regard to the transfer/ pretext conclusions, I find that the reasons given by OEPA management for the site coordinator transfer of Mr. Jayko (reorganization/ realignment) were conflicting, without substance and ultimately, not credible. OEPA management maintains that it had the right to unilaterally reject Governor Voinovich's admonition to "leave no stone unturned" in finding the causes of the high incidence of leukemia in the Marion area, on budgetary grounds. This had the result of limiting the investigation to simply finding whether there were immediate causes of possible new cases of leukemia, disregarding the old. Mr. Jayko knew that this was both disingenuous, and in opposition to what the public was being told about the investigation. He knew that past sources might be both inseparable and continuing, as a result of which he felt an obligation to pursue all avenues that were indicated by his investigation. For this he was branded as not being a "team player," frozen out of important conferences and documentary distribution, and finally transferred. On close analysis, the fracture in respondent's proffered reasons for the transfer indicate that they were not only a pretext for penalizing his protected investigative activity, but that the action was deliberate, and intended to chill those actions in violation of all seven environmental Acts.

So, too, was the imposition of the ten day disciplinary suspension, two days after filing the complaint involving his transfer. This was demonstrated initially by disregarding the May 21, 1998 incident for three weeks, and raising it as an issue about consuming alcohol on state time, a few days after the Dateline incident. When he produced evidence that indicated that he might not have been guilty of that offense, (FF 181) and then produced a letter from Mr. Watson, a neutral in this matter from USACOE, which verified that he was neither intoxicated nor acting under the influence of alcohol, he was charged with "theft" for submitting a reimbursement request for unauthorized Pizza Hut expenditures by summarily notifying the OSHP of the allegation before presenting the matter to him for resolution. While the rejection of the theft charges for administrative determination involving a matter under $10.00, was an indication of the alleged theft's *de minimis* character, the fact that it was referred to the OSPH at all on those grounds constituted substantial evidence that OEPA supervisors intended to hurt Mr. Jayko, both in the performance of his job, and in his reputation, for his protected activities. OEPA's explanations for this was not credible, and I so find.

Considering Mr. Jayko's 6 ½ year good, discipline-free record, the consumption of one and one half of the two, eleven ounce beers purchased with his pizza right there in front of his supervisor, who not only said nothing about it, but rode in the car with him without saying anything about it, and the unintentional nature of his inclusion of the beers together with his obvious overpayment, reinforces the innocence of it. Nothing was hidden, and nothing was "falsified," but an extraordinary penalty was utilized to correct the one technical defect that OEPA could find, the inclusion for the two beers in the request for reimbursement as a theft charge. That unintentional, *de minimis* inclusion could have been corrected by either denying it or demanding repayment of the cost of the beers (some 48 cents to $3.00, depending on who was doing the arithmetic), which was never done.

Under the circumstances, since that reimbursement check was never cashed by Mr. Jayko, he technically cured the technical, unintentional, *de minimis* defect, I, therefore, find, by a preponderance of the evidence that Mr. Jayko did not violate OEPA rules by a monetary receipt of an improper reimbursement. Be that as it may, OEPA management's pursuit of this particular disciplinary action the way that it did, does not make sense - except when viewed in the light of Mr. Jayko's protected activity. I find that a preponderance of evidence supports Mr. Jayko's allegations that the real reason for the actual treatment he received for the two beer consumption and charges therefore, was his protected activity.

Mr. Jayko's protected activity involved actions as an investigator under all seven of the Acts. It included the resurrection of the military and private industry history of the use of the sites from before World War II; the toxic chemical laden ordnance assembly lines at the Scioto Ordnance Plant and the heavy equipment repair facility at the Marion Engineer Depot; the preparations by the Atomic Energy Commission as part of the Manhattan project at both sites - even though full scale operations may never have taken place there, and some tests proved negative; the 100 year history of the private, Baker Woods creosote plant, railroad tie and telephone poll treatment facility, and all of the attendant chemical disposal activities throughout the area, some of which have been suspected to be toxic waste dumps under the River Valley High Schools' athletic fields, and other locations.

The link between the known causes of leukemia and the discovery of possible sources of such causes in Marion, Ohio, including the possible existence of radiation producing elements - even though later proven to be negative - constitutes a reasonable basis for Mr. Jayko's proceeding with the investigation under the ERA to "rule" such effects "in" or "out," and highlights the continuing burden on an investigator such as him in such a circumstance. If the "whistleblower" statutes are, indeed, to be given the liberal interpretation intended in the statutes and the supporting case law cited herein, once engaged as the site coordinator for the Marion project, an investigator such as Mr. Jayko, must be able to establish or reject any reasonable indicators of such causes of a known disease in an area, free from the potential interference that the ERA envisions in its employee protective provisions, which, in fact took place here.

This applies with equal force to Mr. Jayko's efforts under the other Acts to expand air and water sampling, as well as the toxic sampling at the athletic field dump site and resulting USACOE trenching operations there, all of which would be, and have been found to be under the applicable Acts: to "protect and enhance the quality of the nation's air resources," under the CAA; to "promote safe drinking water" under the SDWA; to "restore and maintain chemical, physical, and biological integrity of the Nation's waters," under the CWA (WPCA); to "assure that chemical substances and mixtures do not present unreasonable risks of injury to health or the environment," under the TSCA; to "assure that hazardous waste management practices are conducted in a manner that protects human health and the environment [and to] minimize the generation of hazardous waste," under the SWDA, and to prevent the release of hazardous substances into the air or water, under CERCLA, the last of which governs both of the the federal site clean-up operations, and preserves the jurisdiction of the relevant agencies under each of the other five Acts at the applicable sites.

Therefore, I find that Mr. Jayko's above described activities under the relevant statutes were protected, and the adverse actions by his employer, OEPA, consisting of his transfer as site coordinator due to reorganization/ realignment and his ten day disciplinary suspension for drinking alcoholic

beverages while on state time, and the submission of a request for reimbursement of his travel expenses, were not for those stated reasons, but were imposed as pretext for its retaliation for his protected activities. Not only were the reasons given for the adverse actions not credible and a pretext therefore, but when stripped of the proffered reasons, the only reasons left are willful actions designed to unlawfully retaliate by discriminating against Mr. Jayko for those activities, in violation of the seven "whistleblower" Acts, and I so find.

To make the determination clear, I find that these final discriminatory actions constituted a continuing violation. They capped a course of interference, restraint and coercion, as well as discriminatory conduct toward Complainant Paul Jayko for his protected activity under the above environmental Acts which began following the distribution of Mr. Jayko's six "Concerns" memo of October 15, 1997 with management's hostile response thereto, and was compounded by his exclusion from certain conferences and document distribution, important if not crucial to his performance as Marion site coordinator. As above stated, any sense that he was either withdrawing or not fully participating in internal group or team meetings, was "effect" rather than "cause," of impact on the investigation, the sum total of which must be considered a continuing violation of the Acts.

REMEDIES

Having found that OEPA has violated the employee protective provisions of the seven Acts, I must consider the remedies that must be ordered to rectify the violations, and make Mr. Jayko whole for them. I also must consider what, if any compensatory and exemplary damages must be imposed for OEPA management's conduct.

Mr. Jayko is entitled to be made "whole" for respondent's violations under all seven environmental Acts, including appropriate orders to restore his reputation, reinstatement and back pay, benefits and compensatory damages under them and exemplary damages under the SDWA and the TSCA. 29 C.F.R. §24.7(c)(1). The back pay and benefit considerations may include lost overtime, lost vacation and other chargeable pay remedies such as comp time, sick time, etc., and may include lost pension and health benefit losses and contributions to those plans for hours that would otherwise have been worked.

The purpose of reinstatement and a back pay award is to make the employee whole, that is, to restore the employee to the same position he would have been in if not discriminated against. Back pay awards should, therefore, be based on all of the earnings the employee would have received but for the discrimination. *Blackburn v. Metric Constructors, Inc*., 86-ERA-4 (Sec'y Oct. 30, 1991). The Sixth Circuit has held that §5851 (b)(2)(B) of the ERA allows compensatory damages in addition to abatement of discrimination, reinstatement with back pay, and restoration of all job related entitlements such as retirement benefits. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984). Medical expenses and damages for injury to reputation may also be awarded. *Ibid.*

Mr. Jayko is entitled to prejudgement interest on the back overtime pay, ten day suspension pay and lost litigation time pay in accordance with prevailing case law. The fact that the ERA, or the other the environmental Acts, do not expressly provide for interest on back pay awards does not preclude it. Back pay awards are designed to make whole the employee who has suffered economic

loss as a result of an employer's illegal discrimination. The assessment of prejudgment interest is necessary to achieve this end. According to the Administrative Review Board in *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000), "[t]he usual interest rate employed on back pay awards under ... whistleblower provisions is the interest rate for underpayment of federal taxes, set forth at 26 U.S.C. § 6621(a)(2) (short-term Federal rate plus three percentage points)." The ARB held that in whistleblower cases, it awards the same rate of interest on back pay awards, both pre- and post-judgment that is, compounded and posted quarterly. The Board in *Doyle* stated: "In light of the remedial nature of the ERA's employee protection provision and the 'make whole' goal of back pay, we hold that the prejudgment interest on back pay ordinarily shall be compound interest. Our reasoning applies equally to back pay awards under analogous employee protection provisions of the other federal statutes under which we issue administratively final decisions [the CAA, CERCLA, FWPCA, SDWA, SWDA, STAA and TSCA]. Absent any unusual circumstance, we will award compound interest on back pay in cases arising under all of these ... provisions."

Likewise, prejudgment interest on back wages recovered in litigation before the DOL is calculated, in accordance with 29 C.F.R. § 20.58(a), at the rate specified in the Internal Revenue Code, 26 U.S.C. § 6621. The employer is not to be relieved of interest on a back pay award because of time elapsed during adjudication of the complaint. *Blackburn v. Metric Constructors, Inc.*, 86-ERA-4 (Sec'y Oct. 30, 1991); citing *Palmer v. Western Truck Manpower, Inc.*, 85-STA-16 (Sec'y Jan. 26, 1990).

As part of the "make whole" remedy, respondent may also be ordered to post notices containing the following order, and to submit such notices as are ordered by the undersigned to affected third parties. In *McMahan v. California Water Quality Control Board, San Diego Region***,** 90-WPC-1 (Sec'y July 16, 1993), the respondent was ordered to expunge from its records all memoranda or reference to a reprimand which had been found to be in violation of the FWPCA's whistleblower provision, to post written notice for 30 days advising its employees that the reprimand had been expunged and that he has been reinstated to his former position, and to pay complainant's costs and expenses. See also *Doyle v. Hydro Nuclear Services*, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000)(ARB affirmed the ALJ's order requiring respondent to post the decision at its own facilities).

In *Smith v. Esicorp, Inc.*, 1993-ERA-16 (ARB Aug. 27, 1998) (respondent was ordered to post, for a period of 90 days, the ARB's decision, and an earlier Secretary of Labor remand decision, in a lunchroom and another prominent place, accessible to employees at the nuclear facility where complainant was subjected to harassment. The ARB stated that "[t]he purpose of posting is to provide notice that whistleblowers will be protected if they are discriminated against. If [respondent] is unable to secure posting . . . at the . . . nuclear plant, notification may be accomplished by publishing the two documents in a local general circulation newspaper."

Mr. Jayko is entitled to compensatory and exemplary damages, under the various environmental statutes, as follows:

Compensatory damages are mandatory for a successful complaint under the TSCA, 15 U.S.C. § 2622(b)(2)(B)(iii), and may be awarded under the CAA, 42 U.S.C. § 7622 (b)(2)(B), and the

RCRA, 42 U.S.C. § 6971(b). *Jones v. EG&G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998). Compensatory damages may also be awarded under the SDWA. *White v. The Osage Tribal Council*, 95-SDW-1 (ARB Aug. 8, 1997). The SWDA, CERCLA, and WPCA (CWA)also provide for compensatory damages. *Marcus v. U.S. Environmental Protection Agency*, 1996-CAA-3 (ALJ Dec. 15, 1998).

According to the Administrative Review Board, where a violation of the ERA is found, compensatory damages may also be awarded in addition to back pay. 42 U.S.C. § 5851(b)(2)(B); 29 C.F.R. § 24.6(b)(2). They may be awarded for emotional pain and suffering, mental anguish, embarrassment, and humiliation. The testimony of medical experts is not necessary; the award may be supported by the circumstances and testimony about physical or mental consequences of retaliatory action. *Thomas v. Arizona Public Service Co.*, 89-ERA-19 (Sec'y Sept. 17, 1993). Medical expenses and damages for injury to reputation may also be awarded. *Deford v. Secretary of Labor*, 700 F.2d 281 (6th Cir. 1983), on remand at *Deford v. Tennessee Valley Authority*, 81-ERA1 (Sec'y Aug. 16, 1984). Furthermore, reimbursable costs include a successful complainant's transportation to, and lodging and meals while attending, the DOL hearing. *Creekmore v. ABB Power Systems Energy Services, Inc.*, 93-ERA-24 (Dep. Sec'y Feb. 14, 1996). However, interest does not accrue on a compensatory damages award. Id.

In *McCuistion v. TVA*, 89-ERA-6 (Sec'y Nov. 13, 1991), the Secretary Of Labor cited favorably a series of decisions which upheld compensatory damages for the following types of harm: symptoms such as insomnia, nightmares, fatigue and appetite loss, an employee's wife suffering from tremendous emotional strain, other marital problems, deterioration in health, an exacerbation of pre-existing hypertension, and feelings of remorse that the education of the employee's daughter was disrupted. In *Mitchell v. APS/ANPP*, the Administrative Law Judge awarded $50,000, in part, because respondent's hostile work environment caused the complainant to become upset and nervous, and suffer from post-traumatic stress disorder. 91-ERA-9 (ALJ July 2, 1992).

The TSCA and the SDWA explicitly permit "where appropriate, exemplary damages." *Jones v. EG&G Defense Materials*, supra.; see also Nuclear and Environmental Whistleblower Digest, Division XVI, Subdivision F, Punitive Damages. They are not authorized under CERCLA, WPCA (CWA) or the SWDA (Solid Waste Disposal). *Berkman v. U.S. Coast Gaurd Academy*, ARB No. 98-056, ALJ No.1997-CAA-2 (ARB Feb. 29, 2000), or under the CAA or the ERA. While such damages are not allowable absent express statutory authorization, *Smith v. Esicorp, Inc.*, 93-ERA-16 (Sec'y Mar. 13, 1996), the Administrative Review Board has stated that where the applicable Act does provide such relief, and where the requisite state of mind (intent and resolve actually to take action to effect harm) exists, the decision to award punitive damages involves a discretionary moral judgment, and if the purposes of the statute can be served without resort to punitive measures, the Board does not award exemplary damages. *Jones v. EG&G Defense Materials, Inc.*, 1995-CAA-3 (ARB Sept. 29, 1998). Mere indifference to the purposes of the environmental acts is not sufficient to constitute the requisite state of mind for an award of exemplary damages. *Id.*; citing *Johnson v. Old Dominion Security*, 1986-CAA-3, 4 and 5 (Sec't May 29, 1991) (dealing with violations of the CAA and the TSCA).

Here, I find two important factors present: (1) The totality of Mr. Jayko's investigative activity was such that all of the seven environmental Acts were invoked from the beginning of his assignment to

the end of it, due to his mandate to determine the causes of leukemia in the Marion Ohio area. I also find that his actions thereunder were so related and intertwined that they were inseparable, thereby invoking the TSCA and the SWDA, as well as the other five Acts with each violation; and, (2) OEPA management had an intent to promote harm to Mr. Jayko, in the referral of the theft charges to the Ohio State Highway Patrol, and to thereby either severely limit, if not to shut down Mr. Jayko's entire investigative activity, under the TSCA and the SDWA as well as the other Acts, and I have specifically rejected OEPA management's explanations therefore. (They failed to provide any meaningful investigation for the charges before the referral. They failed to confront Mr. Jayko and consider an explanation for the inclusion. They failed to determine the amount of the charges. They failed to allow him to resubmit his request for reimbursement, or to make up the difference, when they had permitted at least one managerial employee to reimburse the agency for an amount much larger than the one on question with Mr. Jayko.) The action was unconscionable and designed to hurt Mr. Jayko. It must be considered one that warrants an award of exemplary damages under these Acts.

Mr. Jayko and his wife have testified to the various effects that the employer's unlawful conduct has wrought, which I credit in its entirety, as follows:

1. Mr. Jayko has lost the honor and the prestige of the site coordinator position that he had earned and held before the transfer, to which he believes that he is now entitled to reinstatement, and is able to perform. (FF 293-309) I agree that he is entitled to reinstatement, back pay and a make whole remedy.

2. Mr. Jayko has lost various effects of the Marion site coordinator position, which amounts to a total of ten hours per week since the date of his transfer, through the date of this decision and order, (FF 315) plus increases in pay per hour, if any, and less overtime actually paid, at the rate of time and one half per hour ($23.65 hr. X 1.5 X 10 hrs./wk) or approximately $354.80 week, minimum, plus increases, if any, and interest. At the minimum this includes 117 wks. X $354.80 per wk., or $41,511.60 plus increases, less other paid overtime pay, plus interest on the balance.

3. Mr. Jayko was suspended for ten days without pay for the Pizza Hut alcohol drinking and travel reimbursement issues, (FF 310) for which he is entitled to back pay in the amount of $23.65 per hour, base pay, plus 20 hours overtime at the rate of time and one half for the two weeks in question, for a total of $2,601.60, plus interest and lost benefits related thereto, if any.

4. Mr. Jayko has lost at least 30 days of either vacation pay benefits, leave without pay, comp time or other pay for lost time, in the pursuit of this litigation before the hearing, and a combination of earned comp time, personal days for participating in the litigation, including preparation for and participation in the hearing and some other unpaid leave that he had to charge to his time card, (FF 311) for which he is entitled to reinstatement of that lost time.

5. Mr. Jayko testified that his pending promotion to Lt. Colonel in the U.S. Army Reserve has been cast into jeopardy by the false allegations made against him, in particular those of theft in office involving the alcoholic beverage and excessive expense reimbursement allegations, (FF 316-318, and 329-332), concerning which he is entitled to a make whole remedy by directing OEPA to submit a letter to the U.S. Army Reserve informing that agency of this recommended decision and order, and the accompanying preliminary order, and the fact that OEPA has been ordered to remove all negative

personnel documents and entries from Mr. Jayko's files, and to include a copy of the order set forth herein.

6. I also direct the OEPA to notify all other agencies of the Ohio government and the United States Government with whom the OEPA has been involved in the Marion project of the same information that has been ordered to be submitted to to the U.S. Army Reserve, to include but not be limited to: the Office of the Ohio Governor, the Ohio Department of Health, The U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency, the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission, and each sub agency responsible for administration of the CAA, the SDWA, the SWDA, the WPCA (CWA), the TSCA and CERCLA, and subject to Mrs. Jayko's approval, her Ohio State employer.

7. Mr. Jayko believes, testimony supports, and I so find, that OEPA's unlawful conduct has affected Mr. Jayko's reputation, both on and off the job, for which I am directing the OEPA to post a notice of this determination by posting the attached order on all employee bulletin boards in respondent's Columbus office, its Northwest District Office, and all other offices of the OEPA. (FF 318-322)

8. Mr. Jayko claims emotional damages in the allegations of theft, and other allegations regarding drinking on the job, and having the theft allegations forwarded as such to the OSHP. He has supported those claims by his own testimony, and that of his wife. I have observed his forthrightness, his consistency, and demeanor throughout the trial, and I credit his testimony on these points, as well as that of his wife, Mrs. Jayko. I conclude that this ordeal has resulted in personal stress to which he testified, stress in his marriage, and the marital effects on both of them in having to liquidate virtually all of their savings and financial assets and forgo vacations to support the litigation. (FF 324-328) This condition has had an effect far beyond the actual costs, and has added to the stress over and above the attorneys' fees and the costs of litigation. Mr. Jayko is, therefore, entitled to compensatory damages under all seven environmental Acts, for his physical or mental consequences of OEPA's retaliatory action, including emotional pain and suffering, mental anguish, embarrassment, and humiliation, as well as the effects on his wife, which I credit, in the amount of $45,000.00. In determining this amount, I have considered the fact that Mr. Jayko was transferred and suspended, but was not terminated from his employment.

9. I also find that Mr. Jayko is entitled to exemplary damages under the CAA, the TSCA and the SDWA, due to the willful misconduct and intent to harm him that was apparent in the theft referral to the OSHP as set forth above, in the amount of $45,000.00. In determining this amount, I have considered the fact that Mr. Jayko was transferred and suspended, but was not terminated from his employment.

10. Mr. Jayko states that he is entitled to his attorneys' fees and costs of litigation, including his own travel expenses (Mileage, lodging and meals), and those of his attorneys. I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order. It may include as a separate item, costs of Mr. Jayko's own transportation and lodging while engaged in the hearing on this matter. Requests for attorney travel and expenses must be specifically documented and briefed, to which

respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

11. In addition to the above, upon finding a violation of the ERA, 29 C.F.R. §24.7(c)(2) requires that, in the event that I find that the complaint has merit and contains the relief prescribed in 29 C.F.R. §24.7(c)(1), then I must issue a preliminary order providing all of the relief set forth in that paragraph, with the exception of compensatory damages. This preliminary order shall constitute the preliminary order of the Secretary of Labor, and shall be effective immediately whether or not a petition for review is filed with the Administrative Review Board. The compensatory damage award shall not be effective until the final decision is issued by the Administrative Review Board. The ERA does not permit exemplary damages. Under this preliminary order, the implementation of the "make whole" remedies are mandated. These include the reinstatement of Mr. Jayko to his former position as site coordinator for the Marion project together with payment of his lost back pay, overtime pay, vacation pay, personal days pay, comp. time and benefits, is mandated, effective immediately upon issuance of this preliminary order. It also includes posting of the order, and the communication of it together with the cover letter set forth above to all U.S. Government and State of Ohio agencies with which Mr. Jayko was involved on the Marion project.

Therefore, the following recommended order, to be effective immediately if no petition for review is filed, or upon an applicable ruling by the Administrative Review Board if review is sought under the provisions of 29 C.F.R. §24.1(c)(1), and the following preliminary order, to be effective immediately whether or not a petition for review is filed with the Board under the provisions of 29 C.F.R. §24.1(c)(2), are hereby issued:

RECOMMENDED ORDER

Having found that Mr. Jayko's complaint has merit in that OEPA has violated the employee protective provisions of the seven United States environmental Acts in his transfer as site coordinator from the Marion project and in his ten day suspension, under the Energy Reorganization Act, 42 U.S.C. Section 5851; the Clean Air Act, 42 U.S.C. Section 7622 (a); the Solid Waste Disposal Act, 42 U.S.C. Section 6971; the Toxic Substances Control Act, 15 U.S.C. Section 2622; the Federal Water Pollution Prevention and Control Act, 33 U.S.C. Section 1367; the Safe Drinking Water Act,, or Public Health Service Act, 42 U.S.C. Section 300j-9; and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9610; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jayko whole and to compensate Mr. Jayko for them within the provisions of the seven Acts, therefore,

IT IS ORDERED that,

1. Respondent OEPA cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Paul Jayko for his protected activity under the above United States environmental Acts;

2. Mr. Jayko be immediately reinstated to his former position as site coordinator on the Marion, Ohio project;

3. Mr. Jayko receive full back pay for all time lost due to his change in position such as overtime pay, vacation pay, personal days pay, comp time and benefits, to include, but not be limited to $41,511.60 ($23.65 per hr. base rate, x time and one half or $35.48 overtime, X 10 hrs./wk x 117 weeks through September 29, 2000other earned overtime pay, minus other earned overtime, if any, plus lost benefits, if any;

3. Mr. Jayko receive full back pay for all time lost due to his ten day suspension in the amount of $2,601.60, plus lost benefits, if any;

4. Mr. Jayko's 30 days lost vacation time, compensatory time, personal days, etc. while involved with the various phases of the litigation be reinstated in full, plus related lost benefits, if any;

5. Mr. Jayko's personnel file be expunged of all adverse personnel actions and comments regarding allegations against him made as a result of his investigation of the Marion project as set forth herein, including but not limited to, both his transfer as site coordinator, and those leading to the ten day suspension for the drinking of alcohol and reimbursement application;

6. Respondent post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Columbus, Ohio Central Office, its Northwest District Office, and all other district offices, for a minimum of 90 days;

7. A letter be addressed to the appropriate office of the United States Army notifying that agency that Mr. Jayko has been cleared of all allegations against him made as a result of his investigation of the Marion project as set forth herein, including both the transfer as site coordinator, and those regarding alleged drinking while on state time or before a public meeting, and those involved for improper submission of travel expenses leading to the ten day suspension, and that his files have been expunged as set forth above, and that the letter include a copy of this order and preliminary order;

8. A letter as that set forth to the U.S. Army Reserve containing this order and preliminary order, be addressed to all agencies with whom Mr. Jayko had any dealings in his capacity as site coordinator for the Marion project, or to whom notice of his transfer and suspension personnel actions, to include but not be limited to: the Office of the Governor of the State of Ohio, the Ohio Department of Health, the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency, the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission, and each sub agency responsible for administration of the CAA, the SDWA, the SWDA, the WPCA (CWA), the TSCA and CERCLA, and subject to Mrs. Jayko's approval, her Ohio State employer.

9. Mr, Jayko be awarded compensatory damages in the amount of $45,000.00 to cover his stress, humiliation, marital effects and loss of reputation, which now must be reestablished, even though he has continued working for the OEPA;

10. Mr. Jayko be awarded exemplary damages in the amount of $45,000.00 for the willful actions of management to harm Mr. Jayko, in summarily referring the theft allegations to the Ohio State Highway patrol for investigation, and thereafter proceeding to give him an unwarranted, ten day suspension for the discredited charges as set forth herein;

11. Where applicable, that Mr. Jayko receive interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

12. Mr. Jayko be awarded his attorneys fees and costs of litigation, concerning which I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order, which may include as a separate item, costs of his transportation and lodging while engaged in the hearing on this matter. Requests for attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

13. All other outstanding motions which have not been directly addresses in this recommended decision and order, are denied.

IT IS SO ORDERED this __ day of October, 2000.

_____

THOMAS F. PHALEN, JR.
Administrative Law Judge

NOTICE

The Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, U.S. Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, N.W., Washington, D.C. 20210. Such a petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief, Administrative Law Judge. See 29 C.F.R. § 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

PRELIMINARY ORDER

Since I have found that Mr. Jayko's complaint has merit in that OEPA has violated the employee protective provisions of the seven United States environmental Acts in his transfer as site coordinator from the Marion project and in his ten day suspension, under the Energy Reorganization Act, 42 U.S.C. Section 5851; the Clean Air Act, 42 U.S.C. Section 7622 (a); the Solid Waste Disposal Act, 42 U.S.C. Section 6971; the Toxic Substances Control Act, 15 U.S.C. Section 2622; the Federal Water Pollution Prevention and Control Act, 33 U.S.C. Section 1367; the Safe Drinking Water Act,, or Public Health Service Act, 42 U.S.C. Section 300j-9; and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9610; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and that the above order contains the relief prescribed in 29 C.F.R. §24.7(c)(1), I hereby issue this order as a preliminary order providing for immediate implementation of the following actions to abate the effects of the violations consisting of all of the "make whole" relief set forth above, as follows:

IT IS ORDERED that,

1. Respondent OEPA cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Paul Jayko for his protected activity under the above United States environmental Acts;

2. Mr. Jayko be immediately reinstated to his former position as site coordinator on the Marion, Ohio project;

3. Mr. Jayko receive full back pay for all time lost due to his change in position such as overtime pay, vacation pay, personal days pay, comp time and benefits, to include, but not be limited to $41,511.60 ($23.65 per hr. base rate, x time and one half or $35.48 overtime, X 10 hrs./wk x 117 weeks through September 29, 2000other earned overtime pay, minus other earned overtime, if any, plus lost benefits, if any;

4. Mr. Jayko receive full back pay for all time lost due to his ten day suspension in the amount of $2,601.60, plus lost benefits, if any;

5. Mr. Jayko's 30 days lost vacation time, compensatory time, personal days, etc. while involved with the various phases of the litigation be reinstated in full, plus related lost benefits, if any;

6. Mr. Jayko's personnel file be expunged of all adverse personnel actions and comments regarding allegations against him made as a result of his investigation of the Marion project as set forth herein, including but not limited to, both his transfer as site coordinator, and those leading to the ten day suspension for the drinking of alcohol and reimbursement application;

7. Respondent post a notice consisting of copies of the attached order and preliminary order on all employee bulletin boards in its Columbus, Ohio Central Office, its Northwest District Office, and all other district offices, for a minimum of 90 days;

8. A letter be addressed to the appropriate office of the United States Army notifying that agency that Mr. Jayko has been cleared of all allegations against him made as a result of his investigation of the Marion project as set forth herein, including both the transfer as site coordinator, and those regarding alleged drinking while on state time or before a public meeting, and those involved for improper submission of travel expenses leading to the ten day suspension, and that his files have been expunged as set forth above, and that the letter include a copy of this order and preliminary order;

9. A letter as that set forth to the U.S. Army Reserve containing this order and preliminary order, be addressed to all agencies with whom Mr. Jayko had any dealings in his capacity as site coordinator for the Marion project, or to whom notice of his transfer and suspension personnel actions, to include but not be limited to: the Office of the Governor of the State of Ohio, the Ohio Department of Health, the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency, the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission, and each sub agency responsible for administration of the CAA, the SDWA, the SWDA, the WPCA (CWA), the TSCA and CERCLA, and subject to Mrs. Jayko's approval, her Ohio State employer.

10. Where applicable, that Mr. Jayko receive interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

11. Mr. Jayko be awarded his attorneys fees and costs of litigation, concerning which I direct the complainant's attorneys to file an application therefore, postmarked within thirty days of the date of this decision and order and preliminary order, which may include as a separate item, costs of his transportation and lodging while engaged in the hearing on this matter. Requests for attorney travel and expenses must be specifically documented and briefed, to which respondent will be permitted a memorandum in response to be postmarked on or before 20 days from receipt of complainant's brief. A reply brief from complainant may be postmarked within 10 days of receipt of that response.

This preliminary order shall constitute the preliminary order of the Secretary of Labor, and shall be effective immediately whether or not a petition for review is filed with the Administrative Review Board. The compensatory damage award, as well as the exemplary damage award under the other applicable statutes, shall not be effective until the final decision is issued by the Administrative Review Board.

IT IS SO ORDERED this __ day of October, 2000. .

_____

THOMAS F. PHALEN, JR.
Administrative Law Judge

RECOMMENDED NOTICE TO EMPLOYEES

IN THE MATTER OF:
PAUL JAYKO VS. THE OHIO ENVIRONMENTAL PROTECTION AGENCY
CASE NO. 1999-CA-5

POSTED BY ORDER OF THE
ADMINISTRATIVE REVIEW BOARD
UNITED STATES DEPARTMENT OF LABOR
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which the parties HAD THE OPPORTUNITY TO PRESENT EVIDENCE , THE Administrative Review Board, U.S. Department of Labor, has found that the Ohio Environmental Protection Agency (Respondent) has violated the law in its treatment of Paul Jayko (Complainant) and has ordered the posting of this notice.

Having found that Mr. Jayko's complaint has merit in that OEPA has violated the employee protective provisions of the seven United States environmental Acts in his transfer as site coordinator from the Marion project and in his ten day suspension, under the Energy Reorganization Act, 42 U.S.C. Section 5851; the Clean Air Act, 42 U.S.C. Section 7622 (a); the Solid Waste Disposal Act, 42 U.S.C. Section 6971; the Toxic Substances Control Act, 15 U.S.C. Section 2622; the Federal Water Pollution Prevention and Control Act, 33 U.S.C. Section 1367; the Safe Drinking Water Act,, or Public Health Service Act, 42 U.S.C. Section 300j-9; and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9610; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and having considered the remedies and damages that must be ordered to rectify those violations to make Mr. Jayko whole and to compensate Mr. Jayko for them within the provisions of the seven Acts, therefore,
it has been ordered that certain actions be taken to abate the effects of those violations, concerning which it is directed that the following action be taken:

1. WE WILL cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Paul Jayko for his protected activity under the above United States environmental Acts;

2. WE WILL immediately reinstate Mr. Jayko to his former position as site coordinator on the Marion, Ohio project;

3. WE WILL immediately pay Mr. Jayko his full back pay for all time lost due to his change in position such as overtime pay, vacation pay, personal days pay, comp time and benefits, to include, but not be limited to $41,511.60 ($23.65 per hr. base rate, x time and one half or $35.48 overtime, X 10 hrs./wk x 117 weeks through September 29, 2000 minus other earned overtime pay, minus other earned overtime, if any, plus lost benefits, if any;

3. WE WILL immediately pay Mr. Jayko his full back pay for all time lost due to his ten day suspension in the amount of $2,601.60, plus lost benefits, if any;

4. WE WILL immediately reinstate Mr. Jayko's 30 days lost vacation time, compensatory time, personal days, etc. and/or other such time while involved with the various phases of the litigation, plus related lost benefits, if any;

5. WE WILL immediately expunge Mr. Jayko's personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his investigation of the Marion project as set forth herein, including but not limited to, both his transfer as site coordinator, and those leading to the ten day suspension for the drinking of alcohol and reimbursement application;

6. WE WILL immediately post a notice consisting of copies of the attached notice and preliminary order on all employee bulletin boards at its Columbus, Ohio Central Office, its Northwest District Office, and all other district offices, for a minimum period of 90 days;

7. WE WILL immediately address a letter to the appropriate office of the United States Army notifying that agency that Mr. Jayko has been cleared of all allegations against him made as a result of his investigation of the Marion project as set forth herein, including both the transfer as site coordinator, and those regarding alleged drinking while on state time or before a public meeting, and those involved for improper submission of travel expenses leading to the ten day suspension, and that his files have been expunged as set forth above, and that the letter include a copy of this notice and order;

8. WE WILL immediately send a letter as that set forth to the U.S. Army Reserve containing this notice and order, to be addressed to all agencies with whom Mr. Jayko had any dealings in his capacity as site coordinator for the Marion project, or to whom notice of his transfer and suspension personnel actions, to include but not be limited to: the Office of the Governor of the State of Ohio, the Ohio Department of Health, the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency, the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission, and each sub agency responsible for administration of the CAA, the SDWA, the SWDA, the WPCA (CWA), the TSCA and CERCLA, and subject to Mrs. Jayko's approval, her Ohio State employer.

9. WE WILL immediately pay Mr, Jayko compensatory damages in the amount of $45,000.00 to cover his stress, humiliation, marital effects and loss of reputation, which now must be reestablished, even though he has continued working for the OEPA;

10. WE WILL immediately pay Mr. Jayko exemplary damages in the amount of $45,000.00 for the willful OEPA management actions which have harmed Mr. Jayko, in summarily referring the theft allegations to the Ohio State Highway patrol for investigation, and thereafter proceeding to give him an unwarranted, ten day suspension for the discredited charges as set forth in the decision and order;

11. WE WILL immediately pay Mr. Jayko, where applicable, prejudgment interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

12. WE WILL pay Mr. Jayko his attorneys' fees and costs of litigation.

APPROVED, this __ day of _____, 200_.

_____

DIRECTOR, OHIO ENVIRONMENTAL
PROTECTION AGENCY

NOTICE TO EMPLOYEES

IN THE MATTER OF:
PAUL JAYKO VS. THE OHIO ENVIRONMENTAL PROTECTION AGENCY
CASE NO. 1999-CA-5

POSTED BY PRELIMINARY ORDER OF AN
ADMINISTRATIVE LAW JUDGE
UNITED STATES DEPARTMENT OF LABOR
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing in which the parties had the opportunity to present evidence , an Administrative Law Judge of the U.S. Department of Labor, has found that the Ohio Environmental Protection Agency (Respondent) has violated the law and that Mr. Jayko's complaint has merit. In particular it has been found that OEPA has violated the employee protective provisions of the seven United States environmental Acts, in particular under the Energy Reorganization Act, 42 U.S.C. Section 5851 in Mr. Jayko's transfer as site coordinator from the Marion project and in his ten day suspension, as well as under the Clean Air Act, 42 U.S.C. Section 7622 (a); the Solid Waste Disposal Act, 42 U.S.C. Section 6971; the Toxic Substances Control Act, 15 U.S.C. Section 2622; the Federal Water Pollution Prevention and Control Act, 33 U.S.C. Section 1367; the Safe Drinking Water Act,, or Public Health Service Act, 42 U.S.C. Section 300j-9; and the Comprehensive Environmental Response, Compensation and Liability Act, 42 U.S.C. Section 9610; and the implementing regulations appearing at 29 C.F.R. Part 24.1, and that the above order contains the relief prescribed in 29 C.F.R. Section 24.7(c)(1). Therefore the Administrative Law Judge has issued an order as a preliminary order providing for immediate implementation of the following actions by the OEPA to abate the effects of the violations consisting of all of the "make whole" relief set forth above, as follows:

1. WE WILL cease and desist all conduct involving the above determined interference, restraint and coercion, and all discriminatory conduct toward Complainant Paul Jayko for his protected activity under the above United States environmental Acts;

2. WE WILL immediately reinstate Mr. Jayko to his former position as site coordinator on the Marion, Ohio project;

3. WE WILL immediately pay Mr. Jayko his full back pay for all time lost due to his change in position such as overtime pay, vacation pay, personal days pay, comp time and benefits, to include, but not be limited to $41,511.60 ($23.65 per hr. base rate, x time and one half or $35.48 overtime, X 10 hrs./wk x 117 weeks through September 29, 2000other earned overtime pay, minus other earned overtime, if any, plus lost benefits, if any;

3. WE WILL immediately pay Mr. Jayko his full back pay for all time lost due to his ten day suspension in the amount of $2,601.60, plus lost benefits, if any;

4. WE WILL immediately reinstate Mr. Jayko's 30 days lost vacation time, compensatory time, personal days, etc. and/or other such time while involved with the various phases of the litigation, plus related lost benefits, if any;

5. WE WILL immediately expunge Mr. Jayko's personnel file of all adverse personnel actions and comments regarding allegations against him made as a result of his investigation of the Marion project as set forth herein, including but not limited to, both his transfer as site coordinator, and those leading to the ten day suspension for the drinking of alcohol and reimbursement application;

6. WE WILL immediately post a notice consisting of copies of the attached notice and preliminary order on all employee bulletin boards at its Columbus, Ohio Central Office, its Northwest District Office, and all other district offices, for a minimum period of 90 days;

7. WE WILL immediately address a letter to the appropriate office of the United States Army notifying that agency that Mr. Jayko has been cleared of all allegations against him made as a result of his investigation of the Marion project as set forth herein, including both the transfer as site coordinator, and those regarding alleged drinking while on state time or before a public meeting, and those involved for improper submission of travel expenses leading to the ten day suspension, and that his files have been expunged as set forth above, and that the letter include a copy of this notice and order;

8. WE WILL immediately send a letter as that set forth to the U.S. Army Reserve containing this notice and order, to be addressed to all agencies with whom Mr. Jayko had any dealings in his capacity as site coordinator for the Marion project, or to whom notice of his transfer and suspension personnel actions, to include but not be limited to: the Office of the Governor of the State of Ohio, the Ohio Department of Health, the U.S. Army Corps of Engineers; the U.S. Environmental Protection Agency, the U.S. Department of Energy, the U.S. Nuclear Regulatory Commission, and each sub agency responsible for administration of the CAA, the SDWA, the SWDA, the WPCA (CWA), the TSCA and CERCLA, and subject to Mrs. Jayko's approval, her Ohio State employer.

9. WE WILL immediately pay Mr. Jayko, where applicable, prejudgment interest on all amounts set forth herein from the dates of his suspension and his transfer through the dates that the suspension and transfer are determined to have ended;

APPROVED, this __ day of _____, 200_.

_____

DIRECTOR, OHIO ENVIRONMENTAL PROTECTION AGENCY

APPENDIX A

August 8, 1997 Jayko/Indian Summation Letter Re: Marion Engineering Depot (RX EX. 113)

Mr. Jayko's August 8, 1997 letter to Mr. Indian at ODH, regarding the Marion Engineer Depot (RX EX. 113) also stated that:

> Historical accounts indicate that in addition to standard depot operations, radiological activities to support the Manhattan project may have also occurred . . . there. (RX. EX. 113)

He quoted post-war Safety Director, Robert Ferguson, at MED as statingt that radioactive sniper scopes (metascopes) were stored there, and a special building constructed of brick and lead-lined interior walls and a copper roof to house dangerous radioactive materials. In 1956-57, the building was decontaminated and the materials removed. Chemical, biological and radiological (CBR) training also occurred there in the 1950's with radioactive gamma sources scattered throughout the area now occupied by the River Valley Schools. Two sticks of radium 226 were discovered on the site in 1986 and removed; gasoline tanks were also removed, and 4,000 tons of asbestos was scheduled for removal that year.

Eventually, the Army turned over a dump relating to their formerly utilized defense sites (FUDS)at Marion Engineer Depot to the Corps of Engineers. It included paint, paint thinners and removers, carbon tetracholoride, trichloroethylene, and fingerprint removal solutions, and may have been located east of Sixth Street and back to Route 198 which includes the current location of River Valley Schools. Mr. Jayko suggested further investigation to substantiate the content of the dump site, suggesting that the school is located on top of or near the dump site.

This report is verified by that of Ruth Vandergrift in the October 30-31, 1997 report on MED Building 517. (RX. EX. 118; FF 67)

With regard to the Scioto Ordnance Plant (SOP), it was constructed in 1942 to manufacture fuses, boosters, canons, and artillery shells, incendiary bombs, and napalm bombs. This was followed by a history of occupation by other contractors of military ordnance including a gearing up for the manufacture of incendiary and cluster bombs for the Chemical Warfare Service of the War Department. Production shut down immediately upon cessation of the war. Most of the buildings were razed to make room for the Marion Correctional Institute. The Atomic Energy Commission (AEC) and the Department of Energy (DOE) played a part in the history of SOP. The Monsanto Building was built in 1947 and 1948 on the grounds and Monsanto was awarded a contract to research one of several methods of developing atomic energy. Eventually that process was developed at Oak Ridge, Tennessee and the Monsanto operation was abandoned. (RX. Ex. 113, p. 4)

In April, 1949, the AEC acquired SOP, and Monsanto Corporation was again contracted to construct, equip, and operate a facility as a backup for the Mound Laboratory in Miamisburg, Ohio to produce polonium and triggers for nuclear weapons, referred to as "Unit

VI." It received little or no radioactive material and never produced initiators because the Mound remained in operation, but was vacated and sold in 1953-54, and is now occupied by Warner Warehousing since 1973. (*Ibid*)

The possible contaminants believed to have existed at one time on the grounds include:

Mercorse	Fulminate	Uranium	Magnesium	Benzine
Sodium Nitrate	Charcoal	Sulfur	Naptha	
Polystyrene	Gasoline			

Five buildings (IGLOOS) were constructed there to store mercuric fulminate, two of which remain at the current Marion Municipal Airport. Incendiary bombs and napalm were produced using mixtures of the other contaminants.

Summaries of recent investigations to the date of Mr. Jayko's report, show that Marion has been identified through the Defense and Environmental Restoration Program as Formerly Utilized Defense Sites (DERP - FUDS) as such a site by the U.S. Army Corps of Engineers (USA COE) and assigned a site number of G050H015000. However, it has now been eliminated from consideration as a Department of Energy (AEC) Formerly Utilized Sites Remedial Action Program (FUSRAP). The USA COE files appear to relate only to underground storage tanks. With additional investigation warranted, other options may be pursued, but no additional investigations have been planned by the Corps. (RX. EX. 113 at p. 5)

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Reports and files reviewed by Mr. Jayko on July 18, 1997, according to his August 7, 1997 report:

Report on Environmental Assessment of former Marion Engineer Depot, Marion, Ohio. (RX. EX. 113, p. 6-7)

The reports and files reviewed by Mr. Jayko on July 18, 1997, according to his August 8, 1997 report, involved the Report on Environmental Assessment of former Marion Engineer Depot, Marion, Ohio, by ERM-Midwest, Inc., in June, 1990. It was submitted to Graham Investment/GP Properties as a "Phase I" environmental assessment from the facility and grounds, covering areas of history, hazardous materials, hazardous waste handling, waste water discharge, environmental regulation compliance, air emissions, solid waste management, tanks, CERCLA, asbestos, PCBs, radioactive material, and spills. He stated that the report concludes that:

> [N]o significant environmental conditions are apparent which would adversely impact the pending transaction on the property. **However, there are environmental issues of concern which should be addressed by the**

parties involved, including underground storage tanks, waste and PCB transformer storage, and the presence of radioactive materials. This conclusion is based on ERMs understanding of what the U.S. Government has taken responsibility for the USTs, the GP Properties will manage the storage waste and PCB transformers in a appropriate and timely manner, and that the GP Properties will continue to pursue removal of the radioactive materials. (*Ibid*)

The report discusses that the former use of 14 buildings on the 140 acre parcel included radioactive materials and strategic stockpiles maintained at the MED from mid-1960's through 1980, consisting of tin, chromium, tannin, and asbestos. It discusses the water supply, the adjacent brass/bronze foundry west of the property, surface water samples having been taken with findings of arsenic, cadmium, lead, and toluene elements found above detection limits. They discussed underground storage tanks (UST) in building 517, and the former radioactive storage building off Second Street, believed to have been decontaminated in 1956-57. (*Ibid*) (As the ODH report by Ms. Vandergrift verifies this part was wrong, since Building 517 was the subject of a Final Survey Report of October 30-31, 1997, forwarded to Mr. Jayko on January 26, 1998. (RX. EX. 118; FF 67))

In addition, **building 106, was found to have two small tubes of radium 226 containing seven micro curies with a gamma radiation source with a half-life of 1,620 years (In 1989? 1986?).** They were believed to be collaboration sources for personal dosimeters and were removed by USACOE after discovery. The report notes that "aerial photographs, back to 1951, show a property disposal yard near the reservoir to be actively in use." (Id at p. 7) Other reports included asbestos removal, disposal of drums of waste of 25 55-gallon drums, and 23 smaller containers with composite samples of 1-1-1 trichloroethane moved on November 12, 1990. Others included reposition of PCB transformers left on the site. On December 11, 1990, including 37 pounds of transformers containing less than 450 parts per million (ppm) of PCB; 1,200 pounds of transformers containing greater than 450 ppm of PCB, and 2,000 pounds of capacitors. As stated above, the radium 226 were removed after discovery and six underground storage tanks were removed. (*Ibid*)

The last closure of a building, 306, January 3, 1991, involved underground storage tanks.

With regard to the Scioto Ordnance Plant (SOP), "numerous conventional explosive ordnance fill lines were in existence at this site, as well as fill lines for incendiary devices." He could not confirm evidence "available for determining the extent of the environmental contamination that may have occurred" from them. It is confirmed, though, that: "at least two structures were set up for handling of radioactive materials but is unknown to what extent those two structures were used." He admitted "no evidence of gross radiologic contamination" pursuant to the USACOE radiologic survey of 1995." No surveys of explosive, hazardous or toxic materials have been conducted "by them" at the SOP. He stated that "residential sites now occupy the areas of the former Scioto Ordnance Plant and they suspected that several of these residences utilize ground water for their potable source." (*Ibid*) Based upon the information available, he concluded that the most likely pathways for the school were:

1. Dermal, contact with contaminated shallow soils
2. Inhalation, volatilization resulting in airborne vapors
3. Ingestion, ingestion of contaminated shallow soils
4. Radiological, contact or proximity with a radioactive source or contaminated media.

Those considered unlikely were:

1. Dermal, contact with contaminated intermediate or deep soils
2. Dermal, contact with contaminated ground water
3. Ingestion of contaminated ground water; as the school utilizes a municipal supply
4. Ingestion, ingestion of contaminated intermediate or deep soils
5. Inhalation, volatiles contained in drinking or bathing waters.

(Rx. Ex. 113 at p. 9)

Other conclusions of Mr. Jayko included in the report were:

In addition, the Director's Office had committed the investigation to include drinking water; the Ohio Department of Health agreed to conduct the radiation survey, and he discussed the actual plans to conduct investigation of soil gases, air monitoring, and shallow soils, as the responsibility of the OEPA.

Mr. Jayko requested that the plans be reviewed by OEPA, USACOE, and a private company, Harsco Corporation, whose property would require access and also a review of the plans.

In October of 1995, a Final Limited Site Investigation Report for the Radiological Contamination at the Former Scioto Ordnance Plant, Marion, Ohio, was conducted under contract for the U.S. Army Corps of Engineers. (RX 112) It's conclusions and recommendations stated:

> The results of the SI survey and sampling indicate there were no observable gross areas of radiological contamination noted at the Monsanto Building and the Likins Chapel. [Both parts of the Scioto Ordnance Plants] The radiological contamination survey results provided no observable reading above 100 counts per minute for alpha and beta/gamma. The water sample analytical results were below the associated action levels. The results of the study indicate that gross radiological contamination of the Monsanto Building and Likins Chapel is not present and, therefore, no further action is recommended. (*Id*. at 85)

APPENDIX B

Testimony Regarding Paul Jayko's October 15, 1997 Six Concerns Memorandum

Of primary interest, Concern No. 5 refers to parameters remaining for analysis in order to insure that the water entering the distribution lines is actually free of contaminants. For this, Mr. Jayko needed a full metals analysis, as well as analyses for pesticides, and semi-volatiles to include total PAHs. He stated:

> [I]t had been historically known actually before I even joined the EPA that this section of the Little Scioto River was one of the most contaminated sections . . .. But the section of the river near the water intake was highly contaminated with these PAHs." (T 1634-35)

While confirming that the highest contaminated levels were actually slightly downstream of the water intake, the concern remained that there is still high levels that are upstream of the intake. (T 1635)

Mr. Jayko stated that various studies, which were eventually published by the Division of Service Water known as Water Quality Studies, would use river mile markers and check sediment levels. While they had found that slightly downstream of the intake was the highest level, they still found elevated levels of these contaminants upstream before they had the potential of moving downstream and being captured by the intake. (T 1636) Besides the study showing 105 ppm of PAHs, he believed they also had found elevated levels of other constituents upstream. (*Ibid*)

Concern No. 1 cites a water quality study that was done in 1994, as one of several water quality studies done historically in the area. The particular 1994 study found that there were 17 different PAHs that were in this very contaminated section of the river, and that 5 were either known or suspected to be cancer causing and that there were 23 different metals plus cyanide, which is often considered a metal, that were measured in the river. There were also break-down products of DDT, which is a pesticide, in which there were fairly high levels in the river, higher than should be there. (T 1636-37)

Besides talking to Ms. Vandegrift about the radiation hazard, his research showed that there could be improper disposal of radioactive material, and that various radioactive enterprises had taken place in both the Scioto Ordnance Plant and Marion Engineer Depot. (T 1637) On the Scioto Ordnance Plant facility, there were two buildings that had been used there by the NRC. One was known as the Monsanto Building, the other is Likins Chapel. Here, Mr. Jayko discussed the account of these two buildings included in a draft from the Mosher, Scioto Ordnance Plant and Marion Engineer Study After 40 years, (CX. Ex. 71, included in RX. Ex. 113) and the building of the Monsanto Building as part of the Manhattan Project and a backup for the Mound facility in Dayton to manufacture weapons-grade materials, and nuclear triggers. He stated: "[t]here has always been a lot of controversy as to whether or not the radioactive

materials were ever used at this building or not." (T 1639) It has never been established one way or the other as to whether they were there. (*Ibid*)

Three of the five persons interviewed described some of the stories of crates coming through the Engineer Depot marked for the Manhattan Project, and the secrecy that revolved around them. Suddenly, the crates disappeared, and no one really knows what happened to them, as the story is told in that document. (*Id at p.*5) There is a reference to Bob Ferguson, Safety Director at the Marion Engineer Depo during that time, who was a person interviewed by Mr. Jayko. (T 1640)[59] He told Mr. Jayko that they may or may not have had any type of radioactive hazard. He then described the secrecy surrounding the Monsanto facility, and the various accounts that he was aware of, and the very tight security. The purpose of the buildings was to either receive radioactive material, or they could produce weapons-grade radioactive material. (T 1641) Ferguson referred Mr. Jayko to a Mr. Howard Tewalt, former employee of the Marion Engineer Depot. He had participated in the CBR (chemical, biological and radiologic training) and told him that on the grounds, now the campus of River Valley Schools, they had scattered gamma capsules on the ground, in order to practice finding them with various Geiger counters or radiation detection scenes, that they used at the time.

All of this came together to tell Mr. Jayko that there was a strong likelihood that radioactive materials that had been used on the two facilities, that gamma radiation was one of those materials and that the knowledge of the materials and how these materials were eventually disposed of was not known, and remained in question. (T 1642-43)

With regard to the testimony of Mr. McLane, who testified about sampling that he took from faucets back in August 22, 1997, that sampling effort was not the focus of the October 15 memo. (T 1643)

The reason that Mr. Jayko felt that the matters discussed in the October 15 memo needed be to put in writing, was that, as a matter of course, he did not understand how his Agency or any business could operate, if things were not committed to writing. He stated that: "putting something to writing helps clarify it for all the parties involved." Mr. Jayko stated that the writing serves as a reminder for him and for others. It clarifies commitment and allows the type of discrepancies to be worked out. (T 1643) He had no intent to embarrass anyone with the note.
(T 1644)

Copies of the memorandum (JT. Ex. 6) were sent to Mr. Steers and to Doug Scharp. He believed that Mr. Steers would review it, and take any of the concerns up the chain of command for action or could possibly direct him or Doug Scharp to take some specific action with things that they needed to look at. (*Ibid*) Mr. Steers worked as his immediate supervisor on the Marion project, but Ruth Vandegrift sent a blind copy as one of the team members she

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[59] I overruled an objection to the hearsay nature of this in stating that it was admissible for purposes of what Mr. Jayko relied upon in his investigation, and for no other purpose - i.e., the truth or not that nuclear weapons were actually there. (T 1640)

had been working with on it. He was not sending the report to an outside entity, but sending it to a member of the ODH/EPA team, that was working on the project. (T 1645)

With regard to Mr. Don Schregardus's explanation for why he asked for a limitation on the data, Mr. Jayko did not agree with that from his testimony. He stated that Mr. Schregardus talked in terms of "MCLs" which are the parameter that we talked about in just municipal drinking water systems. A list that has been developed for municipal water supply, that if they checked they got good assurance that they got a clean water supply. However, by checking MCLs only, that does not consider unique situations such as heavy contamination in the Little Scioto River and the PAHs. PAHs are not a part of the MCL. (T 1646)

Even though PAHs might occur naturally in the environment, it does not affect his judgment as to whether they should be checked, since 20% would be naturally occurring, and the rest are from man made endeavors. Of particular concern here, the industrial facilities or industrial sites that were close to the PAHs that were found in the river, it only stands to reason that there is a good chance that those PAHs came from other sites. (T 1646-47)

APPENDIX C

June 3, 1998 - Hertzer/Gianforcaro Memo Re: Dateline, NBC (CX. EX. 24; FF 230)

1. On June 3, 1998, a memo was sent by e-mail to Beth Gianforcaro from Randy Hertzer regarding a call from Dateline to Robert Indian of ODH, asking for mortality data, with a blanket Freedom of Information Act (FOI) request, resulting in directions to handle the story; warning that skeptical members of the Marion community who "still believe the government has something to hide" or "those who feel things aren't progressing fast enough" were prompting the Dateline matter, and stating that the story would not be positive, that it would make the government look inept in "dumping" at the former depot site in Marion and not cleaning it up, and that associations would be made between the depot and the leukemia cases that would lead the public to believe that something was going on, "even if science cannot show any connection between the two." They expected the story to show interviews with cancer victims or families, to "pull at the heart strings and re-enforce the idea that something should be done." They cautioned the readers not to "believe this will be a balanced story." They will continue to "get viewers, they will insinuate, implicate and exploit whatever facts they have to make a strong program. They basically felt that none of these formats "can possibly benefit the effort now going on by the agencies" in trying to discover the links, if any. (CX. EX. 24)

2. A June 3, 1998 note from Kenneth Crawford, of the Corps, to the Central Office, stated that he had a 40 minute interview with the Dateline producer on RVS and that his perceptions regarding what the story would be, were the following: that the Army used the Marion Engineer Depot during WWII; that it dumped hazardous waste under environmental laws that were different then; that early investigations found no reason to be alarmed; that "heroic parents of kids with leukemia brought this issue to the attention of the Army and state agencies;" that it will review what is happening; that the focus will obviously be on the "victims and their parents, with a critical look at government actions past and present;" that it will also talk about "the faceless government;" that it will be followed by the question: "How did the Federal government allow a school to be built on a waste dump?"; that the story is hot; that they may not see anything soon because they are working on next season's stories; that they will know in advance when it will be aired, and that they will be asked for on site interviews, noting that his perceptions were based on questions concerning their "CERCLA responsibilities and actions, and ... concern for the leukemia victims;" suggesting that "it would be best to keep this in PA channels," and directing appropriate questions to ODH, OEPA and the headquarters of the Corps.(CX. EX. 25)[60]

3. An e-mail memorandum of June 10, 1998, from the Coyps'Kevin Jasper to the Central Office, regarding PAO Strategy for NBC and a District FUDS Site, CX 75 contained other June 3 e-mails, asking for the sources of the information, and one to Mr. Crawford from Tim Sandler of Dateline requesting a long list of documents is also discussed with him, (CX. EX. 26) which affirmed Ken Crawford as the suggested spokesperson for the Marion site, and is followed by a memo from him outlining the Dateline strategy from the above June 3

[60]CX 75 contained other June 3, 1998 e-mails, asking for the sources of the information, and one to Mr. Crawford from Tim Sandler of Dateline requesting a long list of documents is also discussed with him. (CX. EX. 25)

memorandum (CX. EX. 25), attaching a document for all to utilize captioned, Public Affairs Strategy: Former Marion Engineer Depot - A Discussion of Various Scenarios and Responses to Officials, Public and Media. (CX. EX. 26)[61]

[61]The memo ranks possible scenarios that could occur, starting with: 1) a significant amount of radiation found on school property and possible responses and talking points; 2) in the event that highly toxic hazardous waste is found on the school property; 3) for any reason, the school is closed; and 4) a major, nationwide media outlet plans a potentially negative story. (*Ibid*) The fourth begins with a possible Dateline or other national media story that it states: "is potentially negative" and directs that "the PAO should react in a positive manner." It directs making people available, and up front as possible, though contamination may have been caused by the Army during WWII, the story is positive: we have quickly responded to the state and to the public, have kept the public informed with honest, straightforward information and are working as quickly as possible to find and remove contamination. It emphasizes "all of this is in the interest of the *people*." (CX. EX. 26, p. 8) For a summary of the rest of the memorandum, see, Appendix C.

APPENDIX D

June 10, 1998 - USACOE Memorandum - (RX. EX. 26)

With regard to the Corp's June 10, 1998 memorandum, it states that the Louisville Corps is to remain as the lead office, printed material will be requested, and repeats the anticipated line of thought stated in his perceptions. He states "there is no way to fix this story, but we can make an impact if we do it correctly." He does believe that they should not hide information and must be positive. They point out that what the Army did 50 years ago was accepted practice, but does not excuse them. Since that time, the nation's environmental laws have come into being and the Army is at the forefront of protecting its environment and cleaning contamination. (RX. EX. 26, p. 8)

He pointed out that there are several agencies involved, and the effects of particular contamination would be referred to the Ohio Department of Health, while questions about environmental laws of the state or state environmental actions he would refer them to the OEPA. He can only discuss Army activities at this site. (*Id* at page 9)

The Corps, under the Defense Environmental Restoration Program, is responsible for environmental remediation of about 9,000 formerly used defense sites nationwide, all of which do not require remediation. For those that do, they would love to clean them right now, but the agency does not have enough money so they have to prioritize them. He then goes on to describe the procedure that's followed for this. (*Ibid*)

When Mr. Crawford became aware of River Valley School's problem, they moved immediately for permission to move this up on the priority list and for money to study the program. He stated that "we all hope our activity will quickly find the cause of the leukemia or find that nothing on the school ground contributes to such a disease." [This is a slightly different cast than that given to the OEPA directives.] However, he does say "[T]o be frank, our job is not to find the cause of the problem - by law our job is to look for any contamination at this Formerly Used Defense Site and to remediate it. Whether it causes the cancer or not, we will clean it." He describes how the environmental remediation is handled as a long process and requires "a thorough study and . . . structured decisions." (*Ibid*)

He noted that the Army once used TCE (trichloroethanes) at "almost every industrial-operation it carried out in World War II, as did the rest of the country," as a common solvent. (*Ibid*) It was used to clean metal parts and dumped into trenches or holes. Petroleum, oil and lubricants were removed from vehicles prior to shipment and were placed in a trench and burned. (*Ibid*) He noted that they relied not only on documentation but memories that are sometimes "somewhat less-than-accurate" and receive stories telling us information. With regard to radiological contamination, he pointed out that "we know that radium was stored and used onsite. We have every reason to believe the documentation that says it was removed to Aberdeen Proving Ground in Maryland." (*Ibid*) He then states "we know that some radium-painted markers may have been lost around the site, since they were not a controlled item. We know that radioactive pellets were used to calibrate equipment and to train radiological teams. Some of these may have been lost." With regard to the Manhattan Project, he notes that some boxes passed throught the Depot, but they have no documentation of it remaining there, or that it

contained radioactive material. (*Ibid*) He emphasized that DOE (Department of Energy) has been forthcoming about its Manhattan Project sites in its use of the FUSRAP program as discussed above. (*Id* at p. 9-10) The team in Ohio now consists of the Corps, ODH, OEPA, both Senators DeWine and Glenn's Offices, congressional offices, local officials and area citizens. He stated that the group "works as a team, sharing information, coordinating and working together for a common cause." (*Ibid*)