



**Issue Date: 19 October 2010**

OALJ CASE NO.: 2009-CER-00003

*In the Matter of:*

**DOANN HAMILTON,**  
Complainant,

v.

**PBS ENVIRONMENTAL BUILDING CONSULTANTS, INC. dba PBS ENGINEERING  
& ENVIRONMENTAL,**  
Respondent.

**DECISION AND ORDER AWARDING COMPLAINANT REINSTATEMENT,  
DAMAGES, AND ATTORNEY FEES**

This action involves a complaint under the employee protection provisions of various federal environmental statutes, including the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. § 9610; the Federal Water Pollution Control Act, 33 U.S.C. § 1367; the Toxic Substances Control Act, 15 U.S.C. § 2622; and the Solid Waste Disposal Act, 42 U.S.C. § 6971 (collectively “the environmental acts”), and their implementing regulations found at 29 C.F.R. §§ 18 and 24.

On March 2, 2009, Ms. Doann Hamilton (“Complainant”) filed a complaint with the United States Department of Labor’s Occupational Safety and Health Administration (“OSHA”) alleging her employer, PBS Engineering & Environmental (“Respondent”), among others, had violated the above-listed environmental acts. Complainant also named in her complaint as an additional respondent, D.B. Western, Inc. (“DBW”). On June 11, 2009, OSHA issued a decision dismissing Complainant’s complaint. Complainant subsequently sought *de novo* review of her complaint by this Office on July 7, 2009.

I conducted a hearing into this matter on April 6 and 7, 2010, in Seattle, Washington. During the hearing I admitted into evidence Complainant’s exhibits (“CX”) 1 through 33 as well as Respondent’s exhibits (“RX”) 102, 103, 111 through 121, 126, and 132 through 134. Hearing Transcript (“TR”) at 6-11. I also admitted into evidence Administrative Law Judge’s exhibits (“ALJX”) 1 through 11. TR at 11-15. On July 12, 2010, this Office received from Complainant her posthearing brief, which was then followed by Respondent’s posthearing brief on August 30, 2010, and Complainant’s reply brief<sup>1</sup> on September 29, 2010. I now mark these submissions respectively as ALJX 12 through 14, thereby closing the record.

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<sup>1</sup> In addition to her reply brief, Complainant also included seven new exhibits in her filing with this Office on September 29, 2010. On October 6, 2011, Respondent submitted a motion to strike these exhibits. Complainant indicates nowhere that she has complied with – or even considered – the criteria for such submissions under 29 C.F.R. § 18.55. Consequently, I do not admit or consider such evidence.

## I. Stipulations

The parties included no stipulations in their prehearing materials. However, at hearing counsel for Complainant and counsel for Respondent agreed Respondent would not challenge the thoroughness or effort put forth by Complainant in securing new employment after her termination by Respondent. TR at 6-8. Respondent also concedes in its posthearing brief that Complainant's receipt of a subpoena in January 2009 constitutes protected activity under the SWDA. *See* ALJX 5 at 3; ALJX 13 at 26.

## II. Procedural History

As noted, Complainant's case arrived at this office on July 7, 2009. On August 5, 2009, I issued an Order to Show Cause Why Respondent DBW Should Not Be Dismissed as a Party Not Covered by the Environmental Acts ("August 5 Order"). In response to the August 5 Order, Complainant on August 12, 2009 requested DBW be dismissed from this case. On August 13, 2009, I therefore issued an Order Dismissing DBW.

On September 11, 2009, DBW, despite no longer being a party to this action, submitted a motion for a protective order. In its motion, DBW sought to preclude Complainant from testifying about certain work performed for it allegedly falling under the protections of the attorney-client privilege. ALJX 2 at 1. On September 24, 2009, Complainant filed her opposition to DBW's motion. In her opposition, Complainant argued she was never informed of the existence of either an attorney-client or work-product privilege nor was she ever shown a privilege log related to such assertions of privilege. *Id.* at 1-2. On October 15, 2009, I issued an Order Denying DBW's Motion for a Protective Order ("October 15 Order"). *See generally id.*

On March 29, 2010, Respondent filed a first motion *in limine* seeking to limit the submission into the record of evidence related to three of the four environmental acts under which Complainant alleged her complaint arose. *See generally* ALJX 9. Specifically, Respondent argued Complainant had failed to demonstrate the applicability of three of the four environmental statutes and that only the SWDA could therefore prospectively apply. *Id.* at 2-3. On March 31, 2010, Complainant filed her opposition to Respondent's first motion *in limine*. *See generally* ALJX 10. At hearing, however, I denied Respondent's first motion *in limine* in order to fully develop the factual record in this case. TR at 23-24. Respondent again renewed this motion at hearing in the form of a motion for a directed verdict dismissing all but Complainant's SWDA claim. *Id.* at 413-416. I took this motion under submission, however, and directed the parties to address it in their posthearing briefs. *Id.* at 421.

On September 21, 2009, Complainant began the submission of a series of prehearing materials and amendments – portions of which were objected to by Respondent – starting with her first prehearing statement, witness list, and exhibit list on this date. On March 18, 2010, Complainant submitted an amended prehearing statement, amended witness list, and amended exhibit list. *See generally* ALJX 4, 6, 7. On March 31, 2010, Complainant submitted a second amended prehearing statement. *See generally* ALJX 5. On April 2, 2010, Respondent submitted a second motion *in limine* seeking to strike portions of Complainant's second amended

prehearing statement, arguing it contained two new allegations of protected activities. Complainant filed her opposition on this same date to Respondent's second motion *in limine*. At hearing, however, I notified Respondent I found its reasoning unpersuasive and denied its motion *in limine* without prejudice. TR at 23. In doing so, I again informed Respondent of my desire to fully develop a factual record during the hearing but noted I would allow it to renew this argument in its posthearing brief if it then so desired. TR at 23-24.

On April 1, 2010, Ms. Karen Moynahan of the Oregon Department of Justice filed an Unopposed Motion for Limited Appearance to defend testimony offered at hearing by any Oregon Department of Environmental Quality employees. During the hearing, I granted this motion. *See id.* at 544.

Finally, on April 1, 2010, Complainant filed a third motion *in limine*. In this instance, Complainant sought "an order prohibiting the relitigation of matters decided by the October 15 [Order]." ALJX 11 at 1. Respondent did not file a response to this motion. At hearing, I asked the parties to address Complainant's motion *in limine*. TR at 24-26. During this time, Respondent noted it did not object to the motion because it had accepted the ruling contained within the October 15 Order. TR at 24-26. After allowing the parties to address the issue, I denied Complainant's motion *in limine* but noted Complainant was free to object should the issue of attorney-client privilege with respect to DBW and Complainant again arise during the hearing. *Id.* at 26.

### **III. Summary of Decision**

For the reasons that follow, I find Complainant has successfully proven by a preponderance of the evidence her engaging in protected activity under the Comprehensive Environmental Response, Compensation, and Liability Act, the Toxic Substances Control Act, and the Solid Waste Disposal Act was a motivating factor in the termination of her employment by Respondent. Furthermore, Respondent is unable itself to demonstrate by a preponderance of the evidence that it would have nevertheless terminated Complainant's employment absent her engaging in such activity. Consequently, I find Respondent has violated the employee protection provisions of each of these environmental acts. As such, I award Complainant back pay and benefits as well as incidental and compensatory damages, and order that Respondent reinstate Complainant to her former position.<sup>2</sup> I do not find, however, that Complainant is entitled to exemplary damages.

### **IV. Background**

Complainant has been involved in environmental remediation work for approximately fifteen years. TR at 42. This work involves the sampling, profiling, investigating, and cleaning up of contaminated sites. *Id.* Complainant is currently employed by a company in Virginia in such work in the position of senior geologist. *Id.* at 41. She has multiple university degrees, including a bachelor's degree in forestry from Texas A&M University and both bachelor's and master's degrees in geology from Portland State University. *Id.* at 44.

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<sup>2</sup> I also find Complainant entitled to attorney's fees and costs, but order the parties to address these issues through separate briefing.

Prior to working in her current position, Complainant worked for Respondent beginning in April 2007, where she also did environmental remediation work. *Id.* at 42. While employed with Respondent, Complainant estimated she spent approximately seventy-five to eighty percent of her time “working on environmental remediation or cleanup-type projects” and the remainder of her time performing “geotechnical work.” *Id.* at 42-43.

In September 2007, Complainant began working with Respondent. *Id.* at 46. Respondent is an environmental engineering consulting company. *Id.* at 380. Its primary function is to perform “environment due diligence” work. *Id.* This work involves investigating certain environmental conditions on the properties owned by its clients and performing cleanup work associated with such properties in accordance with regulatory requirements. *Id.* Furthermore, Respondent also serves as an intermediary between regulatory agencies and the clients themselves. *Id.* at 380-81, 445. Respondent has approximately one-hundred-and-thirty employees. *Id.* at 337.

As part of her employment with Respondent, Complainant received and read certain materials. One such set of materials was Respondent’s employee handbook, which contained a confidentiality statement that read as follows: “[Respondent’s] work is of the most sensitive nature. All projects, the nature of their work, or conditions encountered should not be discussed with anyone outside of the office. If this confidentiality is not adhered to, it will be grounds for immediate dismissal.” EX 3 at 316. A second set of materials Complainant received was Respondent’s “Quality Assurance / Quality Control Guide” (“QA/QC Guide”), which defined the roles of various types of employees within Respondent’s organizational structure. *See generally* CX 1. With respect to the position of “Principal-in-Charge,” the QA/QC Guide noted persons in this position were responsible for “overseeing the proposal process, accessing and approval [sic] of project documents and reviewing and signing contracts,” as well as “establish[ing] and maintain[ing] client relations.” *Id.* at 295. Persons working in the position of “Project Managers” were tasked with “client relations and the daily management of team members” as well as “[c]ontract/[s]ub-contract [m]anagement.” *Id.* at 295-96. Complainant signed statements affirming she had received and read Respondent’s employee handbook and the QA/QC Guide. EX 102 at 179-80.

During her employment with Respondent, Complainant performed work at a location referred to as the Cinder Lakes Ranch (“the Ranch”). *Id.* at 46; CX 2 at 48, 52. The Ranch was located in Powell Butte, Oregon, and was owned by Mr. Dennis Beetham and Mrs. Kathy Beetham. TR at 446-47; CX 2 at 48. Respondent became involved in voluntary remediation at the Ranch through a subcontract with another company, SMAF Environmental, LLC (“SMAF”), which DBW – a company run by Mr. Dennis Beetham – retained to perform the removal work of certain materials from the Ranch. TR at 448-52; CX 2 at 48. The relationship between SMAF and Respondent with respect to work to be performed on the Ranch commenced on August 24, 2007.<sup>3</sup> *See* CX 24 at 20. The Oregon Department of Environmental Quality (“DEQ”) and Mr.

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<sup>3</sup> Respondent asserts in its posthearing brief that this relationship began on August 24, 2007. *See* ALJX 13 at 9. However, Respondent provides as the source of such an assertion only Claimant’s Exhibit 24, which itself comprises twenty-nine pages of various documents. A review of these documents reveals only one letter, dated August 23,

Mike Renz were also involved in the cleanup project at the Ranch as was an additional company, Anchor Environmental (“Anchor”), whom DBW retained “to assist in oversight and cleanup activities.” CX 2 at 48. Respondent, DEQ, SMAF, and Anchor were all tasked with “jointly manag[ing] an effective cleanup project” at the Ranch. *Id.* DEQ was aware of the presence of formaldehyde on the Ranch as early as 2007. *Id.* at 55-57.

Complainant testified as to the details of the work she regularly performed at the sites at which she worked. She described taking photo documentation of sites as well as various tasks associated with sampling, including taking samples, mapping sample locations, noting the analysis to be performed on each sample, and preparing the samples to be sent to a laboratory for testing. *Id.* at 45-46. Specific sites in need of environmental remediation were addressed according to a work plan. *Id.* at 45. Complainant stated such a plan “outlines the scope of work that’s going to be done” at a particular site and was usually given to her by the Project Manager of a particular assignment. *Id.* Such a work plan also provided guidance to Complainant regarding the documentation to be kept with respect to a particular project. *Id.*

Complainant’s environmental remediation work also involved the use of “field notebooks” that Complainant used to document her work as specific locations. *Id.* at 50. She described these notebooks as “permanent ‘write in rain’ notebooks with numbered pages,” the purpose of which format was to provide proof of the activities she sequentially performed. *Id.* Complainant stated she would include in these notebooks information such as her observance of trucks leaving and entering a site in her presence as well as the amount and description of certain substances she located at a site during her work. *Id.* These notebooks were also used to assist Respondent’s employees in composing final reports of their work to provide to their clients. *Id.* at 50-51.

According to Complainant, she performed her work at the Ranch per a work plan. Although it had been some time since she had reviewed the work plan describing work at the Ranch, Complainant recalled it describing the possible location and nature of contaminants as well as what sort of analysis she was to perform. *Id.* at 46. Complainant specifically recalled the Ranch work plan as including notation of possible drums – either broken or intact – that she may encounter as well as the location of shavings from tanks that may have at one time contained contaminants. *Id.* The work plan also estimated up to fifty drums possibly located on the Ranch which could contain “Dow-Them-A” and “different possible nitrates.” *Id.* at 46-47.

Mr. Toby Scott was the individual employed by Respondent who served as Complainant’s Project Manager Supervisor during her work at the Ranch. *Id.* at 48. At the time of the hearing in this case, Mr. Scott had worked for Respondent for approximately three-and-a-half years, prior to which DEQ employed Mr. Scott for twelve years. *Id.* at 443-44. Over his last few years with DEQ, Mr. Scott did not supervise any DEQ employees. TR at 534.

Mr. Scott described his position with Respondent at hearing as the Project Manager in charge of its Voluntary Cleanup Program. *Id.* at 444. Complainant stated Mr. Scott assigned her tasks at the Ranch and wrote the work plan for that specific remediation project as well as

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2007, and signed by Scott Porfily on August 24, 2007, which supports the beginning of a relationship between SMAF and Respondent on the latter date.

directed Complainant whether further remediation work was to be done after he interpreted laboratory tests performed on the samples taken by Complainant. *Id.* at 48. Mr. Scott, however, denied at hearing that he was Complainant's supervisor, instead stating only that "[s]upervisor' is a vague term" and that he "supervised [Complainant] on projects that [he] managed." *Id.* at 498.

Complainant testified to her recollection of the details of her and Respondent's involvement at the Ranch. According to Complainant, she first became involved in remediation work there in October 2007. *Id.* at 56. At this time, Complainant recalled a meeting with Mr. Scott as well as Mr. Tom Kitchenmaster, a Project Manager from SMAF, *id.* at 247, and Ms. Kristin Gaines, an employee from Anchor. *Id.* at 56. According to Complainant, the meeting began with Mr. Scott escorting her around the Ranch property and explaining to her where certain chemicals were located per the work plan he had drafted. *Id.* Complainant further recalled Mr. Kitchenmaster explaining to the attendees of the meeting how several organizations and actors were involved in the remediation of the Ranch. *Id.* She characterized the work done by Mr. Kitchenmaster and the crew of SMAF employees he oversaw as "the heavy construction part" of the remediation work at the Ranch. *Id.* at 58-59. Complainant specifically recalled Mr. Kitchenmaster stating DEQ would be present and involved during the remediation, but that she "didn't have to keep going to him to asking [sic] if that was okay to do what they were asking to be done." *Id.* at 57. She further stated Mr. Kitchenmaster expected her to handle the work of documenting the remediation, including the tasks of taking samples and sending them to the appropriate laboratories, photographing and mapping out her work on the Ranch, and preparing documentation. *Id.* at 59. Mr. Kitchenmaster also expected Complainant to give to him copies of any photos she took of remediation work on the Ranch. *Id.* Complainant stated the arrangement with SMAF as her client and these directives from Mr. Kitchenmaster were not unusual when compared to her prior experiences with such work. *Id.* at 56, 59-60.

Mr. Kitchenmaster, according to Complainant, also defined the role of Ms. Gaines on the remediation. *Id.* Ms. Gaines worked for Anchor, which had been retained by DBW. *Id.* at 57, 65. Complainant understood at the time that Mr. and Mrs. Beetham were in the process of a marriage divorce, and each therefore had hired separate entities to observe the remediation of the Ranch. *Id.*; *see also id.* at 446. Mr. Kitchenmaster therefore explained to Complainant an arrangement had been reached where DBW would pay for the remediation of the Ranch, and Ms. Gaines would oversee the remediation and "look out for [DBW's] monetary interests." *Id.* at 57. After explaining this arrangement, Mr. Kitchenmaster then instructed Complainant not to act upon any directive given by Ms. Gaines without first receiving his permission to do so. *Id.*

A. Complainant's Visit to and Subsequent Communications About Work at DBW's Coastal Sites in February 2008

On February 13 and 14, 2008, Complainant performed environmental remediation work at two sites on the Oregon Coast in North Bend, Oregon: a plant owned by DBW ("the Plant") and a personal residence ("the Residence") which had on it a plaque with the word "Beetham" (collectively "the Coastal Sites").<sup>4</sup> *Id.* at 69-70, 181; CX 15 at 2-3. It is the circumstances surrounding this work and Complainant's communications with others about her observations at

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<sup>4</sup> Complainant also referred to these sites generally as "Coos Bay." *See, e.g.*, TR at 113; CX 15 at 132-34.

these sites that gives rise to the bulk of the protected activity alleged in this case, including seven of the nine protected activities listed by Complainant in her prehearing statement. *See* ALJX 5 at 2-3. Given the pivotal nature of these two days within the framework of Complainant's whistleblower complaint, the circumstances of Complainant's work on these dates are unsurprisingly and hotly contested by the parties.

1. Complainant's Understanding of Respondent's Client Relationship with SMAF and Anchor at the Time She Performed Work at the Coastal Sites

One of the most disputed details giving rise to Complainant's whistleblower claim is her understanding of for whom she was working when she visited the Coastal Sites. According to Complainant, she understood SMAF to be Respondent's client on the work to be done at these locations. TR at 67, 71. Complainant testified that it was Ms. Gaines who originally requested Complainant visit the Coastal Sites to perform work, but that she had informed Mr. Kitchenmaster of this request and had subsequently received his approval. *Id.* at 68. Complainant gave multiple reasons for this understanding. First, she stated Mr. Scott directed her to record and attribute her time spent at the Coastal Sites to "Task 9," which Complainant explained was synonymous within Respondent's structure for work done for SMAF at the Ranch. *Id.* at 67, 573. Complainant further explained that Respondent used these "tasks" to break up large projects which it took on. *Id.* Second, Complainant stated all of the tools and materials needed for her work at the site were provided by Mr. Kitchenmaster, including gloves, a protective suit, cartridges, pH strips for sampling, and a meter to perform samplings. *Id.* When asked if she had any knowledge at the time of any potential contracts between Respondent and Anchor, DBW, or Tonkon Torp – the law firm representing DBW and Mr. Beetham, CX 20 at 107 – Complainant responded she was aware of no such relationships and that, furthermore, she had never been told this work would be billed to anyone other than SMAF. TR at 67, 70-71. Complainant also stated she was never told the work she was to perform at the Coastal Sites was privileged, confidential, or done as litigation support. *Id.* at 83.

Mr. Scott, however, testified to a somewhat different recollection of how Complainant's work at the Coastal Sites came about. Mr. Scott agreed the impetus for Complainant's visit to the Coastal Sites to perform remediation was a phone call from Ms. Gaines. TR at 460. During this conversation, however, Mr. Scott noted Ms. Gaines requested Complainant be sent to the Coastal Sites to "meet an Anchor employee" and perform sampling of some containers there. *Id.* at 459-60. A few days after this conversation, Mr. Scott sent an email to Ms. Gaines on February 12, 2008 confirming Complainant was "set up to be ready to go" to the Coastal Sites to perform the aforementioned sampling on February 13, 2008. *Id.* at 460; EX 103 at 4701. The email noted a "meeting . . . with Jennifer," EX 103 at 4701, who Mr. Scott testified was the second Anchor employee with whom Complainant was to meet upon arriving at the Coastal Sites. TR at 460-61. Mr. Scott requested Complainant "segregate" her work at the Coastal Sites away from that at the Ranch, but he did not provide Complainant with any new procedure or instructions regarding the billing of her work at the Coastal Sites. *Id.* at 461-62. Mr. Scott testified he consequently directed Complainant to bill her time "temporarily to Task 9," which Respondent then used for its work at the Ranch. *Id.* at 462. Mr. Scott further characterized the work performed by Complainant at the Coastal Sites as "in my mind, a very separated, single-work activity event," and testified that he expected Complainant would have come to him for

clarification about any misunderstandings as to who Respondent's client was on such work given her "professional experience." *Id.* at 492. Although Mr. Scott testified explicitly that he "told [Complainant] we were going to be working for Anchor at the coast," he also stated, somewhat contradictory, that it was "not typically [Complainant's] role to pay too much attention to, necessarily, the details of who is getting the bills, because she's primarily doing field work." *Id.* at 538-39. Finally, Mr. Scott noted that Respondent did not have all of the equipment Complainant needed to perform the work specified at the Coastal Sites, and he gave no indication as to how exactly she would have procured such equipment aside from noting that "she had to get it from somewhere." *Id.* at 533.

In addition to Complainant and Mr. Scott, Ms. Duly Berri – a partner with Respondent and its Principal Hydrologist, *id.* at 336 – Ms. Tami Skiles – Respondent's Human Resources Manager, *id.* at 422 – and Mr. Kitchenmaster gave their recollections of what information or direction Complainant was given with respect to who the client was on the work she performed at the Coastal Sites. Ms. Berri's recollection of Respondent's relationship with SMAF regarding work at the Coastal Sites came primarily through information conveyed to her by Mr. Scott. *Id.* at 356, 365-66. When asked if she had ever seen a work order or contract from February 2008 indicating DBW – and not SMAF – was then the client of Respondent for such work, Ms. Berri responded she had never seen such documentation, although indicated she believed such a relationship may have existed if Mr. Scott had indicated its existence. *Id.* at 356. Beyond placing faith in Mr. Scott's description of such a relationship, however, Ms. Berri did not conduct a further investigation herself to search for documentation confirming any such relationship. *Id.* at 357. Ms. Berri further indicated she relied upon Mr. Scott's statement that SMAF was Respondent's client regarding work performed at the Coastal Sites in February 2008, but that the billing for this work was later transferred to an account created by Respondent for Anchor in March 2008. *Id.* at 366. Ms. Berri noted that "[i]t was unclear who [Respondent] should be billing at that point" with respect to Complainant's work at the Coastal Sites on February 13 and 14, 2008, although she also stated that the practice of later moving time worked from one client's account to another was not an uncommon practice based on her experience as a partner for Respondent. *Id.* at 396-97.

Ms. Skiles also testified to the relationship between SMAF, Anchor, and Respondent and the role it played in Respondent's decision to ultimately terminate Complainant's employment. Ms. Skiles stated Complainant's being "confused" and giving her timesheet for work performed at the Coastal Sites played a role in Respondent's decision to ultimately terminate Complainant's employment. *Id.* at 431-33. When asked how Complainant could have determined that Anchor and not SMAF was Respondent's ultimate client for this work, Ms. Skiles stated that "when all the details were sorted out, at that time, for that project, [SMAF was] not the client." *Id.* at 434. Ms. Skiles, however, admitted her arrival at this understanding was derived from Respondent's "accounting department, and also information from Ron Petti and Duly Berri," but that she did not herself consult or review any of Respondent's contracts with various clients to confirm the existence of a relationship between Anchor or SMAF at the time Complainant performed the work at the Coastal Sites. *Id.* at 434-35.

Mr. Kitchenmaster also testified as to the circumstances that may have influenced Complainant's understanding of who Respondent's client was for the work she performed at the

Coastal Sites. Mr. Kitchenmaster, as noted, is a Project Manager for SMAF, a capacity in which he has worked since 2006. *Id.* at 247-48. Prior to working for SMAF, Mr. Kitchenmaster worked for eleven years as part of an emergency response hazardous materials team at Hewlett-Packard and for a fire department for twenty-two years. *Id.* at 248. With respect to SMAF's work in general, Mr. Kitchenmaster noted its relationships with clients sometimes included performing work at multiple sites owned by the same client. *Id.* at 255. Mr. Kitchenmaster characterized Anchor's role as being "primarily . . . a representative" of DBW, an understanding he said he gained through conversations with Mr. William Martson, an attorney from the firm Tonkon Torp – which represented DBW – and Ms. Gaines. *Id.* at 258-59, 556.

With respect to Complainant's work at the Coastal Sites, Mr. Kitchenmaster recalled this as a project that DBW wanted performed very quickly. *Id.* at 265. Regarding how the work was presented to Complainant, Mr. Kitchenmaster recalled a conversation at which he was present between Ms. Gaines and Complainant. *Id.* According to Mr. Kitchenmaster, Ms. Gaines asked Complainant to travel to the Coastal Sites to perform some sampling work. *Id.* At this point, Mr. Kitchenmaster stated he gave his approval to such a request, noting this was done because any work Complainant did at the Coastal Sites would "be on SMAF's dime." *Id.* When asked why he made this statement to Ms. Gaines and Complainant, Mr. Kitchenmaster replied that he did this because only SMAF – and therefore not Respondent – actually had a work order to perform such tasks for DBW. *Id.* at 266. He further noted that "it was understood that [Complainant] was going over [to the Coastal Sites] as a subcontractor . . . for SMAF," *id.* at 267, and that it would be "unusual" for a subcontractor working for SMAF to "bypass the contractor and make agreements with the entity that everyone is working under." *Id.* at 278. He did admit, however, that he was not Complainant's "boss" and did not serve in a role where he could direct her day-to-day movements and activities with respect to her work for Respondent. *Id.* at 285. Mr. Kitchenmaster had no recollection of discussing Complainant's then-pending visit to the Coastal Sites with Mr. Scott. *Id.* at 266.

## 2. Complainant's Work at the Coastal Sites

Complainant testified as to the specifics of the work she performed and materials found at the Coastal Sites. This work involved the sampling and photo documentation of several drums at two buildings at the Plant. *Id.* at 71. In the first building Complainant entered at the Plant, she described discovering a "couple of drums" that contained only some residue of materials that she determined were "pretty neutral" – with a pH reading of less than twelve. *Id.* at 72. At a second building that Complainant described as "more like a warehouse," she encountered workers who were heating up barrels of a chemical they identified as Dow-Therm-A. *Id.* Complainant explained this was because Dow-Therm-A solidifies at approximately fifty-seven degrees Fahrenheit, and the temperature during her visit to the Coastal Sites was approximately forty degrees. *Id.*

Complainant also described the circumstances leading to her visit to the Residence. According to Complainant, Mr. Beetham's son arrived at the Plant location during her sampling of the drums there. *Id.* Although she stated she was not introduced to him, she testified Mr. Beetham's son guided her to the Residence, where she was then taken to a barn there that contained several drums. *Id.* at 73. Complainant described seeing several types of drums at this

location. She observed drums of chemical identified by Mr. Beetham's son as something used by DBW to treat timbers but that she was not asked to sample. *Id.* Complainant, however, recalled being shown drums of chromate, paraformaldehyde, and arsenic, and recalled taking a sample of the chromate drum. *Id.* at 73-74. She testified the purpose of the sampling of the chromate was to determine the strength of the chemical within it as it was uncertain whether or not it had been diluted. *Id.* at 74. Complainant further noted that she used the same field notebooks as she had been using at the Ranch to document her work activities at the Coastal Sites because she considered the latter work to be part of the "same project" as the work she had been performing at the Ranch. *Id.* at 74-75. Complainant testified the total amount of time she spent performing sampling work at the Coastal Sites was from approximately 11:00 AM to 4:00 PM or 5:00 PM on February 14, 2008. *Id.* at 76, 78. She also emailed Mr. Scott that evening. *Id.* at 462-63; EX 119 at 1. The email confirmed many of the above details provided by Complainant in her testimony, including her meeting with Jennifer from Anchor upon arriving at the Coastal Sites that day. EX 119 at 4713. In the email, Complainant also described locating a drum of kerosene at the Coastal Sites, *id.*, which she did not discuss in her hearing testimony.

Complainant returned to Respondent's office in Bend, Oregon, the following day. *Id.* at 75, 78. Upon returning to the Bend office, Complainant stated she met with both Mr. Scott and Mr. Kitchenmaster to report on her work and observations at the Coastal Sites. *Id.* at 79. Complainant testified that Mr. Kitchenmaster's presence at such meetings as well as the meetings themselves were not uncommon. *Id.* Mr. Scott, however, stated he could not recall this meeting described by Complainant. *Id.* at 266-67. Complainant gave Mr. Kitchenmaster her photo documentation of the Coastal Sites, but did not turn over to him her field notebooks documenting her work there. *Id.* at 79-80. Complainant stated she filled up one field notebook just before doing the work at the Coastal Sites and consequently began a new field notebook with documentation from her work there. *Id.* at 232-33. However, she further noted she and Mr. Scott continued to use the field notebook she began at the Coastal Sites to document later work at the Ranch. *Id.* at 325-26.

### 3. Complainant's Communications with Dan Sekerak

On February 22, 2008, Complainant received a call on her cell phone from Mr. Dan Sekerak of the Environmental Protection Agency ("EPA"). *Id.* at 85. Complainant testified she was "in the field" at the time of the call and that Mr. Kitchenmaster was standing next to her. *Id.* She therefore turned to Mr. Kitchenmaster to ask him if she could speak with Mr. Sekerak, who gave his approval. *Id.* Complainant stated Mr. Sekerak inquired into who Respondent's client was, specifically asking if there was a contract with DBW for Respondent's work at the Coastal Sites. *Id.* at 85-86. Complainant told Mr. Sekerak there was no contract with DBW and that SMAF was Respondent's client for such work. *Id.*

After telling Mr. Sekerak about her understanding of Respondent's client relationships, Complainant stated she next provided him with details of her work at the Coastal Sites. Complainant told Mr. Sekerak of the various drums she had observed at the sites, including her recollection of the contents within and locations of the drums. *Id.* at 86. Complainant also mentioned to Mr. Sekerak that she had created photo documentation of the various drums that also provided details as to their locations. *Id.*

Complainant contacted Mr. Scott after the first phone call from Mr. Sekerak. According to Complainant, she did so because Mr. Sekerak requested her photo documentation and she was not sure if it were appropriate to release it to him. *Id.* at 87-88. Complainant testified Mr. Scott contacted Mr. Martson about Mr. Sekerak's request. *Id.* She further stated Mr. Scott ultimately relayed to her a response from Mr. Martson stating she could not turn over the photo documentation but could speak to Mr. Sekerak. *Id.* Despite being given permission to speak with Mr. Sekerak, however, Complainant stated she was also told by Mr. Scott that "there wasn't anything [she] had to say to him." *Id.* Mr. Scott confirmed during his testimony that he had a conversation with Complainant in which he told her to inform Mr. Sekerak that he should contact Mr. Martson to seek permission to view Complainant's photos of her Coastal Sites work. *Id.* at 480. Mr. Scott stated Complainant appeared to accept this directive without argument or question; however, he could not recall if Complainant had ever been informed prior to this conversation of a need to seek the permission of Mr. Martson before releasing such information as the photo documentation to a third party. *Id.* at 480-81. After her conversation with Mr. Scott, Complainant sent Mr. Sekerak an email on February 22, 2008 informing him she could not provide him with the requested photo documentation without the approval of Mr. Martson. *See CX 6 at 4702.*

Complainant next spoke with Mr. Sekerak "several days" after she sent the email to him on February 22, 2010. TR at 86. During this conversation, Complainant provided Mr. Sekerak with details of what she had observed at the Coastal Sites during her work there. *Id.* at 86-87. Complainant discerned Mr. Sekerak was likely viewing an aerial photo of the Coastal Sites during their conversation and sought from her directions as to where the drums she had seen and sampled were located. *Id.* at 87. Complainant provided directions to Mr. Sekerak to find both the Plant and the Residence as well as how to find the structure in which she had found the drums at the Residence. *Id.*

Complainant eventually adopted the belief that the details in her conversations with Mr. Sekerak were utilized by the EPA to procure subpoenas and a warrant related to an investigation of the Coastal Sites. *Id.* at 88-90. Complainant testified to a conversation with Mr. Kitchenmaster at some point where she discussed Mr. Sekerak's requests and in which Mr. Kitchenmaster informed her that his own work computer had been subpoenaed. *Id.* at 88-89. Complainant understood that the particular subpoena for records from Mr. Kitchenmaster's computer originated from the EPA. *Id.* at 89. Complainant did not, however, state specifically when her conversation with Mr. Kitchenmaster occurred or when she became aware that the information sought by Mr. Sekerak was being used by the EPA to procure warrants and subpoenas.<sup>5</sup>

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<sup>5</sup> The record demonstrates Complainant's attorney posed only a single question to Complainant related to when she became aware of the purpose of Mr. Sekerak's inquiries, which was as follows: "At some point in February of 2008, *or at any time*, did you become aware that there was some kind of a subpoena for documents that related to the hazardous waste cleanup?" TR at 88 (emphasis added).

#### 4. Complainant's Communications with Mike Renz

Complainant testified to speaking with Mr. Mike Renz of the DEQ sometime after her communications with Mr. Sekerak. *Id.* at 89-90. According to Complainant, this line of communication began somewhat unintentionally when Mr. Renz overheard Complainant discussing the work she had performed at the Coastal Sites with Mr. Kitchenmaster as all three were involved in removing a concrete driveway at the Ranch. *Id.* at 90. Complainant specifically stated she was then discussing with Mr. Kitchenmaster the transfer of her time spent at the Coastal Sites from Task 9 and its relocation to an account affiliated with Anchor. *Id.* Complainant testified that during this time Mr. Renz “heard us talking about drums” and subsequently began asking Complainant about her work at the Coastal Sites. *Id.* Complainant initially found this surprising as she had assumed Mr. Sekerak would have then already provided such details to Mr. Renz. *Id.* Complainant further recalled discussing with Mr. Kitchenmaster and Mr. Renz concerns over the possible removal of “material” affiliated with her work at the Coastal Sites from Respondent’s Task 9 location and into a new location labeled “For Anchor Environmental.” *Id.* at 90-91. Complainant stated these concerns stemmed from a request made on March 11, 2008 by Mr. Scott that she remove certain documents and materials associated with Task 9 on her work computer to this new folder. *Id.* at 91. Complainant further recalled the date of her conversation with Mr. Renz was March 12, 2008. *Id.* at 91-92. She did not inform Mr. Scott of this conversation. *Id.* at 207.

Complainant testified she subsequently provided to Mr. Renz what she described as an “official statement” of her observations and discoveries at the Coastal Sites, *id.*, and which she alleges made its way in part into a memo produced by Mr. Renz. *See* ALJX 12 at 9; CX 13 at 35-36. Although the memo discusses Complainant’s concerns regarding the incorrect billing of her time for any work done at the Coastal Sites as well as fears that records contained in the field notebooks documenting such work may be destroyed or altered, CX 13 at 35-36, it makes no mention of details regarding the location of drums, contaminants, or chemicals at any of the Coastal Sites.

#### 5. Complainant's Communications with Officer Craig Ball

Complainant also had a conversation with Officer Craig Ball of the Oregon State Police. TR at 90. She did not identify exactly when this conversation took place, but noted Officer Ball initiated the conversation by calling her. *Id.* at 92. Complainant stated Officer Ball’s reason for contacting her was his concern of “a possibility of documents that had been altered, back-dated, or changed” by Respondent. *Id.* at 92-93. Complainant explained to Officer Ball that she did not have access to certain computer records possessed by Respondent and reiterated her concern that certain pages associated with her work at the Coastal Sites may be removed from her field notebooks. *Id.* at 93-94. She also told Officer Ball of her belief that her timesheet “would show that the work and the intent on February [14, 2008] was supposed to be for SMAF.” *Id.* at 93. Finally, Complainant testified to telling Officer Ball she did not believe Mr. Scott was the type of person that would falsify any documents. *Id.* at 94.

B. Complainant Turns Over Her Timesheet for Work at the Coastal Sites to Mr. Kitchenmaster

Sometime around March 12 or 13, 2008, Complainant turned over her time sheet for the work at the Coastal Sites to Mr. Kitchenmaster, who, along with Complainant and Mr. Scott, discussed the details and circumstances surrounding this event. *Id.* at 198. According to Mr. Kitchenmaster, he was present when Ms. Gaines requested Complainant travel to the Coastal Sites to perform sampling. *Id.* at 265. At this time, Mr. Kitchenmaster expressed to Ms. Gaines that such work would have to “be on SMAF’s dime,” a point he stated Ms. Gaines agreed to. *Id.* at 265-66. Mr. Kitchenmaster further noted that at the time only SMAF – and therefore not Respondent – had a contract to perform work for DBW, whom Mr. Kitchenmaster further understood owned the Coastal Sites. *Id.*; *see generally* CX 2, 19. *But cf.* CX 20 at 107.

In light of his understanding outlined above, Mr. Kitchenmaster at some point became concerned that SMAF was not being billed for the work Complainant performed at the Coastal Sites. *Id.* at 267. Mr. Kitchenmaster agreed this was of concern because a routine at that point had been established where Respondent would bill SMAF for work, and SMAF in turn would bill DBW for the same work with a markup from which it would profit. *Id.* at 267, 286-87. Mr. Kitchenmaster testified to his understanding that Complainant, although a Respondent employee, had performed the work at the Coastal Sites as “a subcontractor for us, for SMAF,” and he became concerned when SMAF had not received a bill for such work as the end of the billing cycle in which the work was performed. *Id.* at 268. Mr. Kitchenmaster consequently had a conversation with Mr. Scott about this work, who informed Mr. Kitchenmaster that Mr. Martson had requested Complainant’s work at the Coastal Sites be billed directly to DBW. *Id.* Mr. Kitchenmaster further stated this arrangement concerned him as it took work away from SMAF, although he admitted he never directly spoke with Mr. Martson about this arrangement after his conversation with Mr. Scott. *Id.* at 268-69. When asked why he viewed Complainant’s Coastal Sites work as part of SMAF’s arrangement with DBW to perform work at the Ranch, Mr. Kitchenmaster stated “we’d asked for [Complainant] to go over and complete [sampling at the Coastal Sites] underneath of the current Work Order that was there in Cinder Lakes Ranch in Powell Butte.” *Id.* at 269. In addition, all of the tools and materials used by Complainant at the Coastal Sites were provided by Mr. Kitchenmaster, including gloves, a protective suit, cartridges, pH strips for sampling, and a meter to perform samplings. TR at 67, 573.

Complainant submitted into evidence and testified about the timesheet she gave to Mr. Kitchenmaster reflecting her work at the Coastal Sites. *See generally id.* at 113-16; CX 15 at 132-34. According to Complainant, each entry on her timesheet is accompanied by at least two numbers: a “job number” and a task number. TR at 113. Complainant noted the job number appears as seven digits followed by a period followed by three more digits, and the task number appears just below the job number on her timesheet. *Id.*; CX 15 at 132-34. With respect to the work performed at the Coastal Sites, Complainant noted and her timesheet demonstrates that SMAF was listed as the client for each of the three entries, each entry had the same job number, each entry was charged off to Task 9, and each entry had associated with it the label “Beetham Property – Cinder Lakes Ranch.” TR at 113-14; CX 15 at 133-34. Complainant’s timesheet lists various tasks associated with her three-day trip to the Coastal Sites. On February 13, 2008, Complainant’s timesheet notes she spoke with Mr. Scott, loaded supplies, picked up supplies and

drum thieves, drove to Medford, Oregon. CX 15 at 133-34. On February 14, 2008, the timesheet shows Complainant drove to and sampled drums at the Coastal Sites. On February 15, 2008, the timesheet shows she drove back to Respondent's Bend office and unloaded the samples she had taken. *Id.* The timesheet contains work attributable to one other client in addition to SMAF whose name had been redacted. *Id.* at 3. Complainant testified, however, that the work associated with this client did not involve hazardous chemicals, the EPA, nor DEQ. TR at 115-16.

Mr. Scott also testified to Complainant's turning her timesheet over to Mr. Kitchenmaster for her work at the Coastal Sites and why such an action should or should not have occurred. According to Mr. Scott, the only bill for work done by Complainant at the Coastal Sites was submitted directly by Respondent to Anchor and totaled approximately \$2,400. TR at 469; EX 20 at 4714. Mr. Scott stated he discussed this arrangement with Mr. Kitchenmaster, stating to him that Complainant's work "was requested by Anchor . . . for Anchor," but that Mr. Kitchenmaster was free to seek reimbursement for the "limited supplies" SMAF had provided to Complainant to perform her work at the Coastal Sites. TR at 470-71. When asked why Complainant turning her timesheet over to Mr. Kitchenmaster was problematic, Mr. Scott gave three reasons. First, he noted the timesheet contained confidential information. *Id.* at 487. Second, he noted the amount of time recorded by an employee was not necessarily the same amount of time billed by Respondent to a client. *Id.* Third, Mr. Scott stated that, in this case, the timesheet contained information related to work performed for another client that was unrelated to SMAF or DBW, which Mr. Scott went on to state was confidential. *Id.* at 487-89. Mr. Scott further noted he has never given out timesheets to a client and that Complainant did not seek his permission before giving a copy of her timesheet to Mr. Kitchenmaster. *Id.* at 487.

### C. Respondent Enters into Agreement with Tonkon Torp on March 13, 2008

On March 13, 2008, an attorney from Tonkon Torp sent a letter to Mr. Scott purporting to "confirm" an earlier arrangement by which Tonkon Torp had "engaged [Respondent] and its subcontractors to provide privileged and confidential services to us on behalf of our clients [DBW] and Dennis Beetham." CX 24 at 29. The letter indicated Respondent's "standard rate and reimbursable expense sheets" were incorporated into such agreement, and that Respondent should further provide invoices for work to Ms. Gaines of Anchor, who would then forward them after review to DBW for "direct payment" and also serve as the point person for "technical questions related to this project," *id.*, which the letter failed to further define.

Mr. Martson, an attorney for Tonkon Torp, testified at the hearing regarding the parameters of this relationship with respect to Complainant's work at the Coastal Sites. According to Mr. Martson, the work performed by Complainant on February 14, 2008 at the Coastal Sites was for Anchor and Tonkon Torp under an agreement with Anchor to provide "litigation assistance," which covered but was not limited to the Ranch. TR at 558. Tonkon Torp had earlier entered into a contract with Anchor on September 28, 2007. *See* CX 24 at 2-4. This contract contained a provision requiring Anchor to notify Tonkon Torp in writing before subletting out any work under the September 28, 2007 contract. *Id.* at 2. When asked if this had ever occurred, Mr. Martson testified that Anchor had never notified him in writing of such an event. TR at 564-65.

#### D. Complainant Allows DEQ Employees on the Ranch in June 2008

In June 2008, an incident occurred where Complainant was present at the Ranch and allowed two employees from DEQ to enter the Ranch property and perform sampling. *Id.* at 63-64, 520. According to Complainant, on a date near June 11, 2008, she was performing sampling at the Ranch of identified “disturbed areas,” which Complainant described as piles of material on the Ranch. *Id.* at 63. Mr. Matt Matthews, a representative for Mrs. Beetham, at some point received a call informing him that DEQ employees planned to visit the site that day. *Id.* Complainant recalled Mr. Matthews informing Mr. Kitchenmaster of the impending visit of these employees, who arrived very shortly thereafter. *Id.* at 63-64. The employees, according to Complainant, arrived that day to “fine-tune their equipment” by removing samples from areas that Complainant had already sampled. *Id.* at 63. Complainant testified she observed and documented the DEQ employees perform this work, as did Mr. Matthews. *Id.* at 63-64.

Problems arose, however, when Complainant informed Mr. Scott of the visit to the Ranch by the DEQ employees. According to Complainant, Mr. Scott became angry with her for allowing the employees on the Ranch property without first seeking his permission. *Id.* at 64. Complainant testified she found this reaction somewhat unexpected. She stated her reason for this was, in part, that one of the employees, Ms. Marcy Kirk, who visited the Ranch on this date had also visited the Ranch a few weeks prior to observe Complainant’s own sampling of the same areas. *Id.* Furthermore, Complainant interpreted Mr. Matthews’s informing her of the impending arrival of the DEQ employees as constituting Mrs. Beetham’s grant of permission for such employees to enter the Ranch. *Id.* at 65-66. Complainant testified she was verbally reprimanded by Mr. Scott for failing to notify him before DEQ employees were allowed onto the Ranch to take samples, although she stated no further action was taken against her immediately thereafter by Respondent. *Id.* at 117-18.

Mr. Scott testified to his recollection of the incident in which Complainant allowed DEQ employees onto the Ranch property in June 2008 as well. Mr. Scott could not recall exactly who informed him of the visit of the DEQ employees in this particular instance, although he also understood these employees had gained the permission of Mr. Matthews to visit the Ranch. *Id.* at 455. According to Mr. Scott, the DEQ employees collected samples at the Ranch, although he did not learn of their visit or activities until after the visit had already occurred. *Id.* Mr. Scott’s primary frustration with Complainant stemmed from his learning that she had failed to take “split samples” with the DEQ employees. *Id.* at 455-56. Split sampling involves two parties simultaneously sampling at the same location so that the results can later be compared to one another. *Id.* at 165-66. In the case of the June 2008 DEQ employees’ visit, Mr. Scott felt Complainant’s participation in split sampling was particularly important as the DEQ was utilizing a new sampling test for formaldehyde that was unrecognized by the EPA. *Id.* at 456. According to Mr. Scott, Complainant never consulted with him to inquire as to whether or not she should have performed split sampling at this time. *Id.* at 455-56.

After the visit, Mr. Scott testified he contacted Ms. Kirk, Mr. Kitchenmaster, and Complainant. *Id.* at 456-57. According to Mr. Scott, the primary issue he raised with all three of these individuals was their failure to contact him in his capacity as Project Manager to notify him

of the DEQ employees' visit on this date. *Id.* at 457. Mr. Scott elaborated that split sampling could only be performed simultaneously with another sample, after which point the opportunity to verify or contest the accuracy of that particular sample was lost. *Id.* Neither Mr. Kitchenmaster nor Complainant provided a sufficient explanation in Mr. Scott's mind to justify their failures to contact him before the DEQ employees' visit in this instance, and he noted further that neither person stated to him Mr. Matthews had approved the DEQ employees' visit. *Id.* at 457-58.

Mr. Kitchenmaster testified only peripherally to the circumstances surrounding the June 2008 visit of the DEQ employees discussed above. Mr. Kitchenmaster did recall that during this visit "we weren't aware what DEQ was doing on-site." *Id.* at 264. It was his understanding that this incident ultimately contributed to SMAF's being let go of the particular contract it had to perform work at the Ranch. *Id.* Mr. Kitchenmaster testified, however, that he had no authority to exclude DEQ employees from the Ranch, something he stated to both Mr. Martson and his own boss, Mr. Scott Porfily, at SMAF. *Id.*

Ms. Kirk, one of the DEQ employees who participated in the June 2008 visit discussed above, also testified at hearing. *See id.* at 545-46, 549-50. When asked what persons and parties she had worked with at the remediation of the Ranch, Ms. Kirk recalled working with Mr. Jeff Engels and Mr. Renz of DEQ, Ms. Gaines of Anchor, Mr. Scott and Complainant of Respondent, Mr. Kitchenmaster, and Mr. Matthews – who she recalled was self-employed. *Id.* at 545-46. Ms. Kirk first recalled visiting the Ranch on behalf of DEQ in November 2007, noting her role at the Ranch was to manage the "Voluntary Cleanup Program" there engaged in by DBW and DEQ. *Id.* at 546. Ms. Kirk elaborated on her role by noting that her tasks involved "watching the work, and sometimes participating in the work, either inspecting the [R]anch to see if there's any areas that have been disturbed that needed to be investigated, watching them dig test pits," and sometimes performing sampling work herself. *Id.* at 547.

With respect to sampling work, Ms. Kirk noted she did this "only a few times," *id.*, but she did recall the June 2008 visit. *Id.* at 549-50. During this visit, she stated she was accompanied by Mr. Engels, and that the two of them informed Mr. Matthews before arriving at the Ranch "[a]s a courtesy" that they were coming to perform sampling. *Id.* at 548-50. Ms. Kirk further noted that prior to this visit they never requested permission to visit the Ranch from anyone else other than Mr. Matthews. *Id.* at 550. When they arrived, Ms. Kirk recalled Mr. Matthews, Mr. Kitchenmaster, and Complainant being present at the ranch, although she did not believe Mr. Scott was present at that time. *Id.* at 550-51. Despite her recollection of Mr. Scott's absence, Ms. Kirk did recall speaking with Mr. Scott after her visit to the Ranch in June 2008. *Id.* at 551. She recalled him expressing concern that he was not notified before DEQ's visit on that date, although she could not recall Mr. Scott's reasoning for requesting such notification. *Id.* at 551-53. Aside from her June 2008 visit, Ms. Kirk could recall only one other time she visited the Ranch on behalf of DEQ to perform sampling. *Id.* at 554-55. She further stated that she did notify Mr. Scott before this second visit. *Id.* at 555.

#### E. Events in January and February 2009 Leading to Complainant's Termination

The record is uneventful in this case following the DEQ employees' June 2008 visit to the Ranch for some months afterward. It is not until late January 2009 that the record resumes with several meetings and conversations between Complainant and Respondent's employees.

1. Complainant's Conversation with Mr. Scott on January 23, 2009

Complainant testified that she had a phone conversation with Mr. Scott on Friday, January 23, 2009. *Id.* at 97. According to Complainant, Mr. Scott initiated this conversation by calling her while she was at home. *Id.* at 99. The conversation began with Mr. Scott informing Complainant that he had received a "sworn statement" from Mr. Kitchenmaster, several of the facts contained within which Mr. Scott wished to then verify with Complainant. *Id.* The first of these facts was that Complainant had given Mr. Kitchenmaster a timesheet. *Id.* Complainant confirmed that she had in fact done this, after which Mr. Scott then asked her to verify if she had given him any of her field notebooks. *Id.* At this point, Complainant testified she became hesitant to answer because she felt Mr. Scott "was deceiving" her "because [she] realized this couldn't have been a signed, sworn statement by [Mr.] Kitchenmaster, because [he] knew [she] did not give him [her] field notebooks." *Id.* After Complainant refused to answer Mr. Scott's second question, he then posed a third question in which he inquired whether Complainant had made any allegations about the falsification or altering of documents. *Id.* at 99-100. Complainant again refused to answer. *Id.*

Mr. Scott also recalled this conversation with Complainant. According to him, he initiated his call to her after he first received a copy of Mr. Renz's memo from the attorneys for DBW on this same date. *Id.* at 477-78. The memo details Complainant's giving her timesheet to Mr. Kitchenmaster as well as a conversation with him in which she voiced concerns "that records of her work on the project, specifically for [the Coastal Sites] could be altered\deleted [sic] once her computer records [were] moved to the server and field notes [were] out of her control." CX 13 at 35-36. Mr. Scott testified he was "flabbergasted" to read the allegations and activities outlined in Mr. Renz's memo, characterizing them as "very damaging claims" and noting that the activities described were "very unprofessional." TR at 478. Mr. Scott further testified to asking Complainant about her turning over timesheets or field notes to Mr. Kitchenmaster as well as whether "she made any disparaging remarks . . . about [Respondent]." *Id.* at 482. Mr. Scott recalled that Complainant admitted to turning over a timesheet to Mr. Kitchenmaster but that she would not answer his inquiries related to turning over field notes or the altering of certain documents. *Id.* at 485. According to Mr. Scott, he did not yell at Complainant, although he characterized himself during the conversation as "upset internally" and noted Complainant likely could have sensed this emotion in his voice over the phone. *Id.* Mr. Scott recalled this conversation lasting between five and ten minutes, and noted he contacted Ms. Berri afterward to tell her about his communication with Complainant, after which Ms. Berri requested Mr. Scott send her a copy of the memo written by Mr. Renz. *Id.* at 485-86. Mr. Scott also stated Ms. Berri requested that he attempt to get written responses to his questions from Complainant "if she was uncomfortable responding verbally" to the inquiries. *Id.* at 486.

## 2. Complainant's Conversation with Mr. Scott on January 26, 2009

Complainant testified Mr. Scott approached her in person at Respondent's office the following Monday – January 26, 2009 – to attempt again to receive responses to the inquiries he had posed over the phone the previous Friday. *Id.* at 100. Complainant said she was in her office when Mr. Scott entered, positioning himself between her and the door and making her feel “threatened and pinned at [her] desk.” *Id.* Mr. Scott presented her with the same three questions he had posed to her over the phone – requesting that she provide information about her giving Mr. Kitchenmaster a timesheet and field notes as well as her claim that Respondent had destroyed or altered documents – only this time the questions were typed out on a piece of paper. *Id.* After presenting her with a paper version of the three questions, Mr. Scott requested Complainant provide him with signed responses to them. *Id.* Complainant responded to Mr. Scott's request by informing him she felt comfortable producing such responses signed and in writing at that time because she was unsure “where this was coming from” or “what this was about.” *Id.* Complainant further testified that it was during this conversation that Mr. Scott retreated from his earlier representations to her that his inquiries stemmed from a statement given by Mr. Kitchenmaster, instead representing that he had learned of the alleged accusations made by Complainant from Mr. Renz. *Id.* Although Mr. Renz's memo does attribute certain statements to Mr. Kitchenmaster, *see* CX 13 at 35-36, Complainant considered Mr. Scott's attribution in this second conversation of these statements to Mr. Renz to be a “second deception” by Mr. Scott. *Id.* at 100-01.

Mr. Scott testified about his recollection of his second conversation with Complainant following his receipt of Mr. Renz's memo. According to Mr. Scott, he initiated this conversation in part because Ms. Berri had requested he attempt to get Complainant to respond to the allegations in the memo in written form “if she was uncomfortable responding verbally to [him].” *Id.* at 486. Mr. Scott did not respond to Complainant's testimony that he held his second conversation with her in her office, standing between her and the door; however, he did deny ever representing to Complainant that he at any time possessed a “sworn statement” from Mr. Kitchenmaster. *Id.*

Ms. Berri also testified about Mr. Scott's first two conversations with Complainant, but only insofar as she voiced her concerns about the contents of Mr. Renz's memo and discussed how she learned of the memo. According to Ms. Berri, it was Mr. Scott who first informed her of Mr. Renz's memo and its contents. *Id.* at 344. Ms. Berri stated she was “very concerned about the contents of the memo” when first learning of it. *Id.* at 345. When asked to elaborate on her concerns, Ms. Berri testified that they mainly stemmed from Complainant's details and allegations of Respondent's “internal practices, changing field notes, [and] tearing pages out of field books,” which she characterized as “very outrageous.” *Id.* Ms. Berri did not offer testimony, however, as to whether or not she requested for Mr. Scott to attempt to convince Complainant to respond to the allegations of Mr. Renz's memo in writing, although she did recall discussing the memo with Mr. Scott “very shortly after he received” it. *Id.* at 346.

### 3. Complainant's Conversation with Ms. Berri on January 27, 2009

On Tuesday, January 27, 2009, Complainant discussed the information contained within Mr. Renz's memo with Ms. Berri over the telephone. According to Complainant, Ms. Berri initiated the conversation by calling Complainant. *Id.* at 101. Complainant believed she was contacted directly by Ms. Berri because Ms. Berri was unhappy with the details Mr. Scott had provided her from his earlier conversations with Complainant. *Id.* Complainant testified she began the conversation by informing Ms. Berri that she would only provide to her the same information she had provided to Mr. Scott as she had not yet spoken with a lawyer. *Id.* Complainant then proceeded to affirm to Ms. Berri that she had given a timesheet to Mr. Kitchenmaster, but she would not answer the other two questions related to her providing field notes or Respondent's alleged altering or destruction of certain records. *Id.* at 101-02. Complainant characterized Ms. Berri at the beginning of this conversation as "very polite and very considerate and very calm," but explained that this demeanor waned as the conversation carried on and Complainant continued to insist on first speaking with a lawyer before providing any further information. *Id.* Complainant stated Ms. Berri "kept pushing" her for these answers, and told Complainant that she "really didn't want to get lawyers involved." *Id.* at 102. At this point, Complainant responded to Ms. Berri by informing her of concerns she was being asked to bear blame for potential mistakes, stating she felt "isolated and singled-out, and not given the same support" as persons with leadership positions within Respondent's organizational structure. *Id.* Complainant stated, however, that Ms. Berri only "started to get very frustrated" at that point in the conversation, and that she "was pretty much sort of insisting that [she] answer her questions." *Id.* Complainant testified she finally asked Ms. Berri to "please respect [her] wishes" with regarding her refusal to answer the questions and desire to speak with an attorney, after which point their conversation concluded. *Id.*

Ms. Berri did not testify to this specific conversation with Complainant, although she did respond to questions about her reaction to hearing Complainant did not want to speak with either her or Mr. Scott before consulting an attorney. Ms. Berri stated she was "surprised" and "confused" when she heard Complainant wanted to first speak with legal counsel before answering her and Mr. Scott's questions. *Id.* at 387. From Ms. Berri's perspective, she was "simply asking [Complainant] to clarify the information in the memo" from Mr. Renz. *Id.* However, Ms. Berri stated she agreed to allow Complainant speak with an attorney, after which meeting she and Complainant agreed to meet again to discuss the contents of Mr. Renz's memo. *Id.*

### 4. Complainant's Receipt of Grand Jury Subpoena

On January 31, 2009, Complainant received a subpoena dated January 28, 2009 that required her to appear personally in front of a federal grand jury at the U.S. District Court in Portland, Oregon. TR at 83; CX 14 at 3517-21. The subpoena did not give details as to the subject of Complainant's expected testimony – other than noting the grand jury's function was to "determine whether there is sufficient evidence to bring formal criminal charges in a United States District Court," CX 14 at 3518 – but it did list "U.S. Environmental Protection Agency, Criminal Investigation Division, Special Agent Daniel Sekerak" as a contact person should

Complainant have then had any questions about the information the subpoena was requesting. *Id.* Mr. Scott also received a grand jury subpoena containing identical contact information. EX 111 at 100-02.

Complainant testified to the circumstances surrounding her receipt of the subpoena. According to her, the subpoena arrived first at Respondent's office on Friday, January 30, 2009. TR at 103. Complainant, however, was away from the office on that date and therefore did not become aware of the subpoena until her return to the office on Saturday, January 31, 2009. *Id.* She stated the subpoena had been left on her desk at Respondent's office, where she discovered it with a note from Mr. Scott stating, "We need to talk and discuss this in the morning [on Monday]." *Id.*

Complainant next saw Mr. Scott on the morning of Monday, February 2, 2009, at which point Mr. Scott stated both he and Complainant needed to speak with Ms. Berri about the subpoena. *Id.* Complainant replied that she had already spoken with Ms. Berri the previous Tuesday, at which time she had informed Ms. Berri that she was "still trying to resolve some things before [she] continued any conversations about this topic." *Id.* According to Complainant, Mr. Scott's reaction to this statement was to phone Ms. Berri and inform her that Complainant was not willing to cooperate with Mr. Scott's request that she discuss the subpoena. *Id.*

After this call, Ms. Berri called Complainant directly. *Id.* During their conversation, Complainant stated Ms. Berri informed her that any discussion of the subpoena would have nothing to do with the information sought in their conversations the prior week, but instead she only wanted to work with Complainant to "get [her] prepared for the subpoena." *Id.* Complainant expressed the view, however, that Ms. Berri's statement – so far as it attempted to create the impression that she was not interested in finding out more about the circumstances giving rise to Complainant's receipt of the subpoena – was disingenuous. *Id.* at 104. Complainant again informed Ms. Berri that she was scheduled to meet with an attorney the next day, and would therefore not feel comfortable discussing the subpoena until after this meeting. *Id.* at 103.

Complainant further testified that she received the memo from Mr. Renz on either the same day as her receipt of the subpoena or the following day when she visited her lawyer. *Id.* at 104. According to Complainant, she was given the memo after she asked Mr. Scott for a written copy of his earlier inquiries about her giving a timesheet and field notes to Mr. Kitchenmaster as well as her allegations of Respondent's destruction or alteration of documents. *See id.* at 99-100, 104. Complainant stated instead of giving her the requested information, Mr. Scott gave her a copy of Mr. Renz's memo. Complainant testified it was at this point she began to feel that "the subpoena had to do with [DBW]'s activities." *Id.* at 104. Complainant stated Mr. Scott also requested she send him a copy of subpoena, *id.* at 105, a request she complied with on February 2, 2009. *See generally* CX 14.

## 5. Complainant's February 4, 2009 Discussion with Ms. Berri

Complainant had a discussion over the phone with Ms. Berri on February 4, 2009. TR at 238. Complainant could not recall the exact length of this meeting, although she characterized it as taking “an extensive amount of time” and estimated that it lasted over an hour given her recollection of what she and Ms. Berri discussed. *Id.* at 106. Complainant recalled discussing Mr. Renz's memo with Ms. Berri. *Id.* at 106-07. According to Complainant, she affirmed the statement in the memo regarding her giving Mr. Kitchenmaster her timesheet, but she denied ever having given him her field notebooks. *Id.* Complainant further informed Ms. Berri during this meeting that she had met with Mr. Renz on March 12, 2008, during which time she had discussed with him her observations from work at the Coastal Sites on February 14, 2008, and from which observations Mr. Renz had thereby composed a “statement” attributable to Complainant. *Id.* at 111. According to Complainant, Mr. Renz wrote this statement down in a notebook he kept with him. *Id.* With respect to Mr. Renz's memo, Complainant characterized the version she received as an “unsigned document” and recalled asking Ms. Berri during their conversation where such a memo had come from. *Id.* at 109. According to Complainant, Ms. Berri could not recall from where the copy of the memo she possessed had originated. *Id.* at 109-10. Complainant, according to Ms. Berri's notes from this meeting, also spoke to Ms. Berri about possible tension between the various entities and persons involved in cleanup work at the Ranch and Coastal Sites. For example, Complainant informed Ms. Berri that tension developed due to Mr. Kitchenmaster's forming the impression that Mr. Scott was beginning to take directions from DBW. EX 112 at 4703. Mr. Kitchenmaster found this problematic because of his view that only SMAF had a direct relationship with Respondent, who was its subcontractor, and therefore only SMAF should be in a position to direct Complainant's work as such. *See id.*

Complainant also described for Ms. Berri during their meeting her earlier conversations with Officer Ball and Mr. Sekerak. *Id.* at 107. According to Complainant, she informed Ms. Berri that Officer Ball had contacted her to inquire about the possible destruction of documents by Respondent. *Id.* at 111-12. Complainant recalled additional discussion with Ms. Berri during her meeting about her concerns that information was being moved off of her computer due to the fact that she “did not know what happens, basically, to . . . information once it is off [her] computer.” *Id.* at 107. Complainant told Ms. Berri she had discussed with Officer Ball how the pages in field notebooks were numbered and how the sequence of these numbers would be disturbed should any pages have been removed from her field notebooks.<sup>6</sup> *Id.* Complainant also informed Ms. Berri during the February 4, 2009 meeting of her prior communications with Mr. Sekerak, noting that prior to this date the only information she had passed along to either Mr. Scott or Ms. Berri regarding such communications were to inform Mr. Scott of Mr. Sekerak's earlier request to view photos taken by Complainant at the Coastal Sites. *Id.* at 110.

Complainant also testified to her recollection of Ms. Berri's reaction following her revelation to Ms. Berri her prior conversations with Mr. Renz, Officer Ball, and Mr. Sekerak. Complainant stated Ms. Berri reacted by telling her she “had done nothing wrong, that [she] had kept the client's interests at hand, [and] that she would like to be talking [sic] to [Mr. Scott] and hear his side.” *Id.* at 116. Ms. Berri, according to Complainant, promised to meet with her again

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<sup>6</sup> At no point during these proceedings were Complainant's field notebooks ever produced.

after she followed up with Mr. Scott on the details provided by Complainant during their conversation. *Id.* at 117. Complainant further stated that, by February 4, 2009, neither Ms. Berri nor Mr. Scott had told her of any possibility of her being terminated for giving Mr. Kitchenmaster her timesheet reflecting work done at the Coastal Sites in February 2008. *Id.* Ms. Berri later testified, however, that she and others holding leadership positions at Respondent “had come to [the] conclusion by” February 6, 2009 that Complainant would be terminated. *Id.* at 377-78.

Ms. Berri testified at the hearing to her own recollection of her February 4, 2009 conversation with Complainant. Ms. Berri also kept notes, *see generally* EX 112, the purpose of which she noted was to capture as much as she could of what Complainant communicated to her during this conversation. TR at 350-51. Ms. Berri’s notes indicated Complainant told her about conversations with Mr. Sekerak of the EPA. *Id.* at 351; EX 112 at 4704. Ms. Berri stated at hearing Complainant had informed her during their discussion that she had made Mr. Scott aware of such conversations. TR at 351-52. Ms. Berri further recalled being told by Complainant about her being contacted by Officer Ball regarding the falsification of certain evidence as well as the dates of certain contracts, although Complainant also stated to her that she did not turn over any documents or evidence to the state police. *Id.* at 353-54. Complainant told Ms. Berri that Officer Ball had, however, asked about her timesheets. *Id.* at 354. Complainant also informed Ms. Berri the state police had acquired photos of her work at the Coastal Sites, although they had not come from her but instead from Mr. Kitchenmaster. *Id.* With respect to who the client was for the work performed by Complainant at the coastal sites, Complainant reasserted during her discussion with Ms. Berri on February 4, 2009 that she believed SMAF was Respondent’s client, although she further admitted, according to Ms. Berri, that her only evidence of such a relationship was her timesheet itself. *Id.* at 353-54. Ms. Berri was also asked about notes she made from Complainant’s allegedly telling her that she did not give field notes to Mr. Kitchenmaster. *Id.* at 355. When asked if she believed Complainant’s statement to this effect, Ms. Berri commented only that “it conflict[ed] with information in” Mr. Renz’s memo, noting further that she never reached a conclusion as to the accuracy of this claim by Complainant. *Id.*

Ms. Berri also testified as to Complainant’s knowledge of any contract between Respondent and DBW and the June 2008 DEQ visit as evidenced by their February 4, 2009 conversation. According to Ms. Berri, Complainant during this conversation continued to deny knowledge of any contractual relationship between Respondent and DBW. *Id.* at 356. Ms. Berri noted this was “despite information . . . from [Mr.] Scott” to the contrary demonstrating that such a relationship purportedly existed. *Id.* However, when pressed herself as to whether she had ever seen documentation to support the existence of such a relationship, Ms. Berri stated she had never seen such documentation, but that she “believe[d] it when [Mr. Scott told her] that.” *Id.* With respect to the June 2008 DEQ visit, Ms. Berri reiterated that problems arose with respect to such a visit because Complainant had failed to ensure split samples were taken in conjunction with such a visit. *Id.* at 357. Ms. Berri noted the decision to take or not take such samples was Mr. Scott’s to make, not that of Complainant or Mr. Kitchenmaster. *Id.* However, when asked whether she had verified or checked into any permission being given by Mrs. Beetham or her representative, Mr. Matthews, for DEQ to enter the property on such a date, Ms. Berri answered that she had not done so. *Id.* at 359-60. Ms. Berri further noted, however, that Complainant was

under an obligation to inform the Project Manager – in this case, Mr. Scott – of any visits by DEQ regardless of whether or not the property owner had previously granted permission for such visits. *Id.* at 360. Ms. Berri also conceded that Complainant did inform Mr. Scott of the DEQ visit “close to the event,” which she agreed was not so long as months or weeks after the visit. *Id.* at 360-61.

#### 6. Ms. Berri’s Follow-Up Conversation with Mr. Scott on February 5, 2009

Ms. Berri followed up with Mr. Scott on February 5, 2009 to verify and clarify some of the information provided by Complainant during her meeting with her the previous day. During this conversation, Mr. Scott explained to Ms. Berri his understanding of the contractual relationships Respondent had at various times. According to Mr. Scott, Respondent had a contract with SMAF and Mrs. Beetham from August to October 2007, after which time it began “working for” DBW from October 2007 through June 2008. *Id.* at 361-62; EX 112 at 4705. Ms. Berri further noted, however, that Respondent’s relationship with DBW came only through its being a subcontractor of SMAF from October 2007 through June 2008. TR at 362-63. When asked if there was a direct contractual relationship between Respondent and DBW during this time, Ms. Berri stated she could not recall. *Id.* at 363. Ms. Berri did state, however, that Respondent did do work directly with representatives of DBW during this time according to conversations she had with Mr. Scott. *Id.*

Mr. Scott also provided information to Ms. Berri during their February 5, 2009 conversation about the apparent contractual arrangements of Respondent with various entities at the time of Complainant’s work at the Coastal Sites. According to Ms. Berri, Mr. Scott told her during this time that SMAF was “set up . . . as the client” for the work Complainant performed at the Coastal Sites on February 14, 2008, although he also explained to her that “[t]he billing in March got switched to Anchor.” *Id.* at 366; *see* EX 112 at 4705. Ms. Berri testified that it was during this conversation that Mr. Scott provided details to her about certain problems with the relationship between Mr. Kitchenmaster and Mr. Martson, the attorney for DBW. According to Ms. Berri’s testimony and notes from this meeting, Mr. Kitchenmaster and Mr. Martson were “on bad terms” with one another. TR at 367; EX 112 at 4705. Despite these circumstances, however, Mr. Scott relayed to Ms. Berri during their meeting that he had nevertheless pressed Mr. Martson to keep the relationship with SMAF intact in order “to finish [the] project.” TR at 367; EX 112 at 4705. Mr. Scott also informed Ms. Berri that one of the circumstances leading to the problematic relationship between Mr. Kitchenmaster and Mr. Martson was that “SMAF got too close to DEQ,” although neither her notes nor testimony indicate whether this was Mr. Scott’s impression or an opinion shared with him by Mr. Martson. TR at 368; EX 112 at 4706. Mr. Scott also told Ms. Berri that Mr. Kitchenmaster had turned over certain records in response to a subpoena, TR at 368; EX 112 at 4706, although he did not state how he gained such knowledge. TR at 368.

#### 7. Complainant’s Termination

As noted, Ms. Berri testified Complainant’s imminent termination from employment with Respondent was apparent by February 6, 2010. On this same date, Mr. Petti, Respondent’s CEO, sent an email to Ms. Berri expressing his view that Complainant’s employment should indeed be

terminated. *See generally* CX 9. In this email, Mr. Petti noted certain actions on behalf of Complainant justifying such a decision, including Complainant's "breach[ing] client confidentiality," her bypassing Mr. Scott with respect to "sensitive DEQ[/]client communications," and her failure to "come forward to discuss her concerns with anyone from [Respondent]," including Ms. Berri herself. *Id.* Mr. Petti concluded the email by noting that "we need to just let her go ASAP." *Id.*

Ms. Skiles, Respondent's Human Resources Manager, also testified to the circumstances surrounding Complainant's termination. According to her, Complainant's employment with Respondent was terminated due to both her unauthorized release of confidential information and her failure to maintain proper communication with the Project Manager. TR at 426. Ms. Skiles further testified there was a "final discussion" to end Complainant's employment, and this discussion involved her, Ms. Berri, and Mr. Petti. *Id.* Ms. Skiles could not recall exactly when this discussion occurred, but noted it was some time prior to the week she and Ms. Berri travelled to Bend to inform Complainant of the decision to terminate her employment. *Id.*

On February 10, 2009, Ms. Berri emailed Mr. Scott. *See generally* CX 10. In the email, Ms. Berri informed Mr. Scott of the importance of his being able to document prior communications with Complainant in which he may have "clarif[ied] things" as well as to ensure Complainant "had access to [Mr. Scott] if she ever had questions or concerns or wanted to check if certain of her actions were appropriate." *Id.* at 1. In his response, Mr. Scott confirmed that Complainant had "always had access to" him, but then went on to criticize Complainant's prior behavior, concluding that "she was probably manipulated by [Mr. Kitchenmaster] and perhaps others outside of [Respondent] who she had regular contact with out at the site." *Id.* Mr. Scott's response does not mention any specific conversations in which he provided any clarification to Complainant on any matters.

On February 10, 2009, Ms. Skiles and Ms. Berri travelled to Respondent's Bend office to inform Complainant of the decision to terminate her employment. TR at 428. According to Ms. Skiles, the meeting was attended by herself, Ms. Berri, and Complainant and lasted approximately thirty minutes. *Id.* at 428-29; EX 113 at 181-82. During the meeting, Ms. Berri informed Complainant of the decision to terminate Complainant's employment with Respondent, noting the decision hinged on Complainant's lack of communication with her Project Manager and her release of confidential information without having first received authorization from her superiors. TR at 429; EX 113 at 181. Ms. Skiles testified also that Complainant admitted during this meeting to being "confused" as to whom Respondent's client was. TR at 430-31. However, when pressed on cross-examination to herself clarify who Respondent's client was, Ms. Skiles responded that "when all of the details were sorted out, at that time, for that project, [SMAF was] not the client." *Id.* at 434. Ms. Skiles admitted further that she did not herself review any of the contracts between Respondent and SMAF or DBW. *Id.* at 435. When asked to provide details about Complainant's lack of communication, Ms. Skiles provided as examples only her releasing her timesheet to Mr. Kitchenmaster and a comment made by a prior Project Manager. *Id.* at 436.

## V. Analysis

I base the following findings of fact and conclusions of law on my observation of the appearance and demeanor of the witnesses who testified at the hearing; analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 24.109. In deciding this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it. *See Id.* § 18.29. Furthermore, although Complainant and Respondent previously engaged in proceedings regarding Complainant's whistleblower complaint at the OSHA level, my review of the record and evidence is conducted *de novo*. *Id.* § 24.107(b).

Below I set forth an analysis of Complainant's whistleblower complaint. In Part V.A, I discuss the credibility of various witnesses, including the Complainant, who provided substantial testimony at the hearing. In Part V.B, I analyze the coverage of the various environmental acts under which Complainant alleges her whistleblower complaint arises, ultimately concluding coverage exists under three of the environmental acts. In Part V.C, I analyze the substantive elements of Complainant's whistleblower complaint, ultimately concluding Complainant has succeeded in demonstrating the existence by a preponderance of the evidence of the necessary elements for such a claim. Finally, in Part V.D I discuss the various damages and remedies sought by Complainant.

### A. Credibility Determinations

Four witnesses in this case provided the bulk of testimony at the hearing: Complainant, Mr. Scott, Ms. Berri, and Mr. Kitchenmaster. Consequently, I set forth below my findings as to the credibility of each of these witnesses based on their testimony at the hearing and my observations of such.

#### 1. Complainant's Credibility

Overall, I find Complainant to be a credible witness. Her testimony consumed approximately half of the time dedicated to a hearing in this case, during which I observed her to be sincere and for the most part consistent and believable. Her responses were in large part not the result of leading questions, and I found her to be largely consistent in her recollection of events on both direct and cross-examination.

Respondent in its posthearing brief directs my attention to two instances in the record it claims undermine the credibility of Complainant. In the first of these, Respondent argues Complainant contradicted herself with respect to her impression of whether or not Mr. Scott knew of her communications with Mr. Sekerak at any point prior to January or February 2009. ALJX 13 at 13-14. I find this argument unpersuasive. Specifically, Respondent seeks to juxtapose my questioning of Complainant with its own questioning of her in a prior deposition, arguing Complainant's responses evidence a contradiction. My questioning in this instance sought responses from Complainant as to Mr. Scott's directive to her after learning of Mr. Sekerak's desire to view her photos from the Coastal Sites. TR at 316-18. This line of

questioning did not seek from Complainant her view as to whether or not Mr. Scott knew she planned to speak with Mr. Sekerak after such a conversation, however, and therefore does not impeach Complainant's credibility. *See id.* at 333. In the second instance, Respondent argues inconsistencies exist between Complainant's hearing testimony and that from the same earlier deposition with respect to allegations made during her conversation with Officer Ball. Respondent asserts Complainant, at the hearing, described voicing concerns to Officer Ball regarding Respondent's moving of documents related to her work at the Coastal Sites. ALJX 13 at 15; TR at 92. To prove a second alleged contradiction, Respondent again directs me to Complainant's earlier deposition testimony, in which she stated it "would not be [Mr. Scott's] personality" to falsify documents. ALJX 13 at 15-16; TR 220-21. Again, I find this only presents a contradiction in light of Respondent's somewhat careless reading of the record. Complainant's fears that *someone* within Respondent's organizational structure was falsifying documents is entirely consistent with a view that Mr. Scott, one of one-hundred-and-thirty employees, *see* TR at 337, was not the culprit. Therefore, I find that neither of the specific instances cited by Respondent to undermine Complainant's credibility achieves such an objective.

## 2. Mr. Scott's Credibility

Unlike Complainant, I find Mr. Scott to be not a very credible witness. There are four major reasons for this finding. First, I find key details of Mr. Scott's testimony resulted from leading questions posed by Respondent's counsel. *See, e.g.*, TR at 457 (Mr. Scott asked, "Is it fair to say you don't recall getting an explanation that satisfied you?," when asked about details of prior conversation with Mr. Kitchenmaster about events contributing to demise of relationship between Respondent and SMAF); *id.* at 479 (Mr. Scott agrees with Respondent's counsel's categorization of Complainant's allegations of documents being moved from Respondent's server as "a damaging statement."); *id.* at 480 (Mr. Scott agrees by stating, "Something to that effect, yes," when asked by Respondent's counsel, "[D]id you tell [Complainant] that – to tell Mr. Se[k]erak that the information could not be released without permission from Mr. Rick Martson, [DBW]'s attorney?"); *id.* at 492 (Mr. Scott agrees with Respondent's counsel's characterization of a conversation he had with Ms. Berri as opposed to recalling the conversation himself.)

Second, I observed Mr. Scott become irritable and short-tempered during his testimony, particularly during cross-examination when presented with prior deposition testimony and at trial as he clearly preferred any job duty as Respondent's Project Manager over his duty to supervise the field staff personnel such as Complainant. *See* TR at 384, 498-99. Third, I found Mr. Scott to be evasive with respect to certain lines of questioning, particularly as to his supervisory capacity with respect to Complainant. *See, e.g., id.* at 498-99. While Mr. Scott refused to be labeled as Complainant's supervisor, *see id.*, Ms. Berri, Mr. Scott's own superior, stated clearly that Mr. Scott was in fact Complainant's supervisor. *Id.* at 337.

Fourth, I found that Mr. Scott – like Ms. Berri – was unable to clearly articulate the various alleged contractual relationships that existed at the time Complainant performed her work for Respondent as the Coastal Sites. *See, e.g., id.* at 491-92. As the clarity of these alleged relationships supports Respondent's reasoning for terminating Respondent's employment, *see*

ALJX 13 at 26-27, I find Mr. Scott's inability to clearly articulate the parameters of such relationships calls into question the credibility of his testimony. Moreover, I find there was a clear change of relationship between Respondent and SMAF and Respondent and DBW or its attorneys from March 13, 2008 through June 2008 as access to the Ranch site became stricter and SMAF's role decreased in favor of Anchor for DBW. However, this change was not clearly communicated by Mr. Scott to Complainant, particularly with respect to her ongoing work relationships with Mr. Kitchenmaster and any changed procedures for gaining access to the Ranch. At no time did Mr. Scott inform Complainant that things had changed and she no longer had open access to communicate her work findings with Mr. Kitchenmaster, or representatives at SMAF, DEQ, or any other regulatory agencies. *See* TR 55-60. Consequently, I give less weight to Mr. Scott's testimony than that of Complainant.

### 3. Ms. Berri's Credibility

Like Mr. Scott, I also find Ms. Berri to be not a very credible witness. There are three reasons for this finding. First, I find Ms. Berri to have been somewhat evasive with respect to certain lines of questioning. *See, e.g.*, TR at 358-59. Second, certain portions of Ms. Berri's earlier deposition testimony conflicted directly with answers given at the hearing. *See, e.g., id.* at 343-45 (giving of inconsistent answers regarding from whom Mr. Scott had received Mr. Renz's memo); *id.* at 367-69 (giving of inconsistent answers regarding how Ms. Berri found out Respondent's records were subpoenaed). Third, like Mr. Scott, Ms. Berri was also unable to articulate the basis supporting Respondent's version of the contractual relationships existing at the time Complainant performed the work at the Coastal Sites, instead choosing to rely on information conveyed to her by Mr. Scott without conducting her own investigation into the documentation allegedly supporting such relationships. *See id.* at 356-57. I find this particularly relevant to Ms. Berri's credibility given her place as a principal within Respondent's organizational structure, *see id.* at 379, and the fact that this role carries with it the responsibility of "reviewing and signing contracts and or sub-contracts." *see* CX 1 at 295. In sum, these circumstances make me also doubt the veracity and believability of her testimony.

### 4. Mr. Kitchenmaster's Credibility

Finally, I examine Mr. Kitchenmaster's credibility. I find him to be a more credible witness than Mr. Scott and Ms. Berri, although I note two issues arising in his testimony. First, as with Mr. Scott, I note that certain portions of his testimony came via leading questions. *See, e.g.*, TR at 275-78. Second, Mr. Kitchenmaster himself testified to a contentious relationship with Respondent, which in turn makes me question somewhat his motivation at the hearing. Specifically, Mr. Kitchenmaster experienced "frustration" in the dispute regarding for whom Complainant performed work at the Coastal Sites in February 2008, which in turn ultimately contributed to the deterioration of SMAF's relationship with DBW. *See id.* at 296-300. Therefore I give greater weight to his testimony than that of Mr. Scott and Ms. Berri, although not as much weight as I give to the testimony of Complainant.

## B. Coverage of Various Environmental Whistleblower Statutes to the Facts of Complainant's Whistleblower Complaint

Before turning to the substantive elements of Complainant's whistleblower complaint, I address the coverage of the various statutes under which Complainant alleges her whistleblower complaint arises.<sup>7</sup> Complainant alleges that she engaged in protected activity under four of the environmental acts: (1) the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9610; (2) the Federal Water Pollution Control Act (otherwise known as the Clean Water Act, or "CWA"), 33 U.S.C. § 1367; (3) the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622; and (4) the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971. *See* ALJX 12 at 19-20. Respondent, however, argues the activities engaged in by Complainant could be protected by only a single one of these acts – the SWDA. *See* ALJX 13 at 20-21. Below, I examine Respondent's argument.<sup>8</sup>

### 1. Applicability of CERCLA

Under Respondent's view, CERCLA extends only to "sites" that have been contaminated by hazardous substances. Respondent argues Complainant has failed to allege that either of the Coastal Sites were "sites" within CERCLA's meaning, therefore removing the possibility that any complaints or information provided with respect to the Coastal Sites could be protected activity under it. *See* ALJX 13 at 20. Complainant asserts the underlying objective of CERCLA "is to clean up uncontrolled releases of hazardous substances." ALJX 12 at 19. Complainant further notes her communications about the Coastal Sites involved information about a variety of hazardous substances. *Id.*

Congress enacted CERCLA to promote two primary purposes: "the prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party." *See Pritkin v. Dep't of Energy*, 254 F.3d 791, 794-95 (9th Cir. 2001); *Gen. Elec. Co. v. Litton Indus. Automation Sys.*, 920 F.2d 1415, 1422 (8th Cir. 1990). Under its definition of "covered persons," CERCLA includes "any owner and operator of a vessel or facility." 42 U.S.C. § 9607(a)(1). CERCLA also includes in its definition of a "person" a corporation such as Respondent, *id.* § 9601(21), and defines "facility" in pertinent part as "any site or area where a hazardous substance has been deposited, stored, disposed of, or placed, or otherwise come to be located." *Id.* § 9601(9)(B). Despite courts' consistent use of the phrase, *see, e.g., Pritkin*, 254 F.3d at 794-95; *Litton Indus.*, 920 F.2d at 1422, CERCLA appears to contain no definition of "site" or "contaminated site" in its "Definitions" section, nor does it appear to limit its applicability to such sites in § 9604, the section of CERCLA cited by Respondent to support the aforementioned argument.

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<sup>7</sup> "Where an employee's alleged protected activity is not in fact protected under the statutes at issue, the question is one of coverage under those statutes and not whether OSHA, OALJ or ARB has jurisdiction over the complaint." *Santamaria v. U.S. Envtl. Prot. Agency*, No. 04-063, slip op. at 6 n.26 (ARB May 31, 2006).

<sup>8</sup> To make this determination, I consider at this phase collectively the "incidents that could conceivably have had some general impact on the overall environment." *See Culligan*, No. 03-046, slip op. at 8. Following this determination, I address in the proceeding section whether Complainant's individual alleged protected activities qualify as such under the applicable environmental statutes.

In light of CERCLA's text and purpose, I find the activities and materials observed by Complainant at the Coastal Sites fall generally within its purpose of CERCLA. Both the Plant and the Residence, whether owned personally by Mr. Beetham or by DBW, would qualify as a "facility" under CERCLA, and Respondent does not challenge the existence of paraformaldehyde, arsenic, Dow-Therm-A, or chromate at these locations.<sup>9</sup> Furthermore, while Respondent argues CERCLA is inapplicable due to the Coastal Sites non-status as "contaminated sites," it provides me with no authority to support such an assertion. Consequently, I find CERCLA covers Complainant's alleged protected activities. I now address the applicability of the CWA.

## 2. Applicability of the CWA

Respondent argues Complainant has presented no evidence any of the chemicals she observed at either the Ranch or Coastal Sites were proximate to any "navigable waters," the protection of which Respondent states is the primary purpose of the CWA. ALJX 13 at 20. Complainant conversely asserts that CWA's protections are not so specific, and that the possible contamination of groundwater with paraformaldehyde – an activity Complainant alleged occurred at the Ranch and that she was employed by Respondent to test for – is the type of activity the CWA is meant to protect against. Below, I examine these contentions in light of the purpose of the CWA. ALJX 12 at 19.

The CWA's objective is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," within which it lists as a specific goal the elimination of "the discharge of pollutants into the navigable waters." 33 U.S.C. § 1251(a); *see Culligan*, No. 03-046, slip op. at 11. The CWA, however, does not protect against contamination of all water in the United States. Instead, the water source allegedly affected and under which CWA protection is sought must have "a 'significant nexus' to navigable-in-fact waterways," which in turn requires that the water source "either alone or in combination with similarly situated lands in the region, significantly affect[s] the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'" *N. Cal. River Watch v. City of Healdsburg*, 457 F.3d 1023, 1029-30 (9th Cir. 2006) (quoting *Rapanos v. United States*, 547 U.S. 715, 779-80 (2006)).

Here, I find Respondent's argument has merit. Complainant asserts she performed testing near groundwater wells, and that this constitutes a basis to apply the CWA. However, she has offered no evidence or testimony from which I may discern any belief on her part – reasonable or otherwise – that the chemicals she discovered at such locations could in any conceivable way affect "navigable waters" as this term has come to be defined under the CWA. Consequently, I find the CWA does not cover Complainant's whistleblower complaint based on

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<sup>9</sup> Respondent does not argue whether the chemicals located at the Coastal Sites qualified as "hazardous substances" under CERCLA. *See* 42 U.S.C. § 9601(14).

the record before me.<sup>10</sup> Next I turn to Respondent's argument regarding the applicability of the TSCA.

### 3. Applicability of the TSCA

Respondent sets forth two arguments for the inapplicability of the TSCA to Complainant's whistleblower complaint. First, Respondent argues the TSCA regulates only chemicals prior to their placement in interstate commerce, and that Complainant has in no way alleged the chemicals she observed at any of the locations existed in such a state. ALJX 13 at 21. Second, Respondent argues the TSCA is selective in the chemicals it limits, yet Complainant has pointed to no allegations or evidence demonstrating the chemicals she observed at the Ranch and the Coastal Sites – including paraformaldehyde, arsenic, Dow-Therm-A, or chromate – are regulated under its provisions. *Id.* Complainant conversely argues the TSCA provides much broader protection than as portrayed by Respondent, and is therefore applicable to the activities giving rise to her complaint. ALJX 12 at 19. I address these arguments in turn.

I find Respondent's assertion that the TSCA regulates chemicals only prior to their placement in interstate commerce<sup>11</sup> to be misguided. In enacting the TSCA, Congress voiced explicit concern over the "unreasonable risk of injury to health or the environment" associated with the "manufacture, processing, distribution in commerce, use, *or disposal*" of certain chemical substances. 15 U.S.C. § 2601(a) (emphasis added). Such language indicates Congress was clearly concerned with the regulation of substances under the TSCA far beyond only the period when such substances are "about to be placed into interstate commerce." ALJX 13 at 21.

Regarding Respondent's argument that Complainant has failed to demonstrate the existence of chemicals or substances that specifically fall within those regulated by the TSCA, I find this also unpersuasive. The TSCA was promulgated to provide the federal government with "adequate authority . . . to regulate chemical substances and mixtures which present an unreasonable risk of injury to health or the environment, and to take action with respect to chemical substances and mixtures which are imminent hazards." 15 U.S.C. § 2601(b)(2). The ARB has described the TSCA's purpose, along with that of the SWDA, as "essentially aimed at minimizing the dangers and risks to human health and the environment from products developed and distributed, and wastes generated, by private and public enterprises." *Culligan*, No. 03-046, slip op. at 10 (citing *Melendez v. Exxon Chems. Ams.*, No. 96-051, slip op. at 17-19 (ARB July 14, 2000); *Timmons v. Franklin Elec. Co.*, No. 97-141, slip op. at 4 (ARB Dec. 1, 1998)). In addition to this broad statement reflecting the purpose of the TSCA, a review of the most recent inventory list published by the EPA under the TSCA contains several of the chemicals observed by Complainant during her work with Respondent, including formaldehyde, paraformaldehyde, arsenic, and chromate. *What Is the TSCA Chemical Substance Inventory?*, <http://www.epa.gov/oppt/newchems/pubs/invntory.htm> (last visited Sept. 20, 2010) (click on the

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<sup>10</sup> The Safe Drinking Water Act would appear to provide a basis for such a complaint. See 42 U.S.C. § 300j-9(a); 29 C.F.R. § 24.100. Complainant, however, does not allege this as a basis under which her whistleblower complaint arises.

<sup>11</sup> Respondent cites 15 U.S.C. § 2605 as authority for this assertion. This section of the TSCA, however, contains no such statement restricting its scope.

“Comma Separated Value (CSV) text file” link). Consequently, I find the TSCA also provides coverage for Complainant’s whistleblower complaint.

#### 4. Conclusion Regarding Coverage of the Environmental Acts

In sum, I find – despite Respondent’s arguments to the contrary – that CERCLA and the TSCA provide coverage for Complainant’s whistleblower complaint. I do find convincing, however, Respondent’s argument that the CWA does not cover the collective incidents giving rise to Complainant’s whistleblower Complaint. Additionally, I find the SWDA provides another basis for Complainant’s whistleblower complaint. I therefore now turn to an examination of the substantive elements of Complainant’s whistleblower complaint.

#### C. Substantive Analysis of the Elements of Complainant’s Whistleblower Complaint

29 C.F.R. § 24.102(b) places restrictions on employer behavior under the environmental acts. Under this Regulation, an employer may not discriminate against an employee, including “intimidat[ing], threaten[ing], restrain[ing], coerc[ing], blacklist[ing], discharg[ing], or in any other matter retaliat[ing] against” that employee because of three subsets of activity: (1) “[c]ommenc[ing] or caus[ing] to be commenced, or [being] about to commence or cause to be commenced, a proceeding under one of the” environmental acts; (2) “[t]estif[y]ing or [being] about to testify in such a proceeding”; or (3) “[a]ssist[ing] or participat[ing], or [being] about to assist or participate, in any manner in such a proceeding or in any other action to carry out the purposes of” one of the environmental acts. *Id.*; see *Carpenter v. Bishop Well Servs. Corp.*, No. 07-060, slip op. at 5 (ARB Sept. 16, 2009). To succeed in her whistleblower complaint under CERCLA, the TSCA, and the SWDA, Complainant bears the burden to prove by a preponderance of the evidence she engaged in some form of protected activity and that such activity was a motivating factor in some adverse action taken against her by Respondent. See 29 C.F.R. § 109(a). This equates to four elements for a successful claim: (1) Complainant’s engaging in protected activity, (2) knowledge on behalf of Respondent of such activity; (3) some adverse action taken by Respondent; and (4) a causal connection between Complainant’s protected activity and Respondent’s adverse action. See, e.g., *Carpenter*, No. 07-060, slip op. at 5 (ARB Sept. 16, 2009); *Cante v. N.Y. City Dep’t of Educ.*, No. 08-012, slip op. at 4-5 (ARB July 31, 2009); *Culligan v. Am. Heavy Lifting Shipping Co.*, No. 03-046, slip op. at 6 (ARB June 30, 2004). If a complainant demonstrates the existence of these four elements by a preponderance of the evidence, then the burden shifts to the employer to demonstrate it would have nevertheless taken the adverse action despite the complainant engaging in protected activity. 29 C.F.R. § 24.109(b). I now discuss each of the four aforementioned elements as they apply to the facts and circumstances giving rise to Complainant’s whistleblower complaint.

##### 1. Protected Activity

An employee engages in protected activity if he or she “provides information grounded in conditions constituting reasonably perceived violations” of one of the environmental acts. *Carpenter*, No. 07-060, slip op. at 6; see *Kesterson v. Y-12 Nuclear Weapons Plant*, No. 96-173, slip op. at 4 (ARB Apr. 8, 1997). In doing so, the employee providing such information is not held to so exacting a standard as to require an actual violation of a specific act, nor must he or

she actually be correct in the assessment of the perceived hazard. *Dixon v. U.S. Dep't of the Interior*, Nos. 06-147, 06-160, slip op. at 9 (ARB Aug. 28, 2008). This does not mean, however, an employee's protected activity may consist entirely of vague complaints with only the weakest connection to an environmental act under which that employee seeks protection. To be protected activity, the provision of information by an employee must "relate 'definitively and specifically' to the subject matter of the particular statute under which protection is afforded." *Carpenter*, No. 07-060, slip op. at 7 (quoting *Kester v. Carolina Power & Light Co.*, No. 02-007, slip op. at 9 (ARB Sept. 30, 2003)).

Complainant in this case alleges she engaged in twelve protected activities, which are as follows: (1) her communications with Mr. Scott and Mr. Kitchenmaster regarding her observations from her February 14, 2008 work at the Coastal Sites; (2) her providing photo documentation from her work at the Coastal Sites to Mr. Kitchenmaster on or about February 14, 2008; (3) her conversations with Mr. Sekerak regarding her observations from her February 14, 2008 work at the Coastal Sites; (4) her providing to Mr. Kitchenmaster a timesheet in March 2008 documenting the work performed at the Coastal Sites on February 14, 2008; (5) her conversation with Mr. Renz in February 2008 regarding her observations from her February 14, 2008 work at the Coastal Sites; (6) her March 2008 phone conversation with Officer Ball regarding her February 14, 2008 work at the Coastal Sites and Respondent's record-keeping practices; (7) her allowing DEQ employees onto the Ranch and failing to engage in split sampling in June 2008; (8) her being confronted and refusing to answer questions regarding the prior provision of information to governmental actors and Mr. Kitchenmaster as revealed to Ms. Berri and Mr. Scott through their receipt of Mr. Renz's memo in January of 2009; (9) her receipt of a grand jury subpoena in January 2009; (10) her reporting to Respondent in February 2009 of her earlier conversations with Mr. Sekerak, Mr. Renz, and Officer Ball; (11) her "express[ing] concern" to Ms. Berri in February 2009 about being represented by DBW's attorneys; and (12) her providing to Mr. Scott a copy of her grand jury subpoena. ALJX 5 at 2-4. Below, I examine whether each of these activities is protected under the various environmental acts giving rise to Complainant's whistleblower complaint.<sup>12</sup>

a. Complainant's Communications with Mr. Scott and Mr. Kitchenmaster During and Immediately Following Her Visit to the Coastal Sites and Her Providing to Mr. Kitchenmaster Photo Documentation

Complainant fails to address how her conversations with either Mr. Scott or Mr. Kitchenmaster or her providing photo documentation to Mr. Kitchenmaster upon or near her return from the Coastal Sites in February 2008 constitute protected activity. Upon returning from the Coastal Sites, Complainant testified she met with both Mr. Kitchenmaster and Mr. Scott, during which meeting she informed them of her findings and observations there, including what "appeared" to be "some of the drums that we had been looking for at the . . . Ranch." TR at 78-80. At this point, however, no dispute had yet arisen as to who Complainant was performing such work for nor had she been contacted by any governmental actors. Although she also provided Mr. Kitchenmaster with photo documentation, Complainant further testified this was a practice she had engaged in before with him. *Id.* at 80. In light of such facts, Complainant fails

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<sup>12</sup> Several of the dates appearing in Complainant's prehearing statement associated with her various protected activities are incorrect when compared with the testimony and evidence presented at the hearing.

to put forth any theory or point to any portion of the record by which such communications or the provision of such documentation may be tethered to “proceedings” involving a violation of the SWDA, the TSCA, or CERCLA. *See Carpenter*, No. 07-060, slip op. at 6; 29 C.F.R. § 24.102(b). Instead, the record demonstrates Complainant, at this time, engaged in nothing more than communications and actions with her perceived supervisors regarding her performance of what then appeared to her to be routine work. Such circumstances do not demonstrate an actual belief by Complainant at the point of such communications that any violation of the environmental statutes was then occurring, and I find they cannot therefore be considered protected activities. *See, e.g., Melendez v. Exxon Chems. Ams.*, No. 96-051, slip op. at 25 (ARB July 14, 2000) (citing *Minard v. Nerco Delamar Co.*, No. 92-SWD-1, slip op. at 7-16 (Sec’y Jan. 25, 1994)) (holding alleged protected activity must be founded on complainant’s actual *and* reasonable belief that violation of environmental statute has occurred).

b. Complainant’s Conversations with Mr. Sekerak

Complainant’s next alleged protected activities are her two conversations with Mr. Sekerak near February 22, 2008. *See ALJX 5* at 2. As noted, Complainant during these conversations discussed with Mr. Sekerak her understanding of the contractual relationships between Respondent, DBW, and SMAF as well as the location of the drums of chemicals she had observed at the Coastal Sites. TR at 88-90. Complainant at sometime developed a belief that these conversations were engaged by Mr. Sekerak so that he could obtain sufficient information to procure a search warrant for the Coastal Sites, although Complainant failed to state exactly when she developed such a belief. *Id.* at 88. Complainant also testified to her learning from Mr. Kitchenmaster of a subpoena he had received requesting, in part, photos on Mr. Kitchenmaster’s computer, although, again, Complainant failed to place exactly when this conversation occurred in relation to her two conversations with Mr. Sekerak. *Id.* at 88-89. Respondent does not challenge Complainant’s recollection of these events, but instead argues the information relayed to Mr. Sekerak does not in any way demonstrate “any risk to human health or the environment,” ALJX 13 at 24, therefore removing any such communications from the realm of protected activity.

I find Complainant has not demonstrated her conversations with Mr. Sekerak constituted any form of protected activity. This is again due to her inability to prove she held an actual belief that she was engaged in or about to be engaged in any sort of proceeding related to a perceived violation of one of the environmental acts at the time of these conversations. Complainant’s own testimony establishes she regularly communicated with governmental actors regarding her environmental remediation work. TR at 257-58, 284. Absent additional circumstances, I find the communications with Mr. Sekerak were nothing more than her providing answers to routine inquiries regarding the work she regularly performed. While proof of knowledge of ongoing proceedings or Mr. Sekerak’s attempting to procure search warrants or being involved in the issuance of subpoenas may demonstrate both an actual and reasonable belief that she engaged in protected activities, Complainant fails to demonstrate she gained such knowledge prior to her conversations with Mr. Sekerak. This is a burden she bears in order to demonstrate the existence of protected activity. *See Carpenter*, No. 07-060, slip op. at 5; *Melendez*, No. 96-051, slip op. at 25; 29 C.F.R. § 24.102(b). Instead, I am only able to discern Complainant *at some time possibly proximate* to her conversation with Mr. Sekerak became

aware, though separate conversations with Mr. Kitchenmaster, of Mr. Sekerak's involvement in the subpoena of records and a possible attempt to procure a search warrant for the Coastal Sites. *See* TR at 88-90. This does not demonstrate on her behalf an actual belief in a violation of the SWDA, the TSCA, or CERCLA at the time she spoke with Mr. Sekerak. Therefore, I again find these conversations do not constitute protected activities.

c. Complainant's Providing Her Timesheet to Mr. Kitchenmaster in March 2008

Complainant alleges as her next protected activity her giving her timesheet to Mr. Kitchenmaster on March 12 or 13, 2008 that related to the work she performed at the Coastal Sites on February 14, 2008. *See* ALJX 5 at 2; TR at 198. Again, however, Complainant fails to allege any actual or reasonable belief on her part that this action resulted from a perceived violation of one of the environmental statutes. The record instead clearly indicates this had only to do with Mr. Kitchenmaster's concern that work was being pulled away from SMAF. TR at 265-66. Instead, Complainant attempts to rely on Mr. Kitchenmaster's subsequent transfer of the same timesheet to Mr. Renz as a means to transform such an action into protected activity. *See* ALJX 5 at 2 ("Kitchenmaster informs DEQ (Mike Renz) about the time sheet."). This appears to equate to an argument by Complainant that somehow Mr. Kitchenmaster's giving the timesheet to Mr. Renz may be attributable to her as protected activity. The ARB, however, has rejected such a theory. *See, e.g., Henrich v. Ecolab, Inc.*, No. 05-030, slip op. at 11 (ARB June 29, 2006) ("A would-be whistleblower must actually express his concerns in order for his activity to be considered protected."); *Knox v. U.S. Dep't of the Interior*, No. 06-089, slip op. at 5 & n.6 (ARB Apr. 28, 2006). I therefore find Complainant's giving her timesheet to Mr. Kitchenmaster in March 2008 does not constitute protected activity.

d. Complainant's Conversation with Mr. Renz

Complainant lists as her next alleged protected activity her conversation with Mr. Renz of DEQ on March 12, 2008. *See* ALJX 5 at 2; TR at 92-92. As discussed in Part IV.A.4, *supra*, this conversation came about when Mr. Renz overheard Complainant discussing details of her work at the Coastal Sites with Mr. Kitchenmaster, including the subsequent request she had been given by Respondent to transfer time for this work away from Task 9. TR at 90. Complainant further discussed with Mr. Renz and Mr. Kitchenmaster an additional request to recategorize certain documents on her computer away from Task 9 and into a new folder captioned, "For Anchor Environmental." *Id.* at 91-92. Complainant testified she never informed Mr. Scott of this conversation with Mr. Renz. *Id.* at 92.

Respondent argues Complainant's conversation with Mr. Renz did not constitute protected activity. In doing so, Respondent directs my attention to the memo composed by Mr. Renz that Respondent asserts contains a summary of both Complainant's and Mr. Kitchenmaster's conversations with him. *See generally* CX 13. Most importantly, Respondent argues Mr. Renz's characterization of these conversations again serves to attribute the allegations Complainant made in her conversation with Mr. Renz instead to Mr. Kitchenmaster, including the moving of time away from Task 9 for Complainant's work at the Coastal Sites as well as the moving of files on Complainant's computer. *See id.* at 35-36; ALJX 13 at 14-15. However,

Respondent offers no affirmative evidence to prove or otherwise demonstrate that such a conversation did not indeed occur.

With respect to Complainant's conversation with Mr. Renz, I find Respondent's argument unpersuasive and that Complainant, in this instance, did engage in protected activity. Complainant's recollection of this conversation demonstrates both an actual and reasonable belief that violations of the environmental acts were afoot. Furthermore, such a conversation as Complainant had with Mr. Renz related "definitively and specifically," *see Carpenter*, No. 07-060, slip op. at 7, to Complainant's visit to the Coastal Sites, during which she observed at both the Plant and the Residence drums of hazardous materials. In her conversation with Mr. Renz, she communicated concerns to a government actor. These discussions surpassed Complainant's regular duties as an environmental consultant, as she testified describing to Mr. Renz concerns about documentation being moved from Task 9 to a separate account designated to Anchor within Respondent's records. TR at 90-91. Mr. Kitchenmaster testified he had never encountered in his experience the removal of work by a subcontractor from a client. *Id.* at 277. Mr. Scott, when asked about the moving of Complainant's time at the Coastal Sites from SMAF to Anchor, responded that such an activity occurred "frequently" with "the same client" or "similar client[s]," *id.* at 537, but gave no explanation as to what made SMAF and Anchor similar in this particular instance. By the time of this conversation, Complainant had already been contacted by Mr. Sekerak to provide details regarding the location of the drums at the Plant and Residence, TR at 88-90, although it was unclear when she spoke with Mr. Sekerak if she had any actual belief that any violations were afoot. *See supra* Part IV.C.1.b. By the time of her conversation with Mr. Renz, however, Complainant had previously noted to Mr. Kitchenmaster that she was "worried" about Respondent's moving of her time and records associated with her visit to these sites from one client to another. *See CX 13* at 36; TR at 276-77. This demonstrates an actual belief on Complainant's behalf that violations of the SWDA, the TSCA, or CERCLA may be occurring. Furthermore, I find Complainant's observations of the storage of hazardous chemicals at locations away from the Ranch – including a personal residence – supports the reasonableness of such a belief. Therefore, such communications to Mr. Renz, a state governmental actor, constitutes protected activity in this instance. *See, e.g., Conley v. McClellan Air Force Base*, No. 84-WPC-1, slip op. at 8 (Sec'y Sept. 7, 1993).

e. Complainant's Conversation with Officer Ball

Complainant lists as her next alleged protected activity her conversation with Officer Ball on March 13, 2008. ALJX 5 at 3. At the hearing, Complainant testified she provided information to Officer Ball in response to being called by him. TR at 92. According to Complainant, Officer Ball initiated the conversation by informing her he had learned of the "possibility of documents that had been altered, back-dated, or changed" related to Complainant's work at the Coastal Sites. *Id.* at 90-92. In her conversation with him, she explained her understanding of Respondent's record-keeping practices, including that her timesheet should accurately depict for whom and where she worked on February 14, 2008. *Id.* at 93-94. Complainant conveyed to Officer Ball her belief that Mr. Scott was not the kind of person who would engage in the type of behavior Officer Ball was investigating, *id.* at 93-94, although she did not make any such representation to other persons employed by Respondent. Respondent conversely argues this conversation was nothing more than an affirmation of Mr.

Scott's honesty, as demonstrated by her prior deposition testimony. *See* ALJX 13 at 15-15; TR at 218.

I find Complainant's conversation with Officer Ball constituted an additional protected activity despite Respondent's argument to the contrary. Even if Complainant did testify to Mr. Scott's honesty during her conversation with Officer Ball, Respondent does not challenge her providing to him information on how her time would be kept within Respondent's organizational structure. As noted, Complainant by this point had previously communicated with Mr. Sekerak, Mr. Renz, and Mr. Kitchenmaster concerns about Respondent's recordkeeping practices and her observations at the Coastal Sites. *See supra* Part V.C.1.d. These conversations demonstrated an actual and reasonable belief on her part of some potential wrongdoing regarding the disposal or remediation of hazardous chemicals. Although she may have only provided details regarding how Respondent's records were kept and affirmed Mr. Scott's honesty in her conversation with Officer Ball, such communications would have clearly "assisted" Officer Ball in his investigation of potential wrongdoing regarding recordkeeping associated with the Coastal Sites. *See* 29 C.F.R. § 24.102(b)(3). As Complainant by this point had a reasonable and actual belief that such perceived anomalies with respect to recordkeeping were associated with work involving the identification and cleanup of hazardous chemicals, I therefore find Complainant's conversation with Officer Ball was also protected activity.

f. Complainant's Allowing DEQ Employees onto the Ranch to Perform Sampling in June 2008

Complainant's next alleged protected activity is the incident during which she allowed two DEQ employees onto the Ranch in June 2008 to perform sampling. As testified to by Complainant, the two employees came on to the Ranch in this instance to "fine-tune their equipment" with the approval of Mr. Matthews, Mrs. Beetham's representative. TR at 63-64. Complainant was later given a verbal reprimand by Mr. Scott for her failure to inform him of the visit of the DEQ representatives on this date. *Id.* at 65, 117-18. Respondent argues Complainant mischaracterizes the activity at issue in this case, which should instead be viewed as Complainant's failure to engage in split sampling with the DEQ employees, not her allowing them onto the Ranch property in this instance. *See* ALJX 13 at 17-18.

I agree with Respondent's characterization of the events in this case and find that this event does not amount to protected activity. Although I find he suffered from credibility problems at the hearing, *see supra* Part V.A.2, I find credible Mr. Scott's explanation for reprimanding Complainant in this instance. Mr. Scott testified at the hearing to the importance of split sampling, noting that such a process could only occur simultaneously with the sampling of the DEQ employees, after which time such an opportunity would be lost. TR at 455-58. I find this explanation satisfactory in this instance. Furthermore, I find it demonstrates that Respondent did not take issue with Complainant's allowing DEQ employees on the Ranch at this time. Consequently, such an incident does not amount to protected activity.

g. Complainant's Communications with Respondent About Prior Conversations with Mr. Sekerak, Mr. Renz, and Officer Ball

Complainant lists as her eighth and tenth protected activities her being "confronted" by Respondent in January and February 2009 regarding the aforementioned communications with Mr. Sekerak, Mr. Renz, and Officer Ball. ALJX 5 at 3-4; *see supra* Parts V.C.1.b, d-e. While such confrontation may go toward Respondent's knowledge of Complainant's engaging in protected activity, possibly be considered adverse action, or demonstrate a causal link between the two, Complainant offers no theory for how such confrontation itself amounts to protected activity. Consequently, I find it does not amount to such.

h. Complainant's Receipt of a Subpoena

Complainant lists as her ninth protected activity her receipt of a subpoena on January 31, 2009. Respondent concedes this amounts to protected activity. Given the parties' agreement and the relevant case law discussing this topic, I find the receipt of a subpoena in this instance constitutes protected activity. *See Wirtz v. Home News Publ'g Co.*, 341 F.2d 20, 23 (5th Cir. 1965).

Despite admitting Complainant's receipt of a subpoena constitutes protected activity, Respondent nevertheless argues such activity is covered only under the SWDA. ALJX 13 at 26. Respondent bases this argument on a statement in Complainant's posthearing brief in which she notes DBW and Mr. Beetham "have been criminally indicted under the Solid Waste Disposal Act." ALJX 12 at 4-5. By Respondent's logic, the environmental act under which actual charges were later brought against Mr. Beetham therefore serves to limit the coverage of the environmental acts applicable to Complainant's whistleblower complaint. Not only is such reasoning tortured, it is incorrect based on applicable precedent and the record in this case. As stated, protected activity need only be reasonable, and does not require an actual violation of a specific act or correct assessment of the applicable statute by the complainant. *See Dixon*, Nos. 06-147, 06-160, slip op. at 9. As also previously discussed, I find the SWDA, the TSCA, and CERCLA cover the activities observed and reported by Complainant in this case. *See supra* Part V.B. The subpoena received by Complainant contains no indication it was sent pursuant to the authority of any specific act. *See generally* CX 14. Respondent fails to point to evidence in the record that would demonstrate it would have been reasonable at the time of receipt for Complainant to believe the testimony for which she was summoned would relate *only* to the SWDA. To the contrary, I find it would be reasonable for Complainant to have believed the subpoena may have also related to investigations under either CERCLA or the TSCA, which also allow for criminal prosecution. *See* 15 U.S.C. § 2615(b); 42 U.S.C. §9603(b).

Complainant lists as her twelfth protected activity her turning over this same subpoena to Mr. Scott. However, as with her allegations regarding being confronted about prior conversations with government actors, Complainant fails to articulate a theory as to how passing along the subpoena to Mr. Scott constitutes protected activity separate from receipt of the subpoena itself. Therefore, I again find such communication does not constitute protected activity. *See supra* Part V.C.1.g.

i. Complainant's Discussion Regarding Legal Representation

Complainant lists as her eleventh protected activity her “express[ing] concern to Respondent (Berri) as to why [DBW] attorneys want to represent her for the purposes of grand jury testimony.” ALJX 5 at 4. Again, however, Complainant fails to articulate any theory in her prehearing statement or posthearing brief as to how such a discussion in any way “relate[s] ‘definitively and specifically’ to the subject matter of the particular statute under which protection is afforded.” *Carpenter*, No. 07-060, slip op. at 7 (quoting *Kester*, No. 02-007, slip op. at 9). Complainant does not indicate how this conversation at all revealed new instances of perceived violations to or constituted her assisting or participating in any sort of investigation related to any of the environmental acts. Consequently, I find this also does not constitute any form of protected activity.

j. Conclusion Regarding Protected Activity

In sum, I find three of Complainant's twelve alleged protected activities actually constitute such: (1) her conversation with Mr. Renz of DEQ; (2) her conversation with Officer Ball; and (3) her receipt of a grand jury subpoena. I therefore now turn to an analysis of adverse actions Complainant alleges were taken against her by Respondent.

2. Adverse Action

Adverse action is action taken by an employer that a reasonable employee would have found to be “materially” adverse. *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 58 (2006); *Powers v. Paper*, No. 04-111, slip op. at 13 (ARB Aug. 31, 2007). In order for action to be “materially” adverse, it must be capable of “dissuad[ing] a reasonable worker from making or supporting a charge of discrimination.” *White*, 548 U.S. at 58 (quoting *Rochon v. Gonzalez*, 438 F.3d 1211, 1219 (D.C. Cir. 2006)). The determination of whether or not a specific action is adverse under this standard is fact-specific and must take into account the circumstances surrounding such action. *Sillars v. Nevada*, No. 08-17502, 2010 WL 2617801, slip op. at 1 (June 22, 2010). However, actions found to be only “petty slights and minor annoyances” do not rise to the level of being materially adverse. *White*, 548 U.S. at 68.

Complainant alleges four adverse actions were taken against her in this case: (1) her being reprimanded by Mr. Scott in June 2008 after allowing DEQ employees on the Ranch; (2) Mr. Scott and Mr. Berri's “pressur[ing]” of Complainant to discuss with them information contained within Mr. Renz's memo and “her upcoming grand jury testimony”<sup>13</sup>; (3) Respondent's decision to terminate Complainant's employment; and (4) Complainant's actual termination by Respondent. Below I examine whether these alleged adverse actions actually constitute such.

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<sup>13</sup> Complainant lists the dates of these conversations as January 23, 26, and 27, 2009. ALJX 5 at 5. The subpoena, however, was not issued until January 28, 2009, CX 14 at 3517, and Complainant did not receive it until January 31, 2009. TR at 83. Therefore, I discuss these conversations only so far as they relate to Mr. Renz's memo.

a. Mr. Scott's Verbal Reprimand of Complainant Following the DEQ Employees' Visit to the Ranch in June 2008

Complainant lists as her first adverse action Mr. Scott's verbal reprimand following her failure to inform him of the visit by DEQ employees to the Ranch in June 2008. As discussed, Mr. Scott expressed displeasure with Complainant in this instance for failing to take split samples with DEQ employees on this date. Complainant characterized Mr. Scott as "angry" after learning about the visit and her failure to perform split sampling, TR at 64, and agreed when questioned that she had received a "verbal reprimand" from him in this instance. *Id.* at 117. Complainant further noted, however, that there was no written warning associated with this instance and that nothing was placed in her personnel file as a consequence of this behavior. *Id.* at 117-18. Mr. Scott agreed he was "upset" after learning about Complainant's failure to perform split sampling during this particular DEQ visit. *Id.* at 457.

I find Mr. Scott's verbal reprimand of Complainant in this instance does not constitute adverse action. Complainant provides me with no authority for such a finding. In this instance, Mr. Scott issued his verbal reprimand as a corrective measure meant to impress upon Complainant the importance of split sampling with governmental actors. Mr. Scott did not go so far as to issue a written warning in this case. Even had he done so, such action would still likely not have amounted to adverse action. *See, e.g., Littleton v. Pilot Travel Ctrs., LLC*, 568 F.3d 641, 644 (8th Cir. 2009) (holding written correction notice threatening immediate termination, but without evidence of harmful impact on employment, not to be materially adverse); *Baloch v. Kempthorne*, 550 F.3d 1191, 1199 (D.C. Cir. 2008) (holding letter of reprimand threatening immediate disciplinary action, without additional materially adverse consequences, does not constitute adverse action). Consequently, I find Mr. Scott's verbal warning to Complainant in this instance does not constitute adverse action.

b. Mr. Berri's and Mr. Scott's Meetings with Complainant Following Their Receipt of Mr. Renz's Memo

Complainant lists as her next alleged adverse action a series of meetings held by Mr. Scott and Ms. Berri with Complainant between January 23 and January 27, 2009. As discussed, the first of these conversations occurred over the phone, during which Mr. Scott asked Complainant to respond to allegations contained within Mr. Renz's memo regarding her turning over her timesheet and field notes to Mr. Kitchenmaster and the altering of documents by Respondent. *See supra* Part IV.E.1. Mr. Scott characterized himself as "upset internally" during this conversation, TR at 485, and Complainant characterized his presentation of information as deceptive. *Id.* at 99. The second of these conversations also occurred between Complainant and Mr. Scott, only this time in person and in Complainant's work office. *Id.* at 100. Mr. Scott raised the same issues as he had on January 23, 2009, *compare id.* at 100, *with id.* at 99, but this time presented his inquiries in writing, asking for written responses from Complainant. *Id.* at 100. Complainant further testified she felt "threatened and pinned at [her] desk" during this conversation, although she attributed this to little more than Mr. Scott's standing between her desk and the door to her office. *Id.* The third of these conversations occurred when Ms. Berri called Complainant to again discuss the contents of Mr. Renz's memo. *Id.* at 101. Complainant reiterated to Ms. Berri during the conversation that she would again only confirm providing her

timesheet to Mr. Kitchenmaster for her work at the Coastal Sites, *id.*, and for the first time stated she wanted to speak with a lawyer before providing any further information. *Id.* at 97, 101. Complainant further recalled Ms. Berri stating that she “really didn’t want to get lawyers involved,” *id.* at 102, but Complainant presented no evidence of being contacted again by Ms. Berri until February 4, 2009, by which time she had indeed spoken with her attorney.

I again find the above circumstances do not constitute adverse action. Although Complainant’s testimony amounts to being pressured by Mr. Scott and Ms. Berri to reveal details about her prior conversations with Mr. Kitchenmaster and other governmental actors, the record demonstrates such pressure was not extreme or overbearing. Mr. Scott spoke with Complainant about Mr. Renz’s memo both over the phone and in person. Although the in-person meeting caused Complainant to feel subjectively threatened, she presents no evidence that Mr. Scott made any overt threats – either physically or with respect to her job – toward her in connection with this conversation. Furthermore, Complainant did not express her desire to speak with a lawyer until her final conversation with Ms. Berri. Although Complainant claims Ms. Berri continued to pressure her after she first expressed her desire to speak with a lawyer during their January 27, 2009 meeting, the record demonstrates the two did not in fact meet until after Complainant had the opportunity to do so. Such circumstances collectively would not “dissuade[] a reasonable worker from making or supporting a charge of” retaliation. *White*, 548 U.S. at 58. Consequently, I do not find these meetings constituted adverse actions against Complainant by Respondent.

c. Respondent’s Decision to Terminate Complainant and Actual Termination

Complainant’s final two alleged adverse actions are Respondent’s decision to terminate her employment on February 6, 2009 and her actual termination on February 10, 2009. With respect to the February 6, 2009 decision to terminate her employment, Complainant presents no evidence that she ever became aware of this decision prior to her actual termination on February 10, 2009. Indeed, the only piece of evidence in the record indicated such a decision was reached prior to February 10, 2009 is an email from Mr. Petti to Ms. Berri and Ms. Skiles. CX 9 at 188. Complainant presents no evidence, however, that she became aware of the intended consequences of this decision prior to her termination. As such, I am at a loss to discern how this decision could have any way affected her behavior whatsoever, much less dissuaded her from engaging in further protected activity. *See White*, 548 U.S. at 58; *Rochon*, 438 F.3d at 1219; *Powers*, No. 04-111, slip op. at 13. Consequently, I find the decision to terminate Complainant’s employment – before it was in any way communicated to her – does not constitute adverse action.

Complainant’s actual termination, however, is a different story. Surprisingly, Respondent cannot stipulate to it being an adverse action. However, Respondent does not dispute it terminated Complainant’s employment on February 10, 2009. *See* ALJX 13 at 26; *supra* Part IV.E.7. Such an action clearly was materially adverse to Complainant, and I find it constituted adverse action. *See, e.g., Stone v. Geico Gen. Ins. Co.*, 279 Fed. App’x 821, 823 (11th Cir. 2008); *Brooks v. City of San Mateo*, 229 F.3d 917, 928-29 (9th Cir. 2000); 29 C.F.R. § 24.102(b).

d. Conclusion Regarding Adverse Action

In sum, I find, of the adverse actions alleged by Complainant in her prehearing statement, only her actual termination by Respondent constituted an action that was materially adverse to Complainant. As such, I now move on to discuss when Respondent gained knowledge of Complainant's engaging in protected activity.

3. Respondent's Knowledge of Complainant's Engaging in Protected Activity

In order to make out a successful whistleblower claim, the complainant must also prove by a preponderance of the evidence that the respondent had knowledge of his or her engaging in protected activity prior to the occurrence of adverse action. *Carpenter*, No. 07-060, slip op. at 5; *Cante*, No. 08-012, slip op. at 4-5; *Culligan*, No. 03-046, slip op. at 6. As discussed, I find Complainant engaged in three protected activities in this case: her conversations with Mr. Renz and Officer Ball as well as her receipt of a grand jury subpoena on January 31, 2009. *See supra* Part V.C.1. Furthermore, I also find Respondent took only one adverse action toward Complainant – her termination on February 10, 2009. *See supra* Part V.C.2. The record demonstrates and the parties do not dispute that Respondent learned of all of the aforementioned protected activities prior to terminating Complainant's employment. *See* TR at 350-55, 477-78; EX 112; CX 14. Therefore, I find Respondent had knowledge of Complainant's engaging in protected activities prior to her termination.

4. Causation

A complainant, to demonstrate causation, must prove by a preponderance of the evidence that protected activity known to the employer was "a motivating factor" for subsequent adverse action. 29 C.F.R. § 24.109(a). Such protected activity, however, need not be the sole cause of the adverse action for a complainant to succeed on his or her whistleblower claim. If adverse action is motivated in part by a complainant's protected activities and in part by legitimate reasons that do not qualify as protected activities, however, then a "mixed" or "dual motive" analysis may be applied. *See Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977); *Dixon*, Nos. 06-147, 06-160, slip op. at 8. Under this analysis, the complainant bears the initial burden to demonstrate the adverse action suffered was due, at least in part, to his or her engaging in protected activity. *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 249-50 (1989); *Seetharaman v. Stone & Webster, Inc.*, No. 06-024, slip op. at 5 (ARB Aug. 31, 2007); 29 C.F.R. § 24.109(a). If the complainant meets this burden, the employer may still escape liability, however, by itself demonstrating by a preponderance of the evidence that it nevertheless "would have taken the same unfavorable personnel action in the absence of any protected activity." 29 C.F.R. §24.109(b); *see Mt. Healthy*, 429 U.S. at 287; *Dixon*, Nos. 06-147, 06-160, slip op. at 8.

a. Complainant's Burden to Prove Protected Activity Was a Motivating Factor

Temporal proximity itself may establish causation in whistleblower cases if the interval between the retaliatory termination and an employer's gaining knowledge of protected activity is

sufficiently short. *Thompson v. Houston Lighting & Power Co.*, No. 98-101, slip op. at 6 (ARB Mar. 30, 2001); *see also Gonzalez v. Nat'l R.R. Passenger Corp.*, No. 09-35422, 2010 WL 1539755, slip op. at \*2 (9th Cir. Apr. 19, 2010); *Villarimo v. Aloha Island Air, Inc.*, 281 F.3d 1054, 1065 (9th Cir. 2002); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (holding thirty-day interval sufficient to demonstrate causation); *Miller v. Fairchild Indus.*, 885 F.2d 498, 505 (9th Cir.1989) (finding causation when adverse termination occurred forty-two and fifty-nine days after separate protected activities). In this case, Respondent gained knowledge of Complainant's protected activities on January 23, 2009 (the date of Mr. Scott's first discussion with Complainant regarding Mr. Renz's memo, TR 477-78), January 30, 2009 (date of arrival of Complainant's grand jury subpoena at Respondent's office, *id.* at 103), and February 4, 2009 (date Complainant first informs Ms. Berri of her conversation with Officer Ball, *id.* at 107).<sup>14</sup> Complainant was terminated on February 10, 2009, TR at 428-29, eighteen days after Respondent learned of her communication with Mr. Renz, eleven days after learning of her grand jury subpoena, and six days after learning of her conversation with Officer Ball. Given such a short duration between Respondent's gaining knowledge of Complainant's engaging in protected activity and its ultimate termination of her employment, I find Complainant has demonstrated a causal connection exists in this case. *See Passantino v. Johnson & Johnson Consumer Prods. Inc.*, 212 F.3d 493, 507 (9th Cir. 2000); *Couty*, 886 F.2d at 148; *Miller*, 885 F.2d at 505; *Keener v. Duke Energy Corp.*, No. 04-091, slip op. at 11 (ARB July 31, 2006) (citing *Kester*, No. 02-007, slip op. at 10).

b. Respondent's Burden to Prove Nonretaliatory Motive

As Complainant has demonstrated a causal connection between her termination and her engaging in protected activities, I now examine whether Respondent is able to demonstrate by a preponderance of the evidence that it would have nevertheless terminated Complainant's employment in the absence of such protected activities. *See* 29 C.F.R. § 24.109(b). Respondent sets forth two arguments in an attempt to meet such a burden. First, Respondent argues it terminated Complainant's employment not for engaging in the aforementioned protected activities, but instead for her releasing confidential information and failure to communicate adequately with her Project Managers. *See* ALJX 13 at 26-28. Second, with respect solely to Complainant's receipt of a subpoena, Respondent argues Mr. Scott also received such a subpoena yet remains employed by Respondent. *Id.* at 27-28. I consider these arguments below, ultimately finding them both unpersuasive.

Respondent's argument that it terminated Complainant's employment due to her release of confidential information and her failure to communicate adequately with Mr. Scott is pretextual. Although I do not doubt the accuracy of Ms. Skiles's testimony regarding *what* was articulated to Complainant during the meeting in which she was informed of her termination, TR at 429-31, I do not find credible the reasons themselves. I find Respondent's first assertion – that Complainant was terminated in part for the unauthorized release of confidential information – to be unpersuasive based on evidence in the record, including the testimony of Ms. Berri, Mr. Scott,

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<sup>14</sup> Respondent, in its posthearing brief, argues it "knew of [Complainant]'s protected activities nearly a year earlier, in March 2008." ALJX 13 at 27. This argument, however, rests solely on Respondent's alleged knowledge of Complainant's conversations with Mr. Sekerak. *See id.* As discussed, I find these conversations did not constitute protected activity. *See supra* Part V.C.1.b.

and Ms. Skiles. Such an argument hinges on Respondent's attempted characterization of Complainant as negligent or irresponsible in her own failure to realize that SMAF was allegedly not Respondent's client at the time Complainant performed her work at the Coastal Sites. *See* ALJX 13 at 28. I find Complainant, however, presents the more credible depiction of Respondent's client relationships during the time she performed this work. As discussed, Complainant testified she performed the work on February 14, 2008 at the Coastal Sites for SMAF, a belief she harbored due to her receipt of equipment from Mr. Kitchenmaster to perform such work as well as her being told by Mr. Scott to bill such work to Task 9 – which until that point had been associated with work for SMAF. TR at 67, 71, 573. There is no evidence within the record explicitly indicating the existence of a different client relationship involving Respondent at this time, although Respondent does point to the issuance of a March 13, 2008 letter from Tonkon Torp to Respondent stating such a relationship between Respondent and Tonkon Torp existed at some point prior to the writing of this letter. CX 20 at 1; ALJX 13 at 11. Mr. Scott, however, admitted at hearing that no written contract ever existed between Anchor and Respondent. TR at 504.

I base my finding that Respondent's first assertion here is pretextual primarily on the testimony of Mr. Scott, Ms. Berri, and Ms. Skiles. None of these three actors – all of whom served in Respondent's organizational structure in positions superior to that of Complainant – were able at hearing to articulate a sufficiently clear explanation when asked about Respondent's client relationships with respect to the time Complainant performed her work at the Coastal Sites. Mr. Scott, when questioned about the various client relationships at the time Complainant performed the work at the Coastal Sites, gave a very circuitous and opaque explanation that I found unconvincing, *see* TR at 491-92,<sup>15</sup> especially given his aforementioned credibility problems. *See supra* Part V.A.2. Furthermore, the record indicates no steps were taken by Mr. Scott to inform Complainant of such an alleged changed relationship at the Ranch until June 2008, when he directed her to begin sending invoices for her work there to Mr. Martson of Tonkon Torp. TR at 519-20. Ms. Berri and Ms. Skiles also offered testimony regarding Respondent's client relationships at the time of Complainant's work at the Coastal Sites, although neither of them conducted an independent inquiry of the evidence supporting such a relationship; instead, both chose to rely on the representations made by others about such a relationship. TR at 356-57, 434-35.

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<sup>15</sup> In response to a question from Respondent's counsel, Mr. Scott at the hearing characterized Respondent's client relationships at the time Complainant performed her work at the Coastal Sites as follows:

Basically, what I recounted was that, you know, we had a contract with SMAF for doing work at [the Ranch], that the ultimate client was [DBW], they were the responsible party at the site, that we also did this other work for [Anchor], who was retained by Tonkon Torp, the attorneys for [DBW], and that that work was distinctly separate, physically separate, and with different employees, and it was a – you know, it was, in my mind, a very separated, single-work activity event, and that – you know, it appeared to me that she had – that [Complainant] had maybe misunderstood that, and so I – you know, I expected her, if there was any question about any of this, given her experience – professional experience – to come forward and ask me questions about that. But that [sic] never came forward.

TR at 491-92. Despite having such a clear view of these relationships in his own mind, Mr. Scott thought it insignificant to inform Complainant of any billing changes, *id.* at 462, noting that it was “not typically [Complainant's] role to pay too much attention to, necessarily, the details of who is getting the bills.” *Id.* at 538-39.

I find Ms. Berri's failure independently to investigate such a relationship particularly troubling given her role as a Principal within Respondent's organizational structure and Respondent's own reliance on its employee materials as a basis to fault Complainant for her alleged breach of confidentiality. As a means to demonstrate the responsibilities and duties entrusted to Complainant as an employee, Respondent directs my attention to its confidentiality policy and quality assurance guide, *see* CX 1, 3, noting Complainant's signed agreement to adhere to such policies. EX 102 at 301-02. Respondent argues Complainant breached policies contained within these materials when she handed over her timesheet to Mr. Kitchenmaster, which in turn led to her termination. ALJX 13 at 28. The quality assurance guide, however, also designates to various employees duties and responsibilities. *See generally* CX 1 at 294-96. The responsibility of "accessing and approval of project documents *and reviewing and signing contracts and/or sub-contracts*" is designated to Principals-in-Charge, *id.* at 295 (emphasis added), a position which Ms. Berri testified she holds within Respondent's organizational structure. TR at 379. The quality assurance guide also designates responsibilities to Project Managers, CX 1 at 295-96, a position held by Mr. Scott. *Id.* at 443-44; *see also* TR at 384. The Project Manager description includes the responsibility of "Contract/Sub-contract Management," CX 1 at 296, but makes no mention of the Project Manager's "approving" or "signing" such contracts.

Respondent fails to reconcile the division of such responsibilities with the testimony of Ms. Berri, who had absolutely no knowledge of Respondent's relationship with various clients other than that gained from Mr. Scott. TR at 356-57, 366. Respondent may not, on one hand, point to its employee materials as a means to impute upon Complainant a duty to maintain confidential relationships while, on the other, evidence failure of its other employees to adhere to their responsibilities with respect to the creation of such relationships as indicated by the same materials. Such reasoning is contradictory and clearly pretextual, and I find it does not demonstrate a nonretaliatory reason for Complainant's termination.

Ms. Skiles and Ms. Berri also emphasized in their February 10, 2009 meeting with Complainant her inability to communicate adequately with her Project Managers as an additional nonretaliatory basis for her termination. *See id.* at 428-29; EX 113 at 181-82. I find, however, that this purported second reason for Complainant's termination was also pretextual. When questioned by me at the hearing about specific examples of Complainant's "lack of communication," Ms. Skiles admitted "the most concerning" instance of this type of behavior was the above incident in which Complainant divulged confidential information. TR at 436.

Ms. Skiles also cited an incident in which Ulysses Cooley, another employee at Respondent, cited Complainant's lack of communication skills. *Id.* at 436. Mr. Cooley's comment to which Ms. Skiles referred is contained in one of Complainant's performance reviews that Complainant testified occurred "shortly after the event in June" 2008 whereby Complainant allowed DEQ employees onto the Ranch to perform sampling. *See id.* at 132; CX 25. In this review, Mr. Cooley notes that Complainant's "[c]ommunication to [the] Project Manager could improve a bit," but otherwise characterized Complainant's work performance as far above average, using the word "excellent" to describe the quality of Complainant's work four times in a single page. CX 25 at 1.

Ms. Skiles did not elaborate at hearing on other circumstances that may have contributed to this comment in Complainant's performance review. I find Mr. Scott, with no prior experience supervising subordinates, lacked communication and supervisory skills as he freely admitted he did not consider himself Complainant's supervisor. TR at 498. This failure to articulate a foundation for this second alleged nonretaliatory reason for Complainant's termination makes me doubt the veracity of such a basis, and I also find this constitutes little more than pretext.

I also find unconvincing Respondent's argument that Mr. Scott's receipt of a subpoena in light of his continual employment with Respondent somehow demonstrates Complainant's termination was unrelated to her engaging in this same form of protected activity. While Mr. Scott did testify to receipt of a subpoena on the same date as Complainant,<sup>16</sup> *id.* at 476, Respondent presents no evidence he was subjected to the same pressures as Complainant following this date. Although the record does not contain evidence of any meeting between Complainant and Ms. Berri to discuss her subpoena after its receipt prior to February 4, 2009, Complainant did email Ms. Berri on February 2, 2009. In this email, she informed Ms. Berri that she would "not stay[] around to talk about the subpoena." CX 8 at 3515. Complainant testified to conversations on this date with both Mr. Scott and Ms. Berri in which they attempted to pressure her to discuss the subpoena. TR at 103-04. Complainant also received an email from Ms. Berri on February 10, 2009, in which she stated to Complainant, "Please Please Please [sic] don't talk to anyone outside of [Respondent], OK? This is not being secretive, trust me. I have grave concerns about how you've handled all of this and don't want it to get worse, for any of us, OK?" CX 11 at 92. Although such correspondence and conversations do not constitute adverse action, they do demonstrate Complainant was subjected to pressure from Respondent as a result of her receipt of the subpoena and her refusal to discuss it with Mr. Scott and Ms. Berri. There is no evidence in the record, however, that Mr. Scott received similar pressure from his superiors. The fact that Complainant and Mr. Scott received identical subpoenas cannot explain the disparate treatment she received in the following days, especially given the pressure applied to Complainant after she refused to cooperate with Mr. Scott's and Ms. Berri's request that she discuss with them the subpoena. I therefore find Mr. Scott's receipt of a subpoena also does not constitute a basis demonstrating Complainant's employment would have been terminated despite her engaging in protected activity.

In sum, I find none of the theories set forth by Respondent demonstrate by a preponderance of the evidence that it would have terminated Complainant for nonretaliatory reasons regardless of her having engaged in protected activities. All of the arguments set forth by Respondent – including Complainant's alleged divulging of confidential information and lack of communication with her Project Manager in addition to Mr. Scott's receipt of a similar subpoena – amount to no more than pretext. Consequently, I find Respondent has failed to rebut

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<sup>16</sup> Respondent also argues it had knowledge that Complainant *was going to be* subpoenaed months before the actual occurrence. ALJX 13 at 27-28. This assertion, however, again rests on the cryptic and incredible testimony of Mr. Scott, who, when asked how he knew grand jury subpoenas would be issued, responded as follows: "I don't remember that anyone told me definitively that they were going to be issued. It was a suspicion based on all of the activity that was going on, discussion amongst various people. But I don't remember. It was common knowledge." TR at 531. I refuse to find Respondent had knowledge that Complainant would be subpoenaed based on what amounts to little more than Mr. Scott's hunch.

the causal connection proven by Complainant between her termination and engaging in the aforementioned protected activities.

#### 5. Conclusion Regarding the Substantive Analysis of the Elements of Complainant's Whistleblower Claim

Complainant has successfully proven by a preponderance of the evidence that she engaged in protected activity and that Respondent was aware of this activity and terminated her employment as a consequence of it. Although Respondent is afforded the opportunity to defeat the causal connection by demonstrating by a preponderance of the evidence that it would have taken similar action in the absence of such protected activity, *see* 29 C.F.R. § 24.109(b), it has failed to do so in this case. Consequently, Complainant has successfully proven that Respondent violated CERCLA, the TSCA, and the SWDA in terminating her employment. *Id.* § 24.109(a). I therefore now turn to address the issue of damages.

#### D. Damages

Complainant seeks damages in several forms for Respondent's violation of her rights under CERCLA, the TSCA, and the SWDA. These damages include the following: (1) \$58,129 in back pay and benefits; (2) \$51,671 in front pay and benefits or reinstatement in her former position with Respondent; (3) \$14,073.96 in incidental damages; (4) \$100,000 in compensatory damages; (5) an unspecified amount of exemplary damages; and (6) an award of reasonable attorney's fees and costs. *See* ALJX 5 at 5; ALJX 12 at 26. I address each of these categories of damages and costs below.

##### 1. Back Pay and Benefits

Complainant seeks \$58,129 in back pay and associated benefits. This amount is based upon calculations and wage information to which Respondent stipulated at hearing it does not dispute. TR at 148-49; *see also* ALJX 13 at 29. Such damages are allowed under CERCLA, the TSCA, and the SWDA. *See* 15 U.S.C. § 2622(b)(2)(B) (stating damages for violation of the TSCA's employee protection provision include "compensation (including back pay)"); 42 U.S.C. § 6971(b) (noting damages under the SWDA "include[], but [are] not limited to, the rehiring or reinstatement of the employee or representative of employees to his former position with compensation"); 42 U.S.C. § 9610(b) (same with respect to CERCLA); 29 C.F.R. § 24.109(d)(1) (allowing for "compensation (including back pay)" for violations of environmental acts). Consequently, I find Complainant is entitled to \$58,129 in back pay and associated benefits.

##### 2. Front Pay and Benefits or Reinstatement

Complainant also seeks \$51,671 in front pay and associated benefits or reinstatement in her former position with Respondent. ALJX 5 at 5; ALJX 12 at 26; ALJX 14 at 21. This amount of proposed front pay and benefits is based on what Complainant argues constitutes the difference between what would have been her earnings and benefits through 2023 with Respondent minus her expected earnings and benefits with her present employer through 2023, discounted to present value. ALJX 5 at 7-9. Respondent, however, argues evidence presented at

hearing demonstrates the amount of work associated with Complainant's position at Respondent was waning prior to her termination. ALJX 13 at 29. Consequently, Respondent asserts Complainant should be entitled to no more than two years of such front pay and associated benefits, if anything. *Id.* Neither Respondent nor Complainant addresses the appropriateness of reinstatement, although Complainant does request this as a remedy.<sup>17</sup> See ALJX 5 at 5; ALJX 12 at 26; ALJX 14 at 21. Below I examine the merits of these proposed remedies.

CERCLA, the TSCA, and the SWDA all include reinstatement as a possible remedy within their respective employee protection provisions. See 15 U.S.C. § 2622(b)(2)(B); 42 U.S.C. §§ 2971(b), 9610(b). Only the TSCA, however, *mandates* the remedy of reinstatement if a violation of its employee protection provisions is found to exist. See 15 U.S.C. § 2622(b)(2)(B) (“If in response to a complainant filed . . . the Secretary determines that a violation . . . has occurred, the Secretary *shall* order . . . such person to reinstate the complainant to the complainant’s former position . . . .”) (emphasis added). This coincides with the ARB’s view with respect to other environmental whistleblower provisions that “[r]einstatement is viewed as the default or presumptive remedy in wrongful termination cases . . . .” *Hobby v. Ga. Power Co.*, Nos. 98-166, 98-169, slip op. at 4 (ARB Feb. 9, 2001) (discussing reinstatement with respect to the Energy Reorganization Act). Such a view rests on a belief that reinstating a wronged whistleblower will not only make that person whole, but will also deter future improprieties by an employer found to have previously violated an employee protection provision. *Id.* at 5.

Reinstatement may not always be a viable remedy, however. A review of relevant case law reveals courts have found reinstatement to be improper in four scenarios: (1) when an employee would be impaired from again performing in the reinstated position due to a medical condition that is causally related to the retaliatory action taken by the employer, *Michaud v. BSP Transp., Inc.*, No. 97-113, slip op. at 5 (ARB Oct. 9, 1997); (2) when the relationship between the parties is so hostile as to make reinstatement unfeasible, *Creekmore v. ABB Power Sys. Energy Servs., Inc.*, No. 93-ERA-24, slip op. at 7 (Sec’y Feb. 14, 1996); (3) when the employee’s former position has been eliminated, *Cassino v. Reichhold Chems.*, 817 F.2d 1338, 1346 (9th Cir. 1987); and (4) when the employer is no longer in business at the time a decision is rendered. *Kalkunte v. DVI Fin. Servs., Inc.*, No. 2004-SOX-00056, slip op. at 54 (ALJ July 18, 2005). Consequently, before ordering reinstatement as a remedy, I must examine the circumstances presented in the record to determine if it is appropriate. Complainant does not allege – nor does the record support – the existence of any sort of medical condition due to Respondent’s retaliatory termination of her employment.<sup>18</sup> Furthermore, no evidence exists that Respondent is no longer in business. Therefore, I examine below only the level of hostility demonstrated in the record between Complainant and Respondent as well as whether a suitable position exists in which Complainant could be reinstated.

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<sup>17</sup> Respondent’s failure to set forth an argument against the remedy of reinstatement does not bar its imposition given Complainant’s listing of such remedy in her prehearing statement. See ALJX 5 at 5; *EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 905 (9th Cir. 1994).

<sup>18</sup> Complainant does argue that certain negative emotions and effects of her termination justify the award of compensatory damages. See ALJX 12 at 27-28. While these do not amount to a medical condition rising to a level that would bar reinstatement as a remedy, they are discussed, *infra*, in conjunction with Complainant’s request for a compensatory damage award.

a. Level of Hostility Between Complainant and Others Employed by Respondent

While a high level of hostility may present a barrier to the remedy of reinstatement, *see Cassino*, 817 F.2d at 1346; *Thorne v. City of El Segundo*, 802 F.2d 1131, 1137 (9th Cir. 1986); *Fadhl v. City & County of S.F.*, 741 F.2d 1163, 1167 (9th Cir. 1984); *Creekmore*, No. 93-ERA-24, slip op. at 5, I find such hostility does not exist in this case. This is due to the relatively large number of persons employed by Respondent, the limited number of actors involved in bringing about Complainant's termination, and the short duration during which the events leading to Complainant's termination occurred. Respondent has approximately one-hundred-and-thirty employees, TR at 337, three of whom Ms. Berri testified at hearing were employed at Respondent's office in Bend, Oregon, where Complainant worked. *Id.* at 338. The record demonstrates only four employees – Ms. Berri, Ms. Skiles, Mr. Scott, and Mr. Petti – were involved in the investigation and termination of Complainant's employment. *See supra* Part IV.E. Of these four actors, Complainant was involved on a daily basis with only Mr. Scott, *see id.* at 337, with whom she characterized her working relationship as “very professional.” *Id.* at 139. I find the relatively short interval that elapsed between when Respondent first learned of Complainant's having engaged in protected activity on January 23, 2009 and her termination on February 10, 2009, while demonstrating a causal connection between such events, also demonstrates the nonexistence of the type of “dysfunctional working environment,” *see Nolan v. AC Express*, No. 92-STA-37, slip op. at 17 (ALJ Sept. 19, 1994), or “enmity between the parties,” *Michaud*, No. 97-113, slip op. at 6, that would make the remedy of reinstatement inappropriate. Therefore, I find that the level of hostility that may exist residually as a result of Complainant's retaliatory termination does not rise so far as to justify nonimposition of the remedy of reinstatement in this case. *See, e.g., Rosario-Torres v. Hernandez-Colon*, 889 F.2d 314, 322-23 (1st Cir. 1989) (“[R]outinely ‘incidental’ burdens, in their accustomed manifestations, are foreseeable sequelae of defendant's wrongdoing, and usually insufficient, without more, to tip the scales against reinstatement . . . .”); *Creekmore*, No. 93-ERA-24, slip op. at 7.

b. Existence of a Suitable Position for Reinstatement

While the nonexistence of a suitable position for an employee's reinstatement may also serve as a bar to the imposition of such a remedy, *see Cassino*, 817 F.2d at 1346, I again find such a scenario does not exist in this case. Although Respondent makes no explicit argument stating Complainant's former position has been eliminated, it does direct my attention in its posthearing brief to testimony of Ms. Berri demonstrating work in Respondent's Bend office “was slowing” prior to Respondent's gaining knowledge of Complainant's engaging in protected activities or her subsequent termination. *See ALJX 13* at 29. Ms. Berri testified to reducing Complainant's work hours prior to learning of Complainant's protected activity. TR at 398-99. Although I doubt somewhat the credibility of Ms. Berri's testimony, this particular instance is supported by an email sent by Ms. Berri on January 13, 2009, EX 117 at 2387 – ten days before Respondent first learned of Complainant's engaging in protected activity. *See supra* Part V.C.4.a. Ms. Berri testified this reduction in hours was due to the slowing of business in Respondent's Bend office. TR at 398. Respondent also argues in its posthearing brief that “no one has been hired to replace” Complainant at its Bend office. *ALJX 13* at 29. However, the

portion of the transcript cited by Respondent to support this assertion contains no statement indicating Complainant's former position remains vacant. *See* TR at 338.

Even were I to accept unconditionally Respondent's assertions that Complainant's position was being reduced prior to her termination and has remained vacant since that time, I find such circumstances would not serve as a bar to her reinstatement. In determining whether a suitable position for reinstatement exists, courts have directed that such an inquiry must focus on "the employee's former position . . . or a comparable position." *Hobby*, Nos. 98-166, 98-169, slip op. at 9 (citing *Diaz-Robainas v. Fla. Power & Light Co.*, No. 92-ERA-10 (Sec'y Jan. 19, 1996); *Sprague v. Am. Nuclear Res., Inc.*, No. 92-ERA-37 (Sec'y Dec. 1, 1994)). A "comparable position" means one that is acceptable to the employee and "substantially equivalent . . . in terms of duties, functions, responsibilities, working conditions, and benefits" to his or her former position. *DeFord v. TVA*, No. 81-ERA-1 (Sec'y Mar. 4, 1981), *aff'd sub nom. DeFord v. Sec'y of Labor*, 700 F.2d 281 (6th Cir. 1983); *Agbe v. Tex. S. Univ.*, No. 97-ERA-13 (ALJ Jan. 23, 1998), *adopted* No. 90-072 (ARB July 27, 1999). Respondent in this case has failed to demonstrate the nonexistence of such a suitable comparable position. While the record may demonstrate work in the Bend office was waning, there is no indication that Complainant was then the only person performing environmental remediation and geotechnical work within Respondent's one-hundred-and-thirty-person organizational structure. The record further indicates Complainant was willing and flexible to travel to other areas of the state or Oregon to perform such work, attributes for which she received praise from Ms. Berri. EX 117 at 2387 (Ms. Berri states to Complainant in an email, "We'll continue to push you with other offices and with geotech, I appreciate your willingness to travel, that will help."). Such circumstances do not demonstrate the absence of a suitable position for reinstatement.

c. Conclusion Regarding Reinstatement

Although several scenarios may make reinstatement an inappropriate remedy in the whistleblower cases, none are present in Complainant's case. The record demonstrates that little hostility existed prior to the three weeks of events leading to Complainant's termination, and only a small number of people were involved in these events. Although reinstatement may create a situation whereby Complainant would again work under Mr. Scott's supervision, the record indicates she continues to hold him in high regard. TR at 139. Also, there is no evidence of the nonexistence of a comparable position currently within Respondent's organizational structure to that held by Complainant prior to her termination. Consequently, I find Complainant's reinstatement to a position within Respondent's organizational structure with equivalent duties, functions, responsibilities, working conditions, and benefits to her previously held position is an appropriate remedy in this case.<sup>19</sup> Additionally, Respondent shall reimburse Complainant for all expenses reasonably related to her relocation from Richmond, Virginia, to Bend, Oregon, as a result of such reinstatement.

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<sup>19</sup> I do not consider Complainant's request for front pay and associated benefits, which would be an alternative remedy available only if reinstatement were found to be inappropriate. *See Hobby*, Nos. 98-166, 98-169, slip op. at 6; *Jones v. EG&G Def. Materials, Inc.*, No. 97-129, slip op. at 18 (ARB Sept. 29, 1998).

### 3. Incidental Damages

Complainant seeks \$14,073.96 in incidental damages. These damages include various licensing fees and moving expenses associated with Complainant's relocation first from Bend, Oregon, to Molino, Oregon, followed by a subsequent relocation from Molino, Oregon, to Richmond, Virginia. ALJX 5 at 9-11. Respondent does not dispute this amount of damages, but instead insists such damages are unavailable under the SWDA. ALJX 13 at 30. Respondent offers no argument as to the availability of such damages under either CERCLA or the TSCA.

Incidental damages are those damages which are "reasonably associated with or related to actual damages." *Black's Law Dictionary* 417 (8th ed. 2004). Despite Respondent's argument to the contrary, the SWDA, the TSCA, and CERCLA contain no prohibition against the award of such damages. The SWDA and CERCLA in particular allow, in the case of a found violation, for whatever remedies may be "deem[ed] appropriate, including, *but not limited to*" reinstatement. 42 U.S.C. §§ 6971(b), 9610(b) (emphasis added). Although the TSCA does not contain this exact language, it does contain a similar provision for the shaping of relief generally for its violation, allowing for the ordering of "the person who committed such violation to take affirmative action to abate the violation." 15 U.S.C. § 2622(b)(2)(B). In light of no such limiting language and the failure of Respondent to direct me to any other authority to limit incidental damages other than the language of the SWDA itself, I find such damages are also appropriate in this case. Furthermore, I find reasonable the incidental damages requested by Complainant, which are supported by documentation, *see generally* CX 33, and the amount of which are not disputed by Respondent. TR at 6-7, 151. Consequently, I award Complainant her requested amount of \$14,073.96 in incidental damages.

### 4. Compensatory Damages

Complainant seeks \$100,000 in compensatory damages. Respondent again challenges such damages only on the basis that they are allegedly not allowed under the SWDA. ALJX 13 at 30. Again, however, Respondent sets forth no argument against such damages with respect to either the TSCA or CERCLA.

Compensatory damages are a remedy provided to a successful complainant "not only for direct pecuniary loss, but also for such harms as impairment of reputation, personal humiliation, and mental anguish and suffering." *Hobby*, Nos. 98-166, 98-169, slip op. at 25 (citing *Martin v. Dep't of Army*, No. 96-131, slip op. at 17 (ARB July 30, 1999)). For an award of such damages, a complainant bears the burden of demonstrating by means of "competent evidence" the existence of any alleged subjective harm. *Id.* (citing *Carey v. Piphus*, 435 U.S. 247, 264 (1978)). Such an award, however, does not require professional medical testimony or evidence, but instead may be made solely upon the basis of a complainant's testimony regarding the aforementioned types of harm and suffering. *Creekmore*, No. 93-ERA-24, slip op. at 11 (awarding \$40,000 in compensatory damages based on complainant's credible testimony regarding embarrassment related to layoff, relocation, and panic related to early withdrawal of retirement funds); *Crow v. Noble Roman's, Inc.*, No. 95-CAA-8, slip op. at 4 (Sec'y Feb. 26, 1996). Finally, compensatory damages, while sought by Complainant in this instance, are

mandatory under the TSCA. 42 U.S.C. § 2622(b)(2)(B); *see also Jones*, No. 97-129, slip op. at 18.

I find in this case that the record, including Complainant's own credible testimony, supports an award of \$100,000 in compensatory damages. Complainant testified at the hearing that her termination from employment with Respondent was "life-altering," taking a harsh toll on her professional reputation. TR at 144-45. Given Complainant's aforementioned excellent performance review, *see generally* CX 25, I find credible such an assertion. Complainant also became visibly and genuinely upset at hearing when discussing her termination. Complainant further noted she now performs her work for her new employer with a certain amount paranoia that she attributes to her termination from Respondent, TR at 154, an assertion I also find credible. Although Complainant initially found work in Oregon following her termination from Respondent, she was ultimately forced to accept a job in Richmond, Virginia, a move that forced her to leave behind her cat as well as friends and "a whole family network." *Id.* at 151. Complainant further noted cultural differences between Oregon, where she had lived since 1982, *id.* at 41, and Virginia – citing, as but one example, lack of recycling in the latter location – that have also made difficult the transition to her new job and life in Virginia. *Id.* at 151.

The above evidence and testimony merits the compensatory damages award of \$100,000 sought by Complainant in this case. Complainant credibly testified at the hearing to genuine mental anguish and damage to her professional reputation as a result of her termination by Respondent, including that associated with having left her support network to move across the country in order to continue working in her chosen field. The ARB has noted that prior awards may be looked to in determining the adequacy of compensatory damages. *See Leveille v. N.Y. Air Nat'l Guard*, No. 98-079, slip op. at 6 (ARB Oct. 25, 1999). In this instance, I find *Creekmore* instructive. There, the Deputy Secretary found appropriate in 1996 a \$40,000 compensatory damages award based the complainant's "embarrassment" associated with being laid off, his "emotional turmoil" due to having to take on temporary consulting work and eventually relocate, and panic associated with having to withdraw retirement savings and thereby incur unexpected tax consequences. No. 93-ERA-24, slip op. at 11. Despite such an award, the complainant in *Creekmore* additionally received a severance package of nine months of salary, *id.* at 3, a benefit not extended to Complainant in this case. Given such circumstances, I find an award here of \$100,000 is appropriate.

## 5. Exemplary Damages

Complainant, in her prehearing statement and posthearing brief, seeks an unspecified amount exemplary damages. *See* ALJX 5 at 5; ALJX 12 at 28. As it did in resisting awards of incidental and compensatory damages, Respondent again argues that such damages are unavailable under the SWDA. *See* ALJX 13 at 30. However, Respondent further asserts in this instance that, should I find the TSCA applicable, such damages should nevertheless be denied as Complainant's termination did not arise via conduct supporting an award of exemplary damages. *See id.* In her reply brief, Complainant states for the first time her desired amount of exemplary damages is \$75,000. ALJX 14 at 24-25.

The TSCA allows – but does not mandate – the award of exemplary damages. *See* 15 U.S.C. § 2622(b)(2)(B). Such damages are not awarded as a matter of right, but instead only when the conduct of a defendant or respondent “manifests ‘reckless or callous disregard’ for the rights of others” on the level of “‘gross negligence or actual malice.’” *Prospectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985) (quoting *Smith v. Wade*, 461 U.S. 30, 51 (1983)). The purpose of such a damages award, however, is to punish or send a message to the wrongdoer; consequently, such damages should not be awarded when a defendant or respondent simply exercises indifference to – but not intentional disregard of – an employee’s rights. *See Jones*, No. 97-129, slip op. at 24.

Complainant here argues *Coupar v. Federal Prison Industries*, No. 92-TSC-06 (ALJ June 11, 1992), and *Johnson v. Old Dominion Security*, No. 86-CAA-3 (Sec’y May 21, 1991), support an award of exemplary damages. I find these cases wholly unpersuasive. While the complainant in *Coupar* was at some point awarded exemplary damages, the Secretary and Ninth Circuit both overturned such an award, finding the complainant was not an employee within the meaning of the Clean Air Act or the TSCA. *Coupar v. U.S. Dep’t of Labor*, 105 F.3d 1263, 1264-67 (9th Cir. 1997). Furthermore, the ALJ, in awarding exemplary damages, found the respondent engaged in the “obstruction of justice by refusing to obey subpoenas and attempting . . . to prevent the hearing from taking place.” *Coupar*, 92-TSC-06, slip op. at 35-36. Such conduct is absent in this case. *Johnson* did not result in the award of exemplary damages. There, the Secretary instead found the employer’s behavior, while resulting in a violation of the Clean Air Act, was insufficient to support an award of exemplary damages. *Johnson*, No. 86-CAA-3, slip op. at 17. Neither of these cases ultimately resulted in an award of exemplary damages, nor do they discuss facts or circumstances similar to Complainant’s case that would support such an award.

I find Respondent’s behavior in this case, while actionable, constitutes only the sort of “bare statutory violation,” *id.*, that will not support an award of exemplary damages. While Respondent did in fact terminate Complainant’s employment as a result of her engaging in protected activity, it did not evidence malice or gross negligence in doing so. Furthermore, a review of cases in which exemplary damages were awarded reveals conduct far more egregious than that suffered by Complainant in this case. *See, e.g., Collins v. Village of Lynchburg*, No. 6-SDW-3, slip op. at 8-9, 17 (ALJ May 8, 2007) (awarding \$20,000 in punitive damages when complainant was terminated by employer with no investigation whatsoever of alleged basis of termination), *overruled on other grounds by* No. 07-079 (ARB Mar. 30, 2009); *Jayco v. Ohio Env’tl. Prot. Agency*, No. 99-CAA-5, slip op. at 101 (ALJ Oct. 2, 2002) (awarding \$45,000 in exemplary damages where malice demonstrated by superior’s retaliatory conduct involved making knowingly unsupported allegations of theft involving complainant to state highway patrol as a means to damage complainant’s reputation); *Erickson v. U.S. Env’tl. Prot. Agency*, 99-CAA-2, slip op. at 73 (ALJ Sept. 24, 2002) (finding appropriate \$225,000 award of exemplary damages where respondent was found to have “permanently transferr[ed] [c]omplainant out of her career field, subjecting her to a hostile working environment, and allowing her to suffer in a position that she was not fully qualified to perform while she attempted to manage personnel who refused to work with her”). In this case, the record demonstrates Complainant, while ultimately terminated by Respondent, was subjected to no more than the regular procedures and

expected immediate discomfort accompanying such an unfortunate decision. Aside from Mr. Scott's verbal warning associated with the June 2008 incident, any hostility that could have been directed at Complainant as a result of her protected activities occurred within a three-week window in late January and early February 2009. Although Complainant did testify to one in-person meeting with Mr. Scott in which she personally felt "threatened," TR at 100, the record is otherwise deplete of the sort of "bad motive of the wrong-doer as exhibited by [its] acts" that supports an award of exemplary damages. *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 538 (1999) (internal citations and emphasis omitted). Consequently, I find an award of exemplary damages is inappropriate in this case.

## VI. Order

Based on the foregoing findings of fact and conclusions of law, it is **ORDERED** that:

1. Respondent shall pay to Complainant \$58,129 in back pay and associated benefits. This amount shall be subject to interest at the rate specified in 26 U.S.C. § 6621(a)(2), compounded quarterly.<sup>20</sup>
2. Respondent shall reinstate Complainant to her former position as geologist in its Bend, Oregon, office. As part of reinstatement, Respondent shall also reimburse Complainant for all expenses reasonably related to her relocation from Richmond, Virginia, to Bend, Oregon, as a result of such reinstatement.
3. Respondent shall pay to Complainant \$14,073.96 in incidental damages.
4. Respondent shall pay to Complainant \$100,000 in compensatory damages.
5. Counsel for Complainant shall within twenty (20) days after service of this Order submit a fully supported application for costs and fees to counsel for Respondent and to the undersigned Administrative Law Judge. Within twenty (20) days thereafter, counsel for Respondent shall provide Complainant's counsel and the undersigned Administrative Law Judge with a written list specifically describing each and every objection to the proposed fees and costs. Within twenty (20) days after receipt of such objections, Complainant's counsel shall verbally discuss each of the objections with counsel for Respondent. If the two counsel disagree on any of the proposed fees or costs, Complainant's counsel shall within fifteen (15) days file a fully documented petition listing those fees and costs which are still in dispute and set forth a statement of Complainant's position regarding such fees and costs. Such petition shall also specifically identify those fees and costs which have not been disputed by counsel for Respondent. Counsel for Respondent shall have fifteen (15) days from the date of service of such application in which to respond. No reply will be permitted unless specifically authorized in advance.

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GERALD M. ETCHINGHAM  
Administrative Law Judge

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<sup>20</sup> See *Doyle v. Hydro Nuclear Servs.*, Nos. 99-041, 99-042, 00-012, slip op. at 18 (ARB May 17, 2000).

**NOTICE OF APPEAL RIGHTS:** To appeal, you must file a Petition for Review (“Petition”) with the Administrative Review Board (“Board”) within ten (10) business days of the date of the administrative law judge’s decision. 29 C.F.R. § 24.110(a). The Board’s address is as follows: Administrative Review Board, U.S. Department of Labor, Room S-5220, 200 Constitution Avenue, NW, Washington, DC 20210. Your Petition is considered filed on the date of its postmark, facsimile transmittal, or e-mail communication; however, if you file it in person, by hand-delivery or other means, it is filed when the Board receives it. *Id.* Your Petition must specifically identify the findings, conclusions, or orders to which you object. *Id.* Generally, you waive any objections you do not raise specifically. *Id.*

At the time you file the Petition with the Board, you must serve it on all parties as well as the Chief Administrative Law Judge, U.S. Department of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8002. *Id.* The Petition must also be served on the Assistant Secretary, Occupational Safety and Health Administration and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, 200 Constitution Avenue, NW, N 2716, Washington, DC 20210. *Id.*

If no Petition is timely filed, the administrative law judge’s decision becomes the final order of the Secretary of Labor pursuant to 29 C.F.R. § 24.109(e). Even if you do file a Petition, the administrative law judge’s decision becomes the final order of the Secretary of Labor unless the Board issues an order within thirty (30) days after the Petition is filed notifying the parties that it has accepted the case for review. *See id.* § 24.110(b).