



In the Matter of:

CATE JENKINS,

COMPLAINANT,

v.

**UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,**

RESPONDENT.

ARB CASE NO. 98-146

ALJ CASE NO. 88-SWD-2

DATE: February 28, 2003

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Richard Condit, Esq., Boulder, Colorado

For the Respondent:

Joanne Hogan, Esq., Environmental Protection Agency, Washington, D.C.

FINAL DECISION AND ORDER

The Complainant asserts that her employer, the United States Environmental Protection Agency (EPA), violated the employee protection (whistleblower) provisions of the Resource Conservation and Recovery Act (RCRA), also known as the Solid Waste Disposal Act (SWDA or "Act"), 42 U.S.C. § 6971 (2000), and other environmental statutes¹ when the EPA allegedly retaliated against her for raising environmental concerns. Following a hearing, the ALJ recommended denial of the Complainant's claims. Recommended Decision and Order, ALJ No. 88-SWD-2 (ALJ July 10, 1998) ((R. D. & O., slip op.)). For the reasons set forth below, we dismiss portions of the complaint on the ground that they were untimely filed, and additionally

¹ Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2000), Clean Air Act (CAA), 42 U.S.C. § 7622 (2000), Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (2000), Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2000), and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (2000). Congress amended the RCRA/SWDA by means of the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, § 222; 98 Stat. 3221, 3251.

affirm the ALJ's recommended findings and rulings denying the complaint as a whole.

BACKGROUND

I. FACTS

We affirm and summarize the ALJ's findings of fact (R. D. & O., slip op. at 3-21) with some additions. The instant action covers periods of Cate Jenkins' employment from 1985 to 1991: 1985 to 1987, when she was assigned to the wood preserving waste listing and worked under the first line supervision of Robert Scarberry; 1988, when she continued other listings work under Scarberry; and 1988 to 1991, when she was reassigned to the immediate supervision of Robert Dellinger and then Michael Petruska.

A. Wood preserving listing; issues/options paper; removal from the project

Jenkins was a GS-13, environmental scientist, who began working for EPA in 1979. She was employed in EPA's Listing Section, Waste Characterization Branch, Characterization and Assessment Division, Office of Solid Waste. R. D. & O., slip op. at 3; Hearing Transcript (T.) 35; Complainant's Exhibit (CX) 1. There, she worked as a Work Assignment Manager (WAM) responsible for listings under the RCRA. R. D. & O., slip op. at 3. Jenkins was a collector of data, technical advisor, and report and regulation writer, but as such, her position description did not establish her as an EPA environmental policymaker. She reported to a Program Manager, Hazardous Waste Definition Program, who "set policy and provide[ed] overall guidance with regard to program direction and funding." CX 1 at 3-4. Her "[c]ompleted work" was expected to be "technically accurate and . . . reviewed [by the Program Manager] for compliance with [EPA] objectives and policy." CX 1 at 4.

Hazardous wastes were subject to RCRA regulation either by chemical or by industry. Listings governed emissions from specific industries. The process of listing waste entailed preparation of an overview document, travel to industry facilities to collect waste samples for chemical analysis, preparation of a risk assessment and Notice of Proposed Rulemaking (NPRM) for publication in the Federal Register, consideration of comments elicited in response to the NPRM, and publication of the final rule. T. 36-38. Jenkins was required to perform these functions with the assistance of EPA outside contractors and EPA internal support groups. WAM responsibilities associated with contractors included documenting contractor activities, methods of work and delivery dates, and directing and monitoring contractor expenditures, deliverables and technical product.

From 1980 until her removal from the project in September 1987, Jenkins served as WAM for the wood preserving waste listing. Wood preserving involves impregnating wood with pesticide formulations to protect against decay and insect attack. Wood preserving formulations include pentachlorophenol, used for telephone poles and fenceposts; creosote, used for marine pilings and railroad ties; and inorganic arsenical/chromate, used for porch, deck and playground equipment lumber. T. 39-40. EPA assigned Jenkins to develop wood preserving

regulations in late 1979, but classified the project as inactive in 1981. Early activity in 1980 included promulgation of an interim final rule, receipt of comments and promulgation of final regulations. CX 15 at 5-7. A HSWA listing deadline of May 8, 1985, caused EPA to reactivate the project during 1984 and 1985. *See* Pub. L. No. 98-616, § 222; 98 Stat. 3221, 3251; CX 15 at 7, 189.

After reactivation and while the wood preserving regulations were being developed, Jenkins lodged various complaints to Congress and to her managers within EPA. Two letters she wrote to Congress in 1986 and 1987 expressed concern about the impact of wood preserving wastes on drinking water. T. 109-10, 1040. Jenkins criticized her managers for meeting in June 1986 and October 1986 with representatives of the Weyerhaeuser Corporation and with other individuals from the wood preserving industry about their proposals for relaxing the regulations to make them more favorable to the industry. R. D. & O., slip op. at 4; T. 70-71, 89, 96; CX 5, 6, 16. She also objected to a November 12, 1986 meeting of both wood preserving and environmental groups as inappropriate, because she believed the regulations should be prepared internally. T. 96; CX 6. When Jenkins learned that Scarberry, chief of the Listings Section, asked EPA contractor Dynamac to prepare an alternate version of the wood preserving regulations that she regarded as too lenient and “illegal” under the Federal Acquisition Regulations (FAR), she wrote a memo on February 13, 1987, to Scarberry and Matthew Straus, the Waste Characterization Branch Chief and her second line supervisor, and a letter to Congress. She asserted that the “proper forum for discussion of listings prior to the first work group review is within the Agency” and claimed that the contractor produced “incompetent and highly biased health summaries” that did not properly evaluate carcinogens or disagreed on how they should be studied. T. 96, 125, 248-49; CX 14 at 2-3. Jenkins’ Congressional complaint charged that Scarberry had given “illegal instructions to my contractor to prepare an alternate, more lenient version of the wood preserving regulations.” T. 125-26.

Scarberry and Straus faulted Jenkins for not bringing the wood preserving listing to completion, citing, in addition to her delay, poor quality writing and her failure to coordinate with EPA contractors and support groups. In 1985 and 1986, Jenkins supervised data collection and preparation of the regulatory package and supporting documentation. T. 63, 66. She submitted a draft wood preserving listing background paper on June 23, 1986, although the original deadline was December 20, 1985. T. 1840; CX 11, 65 at 2. Following Scarberry’s review, Strauss wrote comments and suggested revisions on the text. T. 75-76; CX 11. On December 1, 1986, the Complainant committed to having a re-worked draft completed “in another two weeks or so” (CX 13 at 3), but the revisions were not back to the work group until early February 1987. T. 1846. Although working with EPA contractors was one of Jenkins’ functions as WAM, Scarberry dealt with Dynamac himself, because he contended that Jenkins used the contractor for clerical work rather than as a source for information on toxic constituents. R. D. & O., slip op. at 5; T. 1845, 1850.

Jenkins’ draft wood preserving regulations were finally sent to the EPA work group for review on February 19, 1987. R. D. & O., slip op. at 5; T. 2094; CX 15. The work group had substantial comments, but Jenkins did not respond to them in writing until May 5, 1987. R. D. & O., slip op. at 5; CX 27, 27-B. At trial, Scarberry described Jenkins’ responses as “irrelevant or

incomplete.” T. 1849. Consequently, Scarberry determined that the next step in the development of the regulations would be for Jenkins to write an issues paper for senior management’s use in considering various options regarding their scope and content. On May 29, 1997, Scarberry informed Jenkins in a memo that the issues/options paper should present “the issues as well as the pros and cons . . . as objectively as possible; no recommendations should be made at this time.” CX 29. Scarberry expected the memo in one or two weeks (T. 1852); however, the Complainant did not have it ready until June 24, 1987. Her draft generated many editorial criticisms, and notably omitted discussion of “stigmatization.” CX 30. Management considered “stigmatization” an important topic, because labeling dioxin wastes “acutely hazardous” might so “stigmatize” them that waste disposal facilities would refuse them. R. D. & O., slip op. at 6; T. 146-48, 1853.

In July 1987, the Complainant protested inclusion of “stigmatization” in a redraft of the issues/options paper and questioned the legality of surveying off-site waste disposal facilities to see how many accepted wood preserving/surface protection wastes. CX 32 at 4-5. Jenkins’ position was that protection of human health and the environment were the only relevant considerations, and that discussion of stigmatization and the capacity (*i.e.*, willingness) of sites to accept acutely hazardous wastes was “illegal.” CX 32 at 9-10, 33 at 2-3. Jenkins submitted a second draft of the issues/options paper on August 6, 1987. CX 34. Straus’ note to Scarberry on the paper said, “[I]t is very much biased. IT NEEDS FAIR ANALYSIS. It needs to be done and get out.” CX 34 at 23 (emphasis in original). Jenkins refused to complete the issues/options paper as assigned, and instead insisted on obtaining an opinion from the EPA office of General Counsel on the legality of including a discussion of stigmatization. CX 33 at 2. Her third line supervisor, Characterization and Assessment Division Director, Sylvia Lowrance, rejected the idea as “silly:”

[M]erely putting in . . . a policy options paper, the issue [of stigmatization] that had been raised . . . was a way to get it to senior managers who have a right to know the facts and the issues that have been raised in a rule-making. . . . [O]ur rule-making as set up in the agency involves a final concurrence from the Office of General Counsel. It’s at that time that the legality of the particular options are ultimately arbitrated.

R. D. & O., slip op. at 6-8; T. 1710-11; CX 38, 39.

On September 2, 1987, Scarberry reminded Jenkins that the purpose of the options paper was to inform “Agency decision makers” of “any significant consequences that may result from our regulatory actions.” CX 42. “It is your responsibility to prepare the technical supporting data for this regulatory effort in an objective and scientific manner, not to make policy and legal decisions that may censor important issues.” CX 42. Scarberry removed Jenkins from the wood preserving options paper on September 3, 1987. CX 43. He told her the issues/options paper was poorly written and inadequately addressed the stigma and disposal issues and that she refused to make changes that would make it of “acceptable quality for senior management,” thereby delaying the project. CX 43. After her removal from the options paper, Jenkins

protested to Scarberry that “all of your and Matt’s [Straus’] comments have consistently recommended less stringent options” CX 44 at 6. The Complainant was removed from the wood preserving listing itself on September 21, 1987. T. 349.

B. Denial of within-grade increase; unsatisfactory performance rating; individual development plan; upgrade of rating with resolution of grievance

As a consequence of her poor performance on the wood preserving listing, the Complainant was denied a step increase within her GS-13 grade, which required that she have performed at an acceptable level of competence for two consecutive fiscal years ending with September 30, 1987. T. 1859-60. Although the circumstances under which a within-grade increase form certifying acceptable competence for Jenkins for the 1986-1987 fiscal years was submitted to the administrative office are unclear,² Scarberry did not intend to give her an acceptable rating, and, when the error was discovered, the form was corrected and the within-grade increase was delayed. R. D. & O., slip op. at 9-10; T. 364-66, 1857-61. In a memo dated November 4, 1987 Scarberry explained to Jenkins that the within-grade increase was denied because her performance, including a 26-month delay on the wood preserving listing, was unacceptable. CX 65.

Because the wood preserving listing constituted the bulk of Jenkins’ assignments for fiscal 1987 (the balance was responding to official correspondence, including Freedom of Information Act (FOIA) requests, and completion of other listings), she was also given an “unsatisfactory” performance evaluation for that year. Scarberry’s November 12, 1987 comments on Jenkins’ performance appraisal referred, among other things, to her poor quality work and missed deadlines. CX 66 at 6. As a result of this unsatisfactory rating, EPA personnel policy mandated that Jenkins demonstrate her continued fitness to be a federal employee through successful completion of an Individual Development Plan (IDP). R. D. & O., slip op. at 12-13, 33. In Jenkins’ draft IDP dated December 9, 1987, she proposed in part, that she would, “Provide management with a very rough, probably misspelled, ungrammatical draft of what the simple, three-page amendment [to the spent solvents exemptions] will look like.” Management found this first draft of the IDP “very bad and not acceptable.” T. 1866. Because the second attempt was also deemed to be of poor quality, management prepared the plan for Jenkins. R. D. & O., slip op. at 12; T. 1866-67; CX 72, 73. She argued she was subject to the IDP from November 1987 to June 1988, although the record shows that Jenkins was on an IDP only from December 2, 1987 to January 31, 1988. R. D. & O., slip op. at 12; CX 72. Under the IDP, her assignments were inorganic pigments and methyl bromide listings and a solvents exemption project.

On December 1, 1987, Jenkins filed a 65-page request for reconsideration of the denial of the within-grade increase performance evaluation with Strauss, as Acting Deputy Director of the

² In an affidavit, Scarberry speculated that Jenkins had forged his signature and submitted it to the administrative office (T. 1969-70, 77); however, at trial he acknowledged signing the form, but testified that it remained in his desk or briefcase. T. 1856-60, 1976. How it was delivered to the administrative office remains unexplained.

Characterization and Assessment Division. CX 80. She sent copies of her request to the House Oversight and Investigations Committee and several United States Congressmen. CX 80 at 63-64. On December 12, 1987, Jenkins filed a formal grievance about the denial of the within-grade increase and the unsatisfactory rating. CX 83-C. On January 7, 1988, Jenkins submitted an EEO complaint against Scarberry for sexual harassment for a comment about her smile. The complaint was later dismissed. R. D. & O. slip op. at 13. On January 4, 1988, Scarberry denied Jenkins' requests for reconsideration and correction of his November 4, 1987 critique of her work. CX 81. Then, in a January 27, 1988 memo to Lowrance, Jenkins accused Scarberry of knowing destruction of the record of successful performance in support of her within-grade salary increase, and the creation of two fraudulent documents that she asserted he placed in her personnel record. CX 74 at 1, 2-4. Jenkins declared him "not fit for the responsibilities entrusted to him . . . for the listing of toxic wastes as hazardous." CX 74 at 5. In the same memo, Jenkins claimed certain EPA managers were "willing to distort the record which I assembled conscientiously." CX 74 at 5. Jenkins requested that EPA's Office of Inspector General (IG) investigate her allegations of willful falsification of her official personnel record, charges that the IG subsequently dismissed. T. 2050, 2054-58; CX 75, 76.

On February 12, 1988, Lowrance at first denied Jenkins' request that she reevaluate Jenkins' grievance as her third line supervisor. CX 83. Lowrance later reconsidered this denial because she was leaving her position and she wanted to bring those issues to closure ("in order that all parties can focus on the important work our Division has to achieve in Fiscal Year 1988"), and not because she had actually changed her mind on the merits. T. 1716; CX 83-A. Accordingly, on March 11, 1988, Lowrance granted Jenkins the relief she sought; namely she directed that her annual performance rating be changed to "satisfactory;"³ that individual ratings for critical job elements be raised to "satisfactory;" that her within-in grade salary increase be granted with back pay to the date of denial; and that documents related to her previously "unsatisfactory" performance be removed from her official personnel folder. CX 83-A.

Jenkins was dissatisfied with this disposition, characterizing as "obscene" Lowrance's explanation that she had resolved the grievance to clean the slate for Devereaux Barnes, who was coming in to replace her as Director of the Characterization and Assessment Division. CX 83-B at 1. Jenkins stated that she would continue to seek vindication by a finding of "falsification of my personnel record [,] illegal removal of [personnel] documents, [and] creation of fictitious [personnel] documents," for resolution "through the criminal investigation process," and for "[r]edress of the defamation of character, pain and suffering caused by the wrongful personnel actions."⁴ CX 83-B at 1-2.

³ Lowrance, Jenkins and other witnesses occasionally use "satisfactory," although the actual classification in the performance appraisals is "fully successful."

⁴ EPA argues that affording Jenkins relief when it granted her grievance in March 1988 rendered portions of her complaint that overlapped with the grievance moot. Respondent's ARB Brief at 31-33. The Secretary and the ARB have adopted principles set forth in *McDonald v. City of West Branch, Michigan*, 466 U.S. 284 (1984), *Barrentine v. Arkansas-Best Freight Sys.*, 450 U.S. 728 (1981) and *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), for use under the

C. Reassignment from Scarberry to Dellinger, continuation of listings assignments

Jenkins' EEO complaint against Scarberry for sexual harassment was one of the reasons Deveraux Barnes, the new division director, transferred Jenkins from Scarberry's Listings Section to report directly to the new Waste Characterization Branch Chief, Bob Dellinger on June 10, 1988. R. D. & O., slip op. at 14; T. 1730-33; CX 210. Another was to increase her productivity because she had worked poorly under Scarberry. T. 1731.

Nonetheless, Jenkins retained her listings work. Management had removed her from the inorganic pigments project because funding was uncertain and to reduce her number of assignments to increase her opportunity to succeed. T. 1867; CX 72, 289, 290. In the spring and summer of 1988, Jenkins worked on the methyl bromide listing project. After completing that assignment, Jenkins complained of being overworked. CX 241 at 3-4. Jenkins turned down a chlorinated aliphatic hydrocarbon listing project in May 1989, claiming the assignment was "inappropriate" and involved too much work. R. D. & O., slip op. at 15-16; CX 241 at 2.

In mid-1990, the Complainant began work on the solvents listing project under Mike Petruska, who had succeeded Dellinger as Waste Characterization Branch Chief and as her immediate supervisor. T. 681. In a memo to Petruska dated May 24, 1990, Jenkins opined that more solvents should be listed as hazardous under the HSWA of 1984 than the four solvents listed by Dynamac, the contractor assigned to the listing. CX 267. Despite the need to determine information requirements to list certain solvents by specific dates under the HSWA, Jenkins lobbied to expand the project and recommended a budget of \$24 million, which her superiors called "absurd." R. D. & O., slip op. at 15; CX 273. Accordingly, about August 30, 1990, her assignment was limited to the four solvents identified in the Dynamac report. R. D. & O., slip op. at 15; T. 681-82; CX 276.

environmental employee protection provisions. These principles govern the interrelationship of Federal statutes, including Title VII of the Civil Rights Act of 1964, and collective bargaining agreements. Environmental whistleblower complainants may pursue remedies in other forums including in grievance/arbitration proceedings governed by collective bargaining agreements. Agency authority to entertain whistleblower complaints is independent of the authority of other entities. Although the resolution of Jenkins' grievance afforded her some of the affirmative relief she sought, in other respects the forms of relief available to her under the whistleblower provisions exceed those available under the union contract. For instance, she would be eligible to recover compensatory damages for emotional distress and costs and expenses including attorney fees reasonably incurred in bringing the complaint. See 15 U.S.C. § 2622(b)(2)(B) (2000); 42 U.S.C. § 300j-9(i)(2)(B)(ii) (2000); 42 U.S.C. § 7622(b)(2)(B) (2000). Although we have determined that Jenkins may proceed in her complaint that EPA's actions violated the employee protection provisions of the environmental statutes, we do not reach the question of additional relief, since we have ruled in favor of the Respondent on the merits, III-IV, *infra*.

In 1990, Jenkins was also occupied with unsymmetrical dimethylhydrazine (UDMH) listings. A dispute arose between the EPA Office of Solid Waste, where Jenkins was assigned, and the Office of Pesticide Programs over whether an existing study (the “Toth” study) could be relied upon to conclude that UDMH was a carcinogen. R. D. & O., slip op. at 16; T. 631-51. Jenkins told Congress in a February 7, 1990 letter that EPA was trying to cover up the hazardous effects of the chemical. CX 250. Another listing, UDMH II, involved wastes from what was known as the Olin manufacturing process. Although Jenkins wanted to analyze the wastes for dioxins and furans (CX 260), management disagreed, advising her on August 30, 1990, not to start the listing due to lack of funds, insufficient sampling data, and a policy decision that the listing might not be required under HSWA. CX 261. However, Jenkins remained involved in the UDMH listings for wastes from an apple pesticide. R. D. & O., slip op. at 16; CX 261.

D. Complainant’s public activities outside assigned duties

Between 1988 and 1990, the Complainant used her position as an EPA scientist to voice environmental concerns, mostly about the assumed presence and carcinogenic effects of dioxins. R. D. & O., slip op. at 17-21. She sent a memo to EPA’s Region 9 concerning potential dioxin contamination of drinking wells in California (later determined to involve an error). T. 571-72; CX 217 at 2. On EPA letterhead, Jenkins complained to several Congressional subcommittees about “cover-up and falsification of exposures from Superfund site,” making “deals with industry for national wood preserving regulations,” failing “to regulate other hazardous wastes,” engaging in “reprisals against EPA staff scientist,” and allowing “illegal use of public sector contracts.” CX 151. Also on EPA stationery, she complained about “Consultant Abuses at EPA and Cover-Up” concerning the Radian Corporation. CX 157 at 1, 22. Jenkins submitted a 132-page comment on the proposed wood preserving regulations that were printed in the Federal Register after she was removed from the project. CX 191. In a letter to Congress, she asserted that Congressional interference on behalf of the wood treating industry subverted the regulatory process. CX 192. On December 5, 1989, she joined a press conference with the environmental group Greenpeace on its report entitled *The Politics of Penta* (short for Pentachlorophenol used in wood treatment). Jenkins forwarded a copy of the study to Congress in a memo on EPA letterhead that accused the EPA Inspector General of “Corruption . . . in Investigating Criminal Acts by EPA Officials.” CX 195, 196, 197.

Finally, the Complainant alleged that the Monsanto Corporation committed fraud in an epidemiological study that found that dioxins in Agent Orange did not cause cancer in humans. R. D. & O., slip op. at 18-21; CX 301. Jenkins’ allegation caught the attention of those concerned about the question: scientific groups, Vietnam veterans, Congress and the media. The National Enforcement Investigations Center, a division of EPA’s Office of Criminal Enforcement, Forensics and Training, interviewed Jenkins with regard to her contention that Monsanto’s fraudulent study influenced the regulatory process. T. 732. Jenkins improperly revealed the existence of this on-going criminal investigation. T. 742, 1574-75; CX 321, 326. In partial response, EPA management added a requirement to Jenkins’ 1991 performance standards that she follow “Agency policies concerning communicating with the public.” Her overall rating

for that year became “fully successful.” CX 334 at 6.

After a decline in her officially assigned workload in the spring of 1991, in November 1991, Jenkins’ supervisors discussed reassigning her to a position that would reduce her contact with the regulated community and the public. In April 1992, she was sent to an administrative position in the Office of Solid Waste’s Technical Assessment Branch, where she did policy analysis budgetary work. That reassignment is not at issue in this litigation.

II. PROCEDURAL HISTORY

Jenkins filed her original complaint in the instant case on April 11, 1988. In a June 9, 1988 letter, the Department of Labor, Employment Standards Administration, Wage and Hour Division, informed Jenkins that their investigation found no retaliatory discrimination:

The evidence developed during the course of our investigation does not support your allegation that the personnel actions taken against you by EPA management were motivated by your efforts to carry out duties protected by the Solid Waste Disposal Act. Rather, it appears that those actions were carried out based on other factors bearing no direct relationship to those duties.

Letter from Travis M. Campbell, Area Director.

Jenkins amended the complaint to allege additional adverse actions on July 12, 1988; September 27, 1990; May 28, 1991; and November 13, 1991, while proceeding *pro se*. Jenkins’ counsel filed a fifth amended complaint on February 28, 1996, which did not allege additional adverse actions but which summarized all previous allegations. The ALJ initially assigned to hear the case recommended its dismissal on grounds of preemption or implied repeal of the environmental whistleblower provisions by the Civil Service Reform Act (CSRA), 5 U.S.C. § 2302(b)(8) (2000). *Jenkins v. United States Environmental Protection Agency*, 88-SWD-2 (ALJ Aug. 11, 1989). The Secretary of Labor remanded the complaint to the ALJ following a finding of waiver of sovereign immunity under five of six environmental statutes and no implied repeal (or preemption) under the CSRA. *Jenkins v. United States Environmental Protection Agency*, 88-SWD-2 (Sec’y June 3, 1994). After conducting a hearing between February 10 and June 27, 1997, a different ALJ, on July 10, 1998, issued the R. D. & O. in which he found that Jenkins failed to prove that EPA had discriminated against her because of activity protected under the whistleblower provisions. R. D. & O., slip op. at 37. The ALJ found in particular that “[a]ny adverse actions taken against [Jenkins] from 1987 to 1991 were taken for legitimate business reasons and were not retaliatory” and accordingly recommended that the complaint be dismissed. R. D. & O., slip op. at 37. Jenkins timely petitioned for review of the R. D. & O. 29 C.F.R. § 24.8.

In *Jenkins v. United States Environmental Protection Agency (Jenkins II)*, 92-CAA-6 (Sec’y May 18, 1994), Jenkins alleged that EPA took retaliatory action against her when it

transferred her in 1992 to an isolated administrative position in the Technical Assessment Branch of the Office of Solid Waste. The *Jenkins II* ALJ recommended that Jenkins should prevail on her complaint, and the Secretary adopted the recommendation in a jurisdictional and merits decision, and a final decision awarding costs and expenses. *Jenkins v. United States Environmental Protection Agency (Jenkins II)*, 92-CAA-6, slip op. at 2 (Sec’y Dec. 7, 1994).⁵

JURISDICTION AND STANDARD OF REVIEW

The environmental whistleblower statutes authorize the Secretary of Labor to hear applications of alleged discrimination in response to protected activity and, upon finding a violation, to order abatement and other remedies. *E.g.*, 42 U.S.C. § 6971(b) (2000). The Secretary has delegated authority for review of initial decisions of an ALJ to the Administrative Review Board (ARB). 29 C.F.R. § 24.8 (2002). *See* Secretary’s Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary’s authority to review cases arising under, *inter alia*, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the designee of the Secretary, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The Board engages in *de novo* review of the recommended decision of the ALJ. *See* 5 U.S.C. § 557(b) (2000); 29 C.F.R. § 24.8; *Stone & Webster Engineering Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997). The Board is not bound by an ALJ’s findings of fact and conclusions of law because the recommended decision is advisory in nature. *See* Att’y Gen. Manual on the Administrative Procedure Act, Chap. VII, § 8 pp. 83-84 (1947) (“the agency is [not] bound by a [recommended] decision of its subordinate officer; it retains complete freedom of decision as though it had heard the evidence itself”). *See generally* *Starrett v. Special Counsel*, 792 F.2d 1246, 1252 (4th Cir. 1986) (under principles of administrative law, agency or board may adopt or reject ALJ’s findings and conclusions); *Mattes v. United States Dep’t of Agriculture*, 721 F.2d 1125, 1128-1130 (7th Cir. 1983) (relying on *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951) in rejecting argument that higher level administrative official was bound by ALJ’s decision). An ALJ’s findings constitute a part of the record, however, and as such are subject to review and receipt of appropriate weight. *Universal Camera Corp. v. NLRB*, 340 U.S. at 492-497; *Pogue v. U.S. Dep’t of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991); *NLRB v. Stor-Rite Metal Products, Inc.*, 856 F.2d 957, 964 (7th Cir. 1988); *Penasquitos Village*,

⁵ The ALJ in the instant case found that neither party argued that *Jenkins II* rulings had preclusive effect, and further held that “the issues contested and relief requested were sufficiently different that collateral estoppel would not apply” even if it had been properly raised. R. D. & O., slip op. at 2. The Complainant seeks review of that decision. Complainant’s ARB Brief at 4-6. Although we find some overlap in the period of Complainant’s protected activity, the adverse action established by the *Jenkins II* decision, her 1992 transfer to a purely administrative position, is not at issue here. Applying well established principles of preclusion, *see Agosto v. Consolidated Edison Co. of New York, Inc.*, ARB Nos. 98-007, 98-152, ALJ Nos. 96-ERA-2, 97 ERA-54, slip op. at 8 (ARB July 27, 1999); *Matter of Univ. of Texas at Austin*, ALJ No. CC-10 (OFCCP), slip op. at 5-7 (Sec’y June 28, 1985), we rule that *Jenkins II* made no binding determination with respect to the alleged acts of discrimination in 1988 to 1991 now before us.

Inc. v. NLRB, 565 F.2d 1074, 1076-1080 (9th Cir. 1977).

In weighing the testimony of witnesses, the fact finder considers the relationship of the witnesses to the parties, the witnesses' interest in the outcome of the proceedings, the witnesses' demeanor while testifying, the witnesses' opportunity to observe or acquire knowledge about the subject matter of the witnesses' testimony and the extent to which the testimony was supported or contradicted by other credible evidence. *Cobb v. Anheuser Busch, Inc.*, 793 F. Supp. 1457, 1489 (E.D. Mo. 1990); *Shrout v. Black Clawson Co.*, 689 F. Supp. 774, 775 (S.D. Ohio 1988). The ARB gives great deference to an ALJ's credibility findings that "rest explicitly on an evaluation of the demeanor of witnesses." *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001) quoting *NLRB v. Cutting, Inc.*, 701 F.2d 659, 663 (7th Cir. 1983). *Accord Lockkert v. United States Dep't of Labor*, 867 F.2d 513, 519 (9th Cir. 1989)(court will uphold ALJ's credibility findings unless they are "inherently incredible or patently unreasonable").

ISSUES

At issue is (1) whether the Complainant filed a timely complaint of unlawful discrimination and (2) whether EPA took adverse employment action or perpetuated a hostile work environment against her because she engaged in activity protected under the designated environmental whistleblower statutes.

DISCUSSION

I. Dismissal of April 11, 1988 Complaint as Untimely

Jenkins filed her original complaint of unlawful discrimination on April 11, 1988. This complaint covered claims of early adverse employment action, *i.e.*, removal from the wood preserving waste listing issues/options paper, reassignment from the listing project, denial of a within-grade increase, and receipt of an unsatisfactory performance rating resulting in imposition of an Individual Development Plan (IDP). Jenkins subsequently amended the complaint to allege additional acts of retaliation. For reasons we now discuss, we hold that Jenkins' April 11, 1988 discrimination complaint was untimely and therefore dismiss the claims of retaliation that it raised.

A. Timeliness issue preserved for ARB consideration

The ALJ addressed the timeliness issue in terms of its possible waiver, stating: "While the timeliness of the complaint was raised initially as an issue, neither party raised it at the hearing, and the respondent devoted only a short paragraph in its brief to the issue. Therefore, it is unclear whether timeliness continues to be an issue." R. D. & O., slip op. at 27 n.11. The ALJ ultimately declined to decide the issue because of its perceived complexity and because he recommended dismissing the complaint on the merits. R. D. & O., slip op. at 27 n.11.

Throughout the course of this proceeding, EPA has challenged the timeliness of Jenkins'

first complaint. Whether the EPA expressly raised the issue of timeliness at the hearing, presumably through a motion for dismissal or summary decision, is inconsequential where, as here, EPA indisputably raised the issue throughout the proceeding, first moving for dismissal on June 5, 1989. With respect to the April 11, 1988 complaint Jenkins defended against dismissal on the bases that the filing deadline was enlarged because: a hostile work environment created a continuing violation and EPA's March 1988 settlement of Jenkins' pending grievance failed to provide a "make-whole" remedy and was itself a new adverse action. Complainant's June 7, 1989 Supporting Arguments to Deny Motion for Dismissal at 5-6. On August 11, 1989, the ALJ who was then assigned to the case recommended that the case be dismissed on grounds of preemption or implied repeal of the environmental whistleblower provisions by the CSRA. Given this outcome, the ALJ ruled all other pending motions, including the timeliness challenge, moot. *Jenkins v. United States Environmental Protection Agency*, 88-SWD-2 (ALJ Aug. 11, 1989). The Secretary subsequently remanded the case for a hearing. *Jenkins v. United States Environmental Protection Agency*, 88-SWD-2 (Sec'y June 3, 1994).

In its post-hearing brief filed in December 1997, EPA argued:

Complainant would have only 30 days from the date of any individual employment decisions that Complainant considered discriminatory to file a complaint with the Wage and Hour Division. Clearly, Complainant did not contact DOL within 30 days with respect to the reassignment of the wood preservation project to another employee, the denial of the WIGI [within-grade increase], and the Unsatisfactory performance rating. Therefore, those Complaints filed after 30 days are time barred, and should be dismissed.

Respondent's Post-hearing Brief at 8.

EPA also raised the timeliness issue squarely before us. In its reply brief, EPA stated: "[T]he Agency continues to assert alternatively that Complainant did not timely file her complaint with [the Department of Labor]. Therefore, it should be dismissed." Respondent's ARB Brief at 41-42. EPA argued the absence of hostile work environment and the absence of a continuing violation, concluding that "[c]omplainant would have only 30 days from the date of any individual employment decisions that Complainant considered discriminatory to file a complaint with the Wage and Hour Division." Respondent's ARB Brief at 43. Because Jenkins failed to file a complaint concerning "the reassignment of the wood preservation project to another employee, the denial of the WIGI, and the unsatisfactory performance rating" within thirty days of their occurrence, the complaint about these actions "should be dismissed."⁶ Respondent's ARB Brief at 43. Jenkins responded to the timeliness argument in Complainant's ARB Rebuttal Brief at pages 14-15.

⁶ Because the Respondent challenges only the timeliness of the issues raised in the Complainant's April 11, 1988 complaint, Respondent's ARB Brief at 43, we decline to consider whether her subsequent complaints raising new alleged acts of discrimination were timely filed.

Resolution of the issue is appropriate because EPA has raised it consistently. We consider EPA's arguments to be persuasive.

B. Thirty-day limitations period not met

We turn now to the timing of Jenkins' filing. The environmental whistleblower statutes carry limitations periods of thirty days, meaning that, for the complaint to be timely, a complainant must file a complaint of unlawful discrimination within thirty days of a discrete adverse action. The thirty-day limitations period begins to run on the date that a complainant receives final, definitive and unequivocal notice of an adverse employment action. The date that an employer communicates its decision to implement such an action, rather than the date the consequences are felt, marks the occurrence of the violation. *See generally Chardon v. Fernandez*, 454 U.S. 6 (1981) (proper focus contemplates the time the employee receives notification of the discriminatory act, not the point at which the consequences of the act become painful); *Delaware State College v. Ricks*, 449 U.S. 250 (1980) (limitations period began to run when the employee was denied tenure rather than on the date his employment terminated).

Jenkins received notice of the denial of within-grade increase by memorandum dated November 4, 1987. CX 65. She received the unsatisfactory performance rating on November 12, 1987. CX 66. The ensuing Individual Development Plan (IDP), which follows automatically upon receipt of an unsatisfactory rating, spanned the period from December 2, 1987, to January 31, 1988. Removal from the issues/options paper and reassignment from the listing preceded these adverse actions. The latest date upon which the limitations period began to run for purposes of these actions thus was November 12, 1987, upon receipt of the unsatisfactory rating. The period expired thirty days later on December 12, 1987. Jenkins first filed a complaint pertaining to these actions on April 11, 1988. Jenkins' April 11, 1988 discrimination complaint was therefore untimely.

C. Limitations period not extended, because grievance did not enlarge time and hostile work environment not found

The thirty-day limitations period is not jurisdictional and is subject to modification (waiver, estoppel and equitable tolling) "when fairness requires," *e.g.*, when a complainant receives inadequate notice of adverse action, or affirmative misconduct on the part of a respondent lulls the complainant into inaction. *Hill v. U.S. Dep't of Labor*, 65 F.3d 1331, 1335 (6th Cir. 1995). A complaint alleging hostile work environment is not time-barred if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period. *Cf. National Railroad Passenger Corp. v. Morgan*, 122 S.Ct. 2061 (2002) (application of doctrine under Civil Rights Act Title VII). While evidently conceding that her April 11, 1988 complaint was untimely, Jenkins asserts two theories upon which the thirty-day limit could be enlarged: the filing and resolution of her grievance and her alleged exposure to continuing harassment in a hostile work environment.

Jenkins appears to raise limitations defenses based on the filing of her grievance on December 12, 1987, and its resolution on March 11, 1988. It is well established that the filing of a grievance does not operate to toll the limitations period for filing a complaint under the whistleblower statutes. *Greenwald v. City of North Miami Beach, Florida*, 587 F.2d 779 (5th Cir. 1979) (pursuit of local Civil Service Board review of discharge did not toll limitations period for filing complaint under whistleblower provision of Safe Drinking Water Act); *Prybys v. Seminole Tribe of Florida*, ARB No. 96-064, ALJ No. 95-CAA-15, slip op. at 5-6 (ARB Nov. 27, 1996) (appeal to Tribal Council did not toll limitations period for filing complaint under environmental whistleblower statutes). *Cf. International Union of Electrical, Radio and Machine Workers v. Robbins & Myers, Inc.*, 429 U.S. 229, 236-240 (1976) (initiation of grievance procedure under collective-bargaining agreement did not toll running of statutory limitations period for filing a claim under Title VII of the Civil Rights Act).

Likewise, the resolution of the grievance on March 11, 1988, would not start the limitations period even if Jenkins was dissatisfied with the outcome. CAD Director Lowrance directed that the performance rating be changed to “satisfactory” (*i.e.*, “fully successful”), that the within-grade increase be granted, including back pay, to the original date of denial and that any documents relating to the unsatisfactory performance rating be removed from the official file. CX 83-A. In her ARB rebuttal brief Jenkins attempts to characterize Lowrance’s action as adverse by arguing that it constituted “a unilateral imposition of inadequate remedies.” Complainant’s ARB Brief at 15. Jenkins argues, in other words, that she failed to receive the full extent of requested relief, including exoneration. We know of no precedent that would render management’s response to Jenkins’ grievance a separate adverse action. *R. D. & O.*, slip op. at 31. However, since Lowrance granted the grievance remedies on March 11 and the complaint was not filed until 31 days thereafter, on April 11, the complaint remains untimely.

Jenkins’ second basis for extending the thirty-day deadline for filing is that she was exposed to continuing harassment in a hostile work environment. She complains that she “was subjected to hostility from her supervisors, isolation, estrangement and stigmatization from her colleagues, and false and defamatory comments [which] cumulatively resulted in a hostile work environment, and resultant emotional distress, humiliation, and personal indignity.” Complainant’s Post-hearing Brief at 177. A complaint alleging hostile work environment is not time-barred if all the acts comprising the claim are part of the same practice and at least one act comes within the thirty-day filing period. *Cf. National Railroad Passenger Corp.*, 122 S.Ct. 2061. In this instance, if the Complainant were able to prove the existence of a hostile work environment within thirty days prior to April 11, 1988, her cause of action would relate back to her otherwise stale 1987 claims. After reviewing the record evidence, we have held, *IV, infra*, that a hostile work environment did not exist; therefore, the limitations period is not extended.

We consequently rule Jenkins’ April 11, 1988, discrimination complaint to be untimely. Despite this finding, we proceed alternatively to the merits of that and Jenkins’ other complaints, beginning with the standards required to establish those whistleblower claims.

II. Legal Standards for Establishing Whistleblower Claim

Jenkins complains that EPA violated the whistleblower protection sections of the Resource Conservation and Recovery (RCRA) or Solid Waste Disposal Act (SWDA or “Act”), 42 U.S.C. § 6971 (2000), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA), Pub. L. No. 98-616, § 222; 98 Stat. 3221, 3251; Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i) (2000); Clean Air Act (CAA), 42 U.S.C. §7622 (2000); Water Pollution Control Act or Clean Water Act (CWA), 33 U.S.C. § 1367 (2000), Toxic Substances Control Act (TSCA), 15 U.S.C. § 2622 (2000), and Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9610 (2000). The record in the case shows coverage under at least the RCRA/SWDA, SDWA and CERCLA because of the nature of the complaints.

A. Employee Protection Provisions Of Environmental Statutes

The employee protection (whistleblower) provisions of the RCRA/SWDA, SDWA and CERCLA prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment, *i.e.*, take adverse action, because the employee has notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding or has assisted or participated in any such proceeding.

Under the RCRA/SWDA, no person shall discriminate against any employee “by reason of the fact” that such employee has engaged in enumerated protected activity, namely

filed, instituted, or caused to be filed or instituted any proceeding under this chapter or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any implementation plan.

42 U.S.C. § 6971(a).

Pursuant to the CERCLA an employer may not retaliate against an employee or an employee representative

by reason of the fact that such employee or representative has provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

42 U.S.C. § 9610(a).

The SDWA prohibits discrimination because the employee or representative

has – (A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter or a proceeding for the administration or enforcement of drinking water regulations . . . (B) testified or is about to testify in any such proceeding, or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

42 U.S.C. § 300j-9(i)(1).

B. Elements, burdens of proof and persuasion

To prevail on a complaint of unlawful discrimination under these environmental whistleblower statutes, a complainant must establish by a preponderance of the evidence that the respondent took adverse employment action against the complainant because she engaged in protected activity. *Carroll v. United States Dep't. of Labor*, 78 F.3d 352 (8th Cir. 1996); *Ellis Fischel State Cancer Hosp. v. Marshall*, 629 F.2d 563, 566 (8th Cir. 1980). The ARB and reviewing courts may apply the framework of burdens developed for use in performing a pretext analysis under Title VII of the Civil Rights Act of 1964 and other employment discrimination laws. *See, e.g., Kahn v. U. S. Sec'y of Labor*, 64 F.3d 271, 277 (7th Cir. 1995); *Couty v. Dole*, 886 F.2d 147 (8th Cir. 1989).

A complainant, at hearing, first must establish a *prima facie* case, thus raising an inference of unlawful discrimination. A complainant meets this burden by showing that the employer is subject to the applicable whistleblower statutes, that the complainant engaged in activity protected under the statutes of which the employer was aware, that she suffered adverse employment action and that a nexus existed between the protected activity and adverse action. *See Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 933-934 (11th Cir. 1995); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995) (*citing Couty v. Dole*, 886 F.2d at 148 (“[p]roximity in time is sufficient to raise an inference of causation”)).

The burden then shifts to the employer to produce evidence that it took adverse action for a legitimate, nondiscriminatory reason. In the event that the employer meets this burden of production, the inference of discrimination disappears, leaving the single issue of discrimination *vel non*. The complainant then must prove by a preponderance of the evidence that the employer intentionally discriminated. *E.g., Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) (Age Discrimination in Employment Act); *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under this line of cases, the ultimate burden of persuasion rests always with the complainant. To meet this burden, a complainant may prove that the legitimate reasons proffered by the employer were not the true reasons for its action, but rather were a pretext for discrimination (*St. Mary's Honor Center*, 509 U.S. at 507-508), *i.e.*, a

complainant may prove that she suffered intentional discrimination by establishing that the employer's proffered explanation is unworthy of credence. *Burdine*, 450 U.S. at 256. An adjudicator's rejection of an employer's proffered legitimate explanation for adverse action *permits* rather than compels a finding of intentional discrimination. Specifically, "[i]t is not enough . . . to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination." *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. at 519.

III. Application of Legal Standards to Complainant's Whistleblower Claims

We proceed to a review of the evidence in this case in the light of the legal standards just enunciated for establishing an environmental whistleblower claim: Jenkins' *prima facie* case; EPA's articulation of legitimate, non-discriminatory reasons for the personnel actions taken; and finally whether Jenkins has proven by a preponderance of the evidence that EPA intentionally discriminated against her.

A. Complainant's protected activity

Protected activity furthers the purpose of the environmental statutes. Under the "participation" provisions of the employee protection (whistleblower) provisions of the RCRA/SWDA, CERCLA and SDWA, the term "proceeding" encompasses all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding. *Passaic Valley Sewerage Com'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 479 (3d Cir. 1993). *Cf. Mackowiak v. University Nuclear Sys., Inc.*, 735 F.2d 1157, 1159 (9th Cir. 1984) (Energy Reorganization Act); *Phillips v. Interior Board of Mine Operations Appeals*, 500 F.2d 772 (D.C. Cir. 1974) (Coal Mine Safety Act); *Donovan v. Stafford Construction Co.*, 732 F.2d 954, 959 (D.C. Cir. 1984) (Federal Mine Safety and Health Act).

Petitioning congressional subcommittees about diminished environmental regulation and complaining internally about inadequate and inappropriate regulation are protected activities. *See, e.g., Passaic Valley Sewerage Com'rs*, 992 F.2d at 478-480 ("proceeding" includes intracorporate complaints that sewerage system was "inordinately expensive, inefficient, scientifically unreliable and in violation of the Clean Water Act user charge provisions"); *Pogue v. U.S. Dep't of Labor*, 940 F.2d at 1288-1289 (complainant employed in "hazardous waste oversight position charged with the responsibility for surveying and reporting on hazardous waste compliance[;]" undisputed protected activity included preparation of internal reports documenting noncompliance at Navy shipyard and transmittal of letter to shipyard commander detailing environmental violations).

Protection may also extend to a whistleblower's effort to obtain a legal opinion from an agency counsel regarding the legality of considering, in rulemaking, criteria other than those thought to be set out in the applicable statute and regulation, because the effort would advance concern about inappropriate and inadequate regulation. *Bechtel Const. Co. v. Sec'y of Labor*, 50 F.3d at 931-933 (raising "particular, repeated concerns" about public safety and health is "tantamount to a complaint" and falls within comprehensive statutory protections). *See also Jarvis v. Battelle Pacific Northwest Laboratory*, ARB No. 97-112, ALJ No. 97-ERA-15, slip op.

at 8-9 (ARB Aug. 27, 1998)(ARB found “clearly” protected, under the whistleblower provisions of the environmental statutes and the Energy Reorganization Act (ERA), the following activities: “auditing work[,] raising of compliance and retaliation concerns [and] development of a methodology to be used to assess the risks posed by radioactive waste deposited in a tank waste remediation system and to determine the safeguards warranted by the system . . .”).

In this case, the ALJ stated: “For purposes of this decision, it will be assumed that the complainant’s activities were protected.” R. D. & O., slip op. at 28. The ALJ’s assumption is sound. Jenkins’ petitioning congressional subcommittees about diminished RCRA regulation and complaining internally about inadequate and inappropriate regulation are protected. Protection may extend to Jenkins’ effort to obtain a legal opinion from EPA’s OGC regarding the legality of considering, in rulemaking, criteria other than those set out under RCRA, 42 U.S.C. § 6921(a) (2000) and 40 C.F.R. § 261.11(a)(3) (2002) because the effort advanced concern about inappropriate and inadequate regulation. Jenkins’ rulemaking responsibilities were analogous to employment responsibilities that engendered protected activity in *Pogue* and *Jarvis, supra*.

The Complainant has listed nine letters to Congress and 56 internal documents that were introduced as evidence at trial and which purportedly demonstrate her protected activity. Complainant’s Post-hearing Brief at 166-170. We decline to rule on these individually. Suffice it to say, as the ALJ did, that we can assume that she has met her burden of showing that she engaged in activities that the environmental whistleblower statutes at issue are designed to protect.

B. Respondent’s knowledge of protected activity

EPA management was likely aware of most of Jenkins’ external protected activity and essentially all of her internal protected activity. Although Jenkins concedes that EPA was not informed of the first two letters she sent to Congress (Complainant Post-Hearing Brief at 178), she quickly began copying her EPA supervisors on such correspondence and notifying management of news conferences and publications. Jenkins “believed that it was important in employee discrimination cases at all times to ensure that your management was aware of your protected activity” (T. 536), and so she made a point to distribute copies of her communications in and outside the office to her chain of command. The Complainant knew her supervisors were aware of the television press coverage because they would see “these very large television crews coming into my office at EPA.” T. 759. At trial, Jenkins introduced as exhibits 69 trade journal and news articles that were generated as a result of her environmental activities. Complainant’s Post-hearing Brief at 172-75. Thus, we assume, along with the ALJ, that EPA had knowledge of Jenkins’ protected activity.

C. Complainant’s claims of adverse actions

The Complainant’s *prima facie* case next requires that she show that her employer took

adverse action. Jenkins has identified the following employment actions as adverse:

- 9/3/87: Removal from the wood preserving issues/options paper
- 9/21/87: Removal from wood preserving listing
- 11/2/87: Retroactive retraction of within-in grade increase
- 11/12/87 “Unsatisfactory” performance evaluation
- 11/87 – 6/88: Imposition of IDP
- 3/88: Elevation of 11/12/87 performance evaluation only to the “satisfactory” rather than “exceeds expectations” performance rating
- 6/10/88: Reassignment to report to branch chief, removal of Listing Section to another branch within 3 months of reassignment, resulting in isolation
- 12/88: “Satisfactory” rather than “exceeds expectations” performance rating
- 1988 – 1989: Period of no duties and isolation
- 8/30/90: Retraction of solvents and UDMH II listing assignments after Dr. Jenkins raises the possibility of the presence of dioxins
- 1990 – 1991: Period of no duties and isolation
- 4/29/91: Retroactive imposition of a clause in performance standards requiring adherence to an unpublished unavailable policy on communications
- 10/29/91: “Satisfactory” rather than “exceeds expectations” performance evaluation based on alleged non-adherence to policy on communications

Complainant's Post-hearing Brief at 176-77; R. D. & O., slip op. at 28, 31, 34-36.

In addition to these personnel actions, Jenkins claims that she was subjected to a hostile work environment. Complainant's Post-hearing Brief at 177. We turn to whether these claims constituted adverse actions and later to whether a hostile work environment existed.

Not every action taken by an employer that renders an employee unhappy constitutes an adverse employment action. *Smart v. Ball State Univ.*, 89 F.3d 437, 441 (7th Cir. 1996). Cf. *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178 (10th Cir. 1999) (the American with Disabilities Act, like Title VII, is neither a "general civility code" nor a statute making actionable ordinary tribulations of the workplace). To be actionable, an action must constitute a "tangible employment action," for example "a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 761 (1998). Compare *Mattern v. Eastman Kodak Co.*, 104 F.3d 702, 706-710 (5th Cir. 1997) and *Dollis v. Rubin*, 77 F.3d 777, 781 (5th Cir. 1995) (acts must constitute ultimate employment decisions rather than being "tangential" to future decisions which might be ultimate decisions) with *Price v. Delaware Dep't of Correction*, 40 F. Supp.2d 544, 552-553 (D. Del. 1999) (adverse action must be serious and tangible enough to affect an employee's terms and conditions of employment). See also *Mungin v. Katten, Muchin & Zavis*, 116 F.3d 1549, 1556 (D.C. Cir. 1997); *Williams v. Bristol-Myers Squibb Co.*, 85 F.3d 270, 274 (7th Cir. 1996). Obviously material adverse actions such as discharge, demotion or loss of benefits and compensation are actionable. *Fierros v. Texas Dep't of Health*, 274 F.3d 187, 192-194 (5th Cir. 2001) (denial of a pay increase may constitute an "ultimate employment decision"). Less obvious actions likewise are actionable, for example, stripping an employee of job duties or altering the quality of an employee's duties, if they have tangible effects. *Scamardo v. Scott County*, 189 F.3d 707, 709-711 (8th Cir. 1999); *Dahm v. Flynn*, 60 F.3d 253, 258 (7th Cir. 1994); *Crady v. Liberty Nat'l Bank & Trust Co.*, 993 F.2d 132, 135-136 (7th Cir. 1993); *Pieczynski v. Duffy*, 875 F.2d 1331, 1333-1336 (7th Cir. 1989); *Mendelsohn v. University Hospital*, 178 F. Supp.2d 323, 329-330 (E.D.N.Y. 2001).

We review Jenkins' specific contentions of adverse actions in the light of the applicable law. On November 4, 1987, Scarberry issued Jenkins a memorandum notifying her that he had denied her a within-grade salary increase based upon her failure to perform at an acceptable level. CX 65. On November 12 Jenkins received an "unsatisfactory" performance rating for the period October 1986 through September 1987. CX 66. As an automatic consequence, EPA imposed an IDP effective from December 2, 1987, through January 31, 1988. CX 72. The denial of the within-grade increase and issuance of an unsatisfactory performance rating were adverse actions. We recognize that negative performance ratings alone may not constitute adverse action in some venues where proof of material employment disadvantage is necessary to render a complaint actionable. See, e.g., *LaCroix v. Sears, Roebuck & Co.*, 240 F.3d 688, 692 (8th Cir. 2001); *Hollins v. Atlantic Co., Inc.*, 188 F.3d 652, 662 (6th Cir. 1999); *Enowmbitang v. Seagate Tech., Inc.*, 148 F.3d 970, 973-974 (8th Cir. 1998); *Smart v. Ball State Univ.*, 89 F.3d at 441-442. But see *United States v. Rapone*, 131 F.3d 188, 193-194 (D.C. Cir. 1997) (supervisor's criticism of employee's work performance coupled with supervisor's extreme hostile behavior

toward employee was retaliatory). Here, however, the negative rating accompanied monetary deprivation, in short, material disadvantage. On the other hand, the record does not disclose how Jenkins' other employment evaluations, "satisfactory" (*i.e.*, "fully successful") in March 1988, December 1988, and October 1991, resulted in material disadvantage, *e.g.*, a reduced pay increase, and we therefore hold that they did not constitute adverse actions.

We also conclude, applying the relevant authorities, that Jenkins' removal from the issues/options paper and listing, reassignment to another section, and reduction in listings assignments were not adverse actions. In terms of precedent, Jenkins' removal and reassignment appear most analogous to those cases that involve lateral transfers. As a general proposition lateral transfers, *i.e.*, those not entailing "a demotion in form or substance, [do] not rise to the level of a materially adverse employment action." *Ledergerber v. Stangler*, 122 F.3d 1142, 1144 (8th Cir. 1997) (*quoting Williams v. Bristol-Myers Squibb Co.*, 85 F.3d at 274). Such transfers would not become actionable unless some other consequences attached that adversely affected the terms, conditions or privileges of employment or future employment opportunities upon which to base a finding that the employee "has suffered objectively tangible harm." *Brown v. Brody*, 199 F.3d 446, 457 (D.C. Cir. 1999). A lateral transfer whereby the employee maintains the same title, benefits, duties and responsibilities has been held not to constitute an "ultimate employment decision," *e.g.*, "hiring, granting [or restricting] leave, discharging, promoting, and compensating." *See Burger v. Central Apartment Management, Inc.*, 168 F.3d 875, 878-880 (5th Cir. 1999). *See also Mungin v. Katten, Muchin & Zavis*, 116 F.3d at 1556-1557 ("[p]erhaps in recognition of the judicial micromanagement of business practices that would result if [courts] ruled otherwise, [courts] have held that changes in assignments or work-related duties do not ordinarily constitute adverse employment decisions if unaccompanied by a decrease in salary or work hour changes."); *Harlston v. McDonnell Douglas Corp.*, 37 F.3d 379, 382 (8th Cir. 1994) (reassignment to more inconvenient job insufficient); *Flaherty v. Gas Research Institute*, 31 F.3d 451, 456 (7th Cir. 1994) ("bruised ego" insufficient); *Kocsis v. Multi-Care Management, Inc.*, 97 F.3d 876, 887 (6th Cir. 1996) (demotion without change in pay, benefits, duties or prestige insufficient).

However, because evaluation of whether an action is adverse contemplates its entire effect on the employee's employment, a lateral transfer to a position with different job responsibilities and employment conditions, for example exposure to greater risks, may constitute adverse action even absent reduction in salary or benefits. *Richardson v. New York State Dep't of Correctional Services*, 180 F.3d 426, 440-443 (2d Cir. 1999); *Collins v. Illinois*, 830 F.2d 692, 703-704 (7th Cir. 1987). Transfer to a job that the employee knows he cannot perform may constitute adverse action in that the employee reasonably can expect his employment situation to worsen substantially. *Dilenno v. Goodwill Industries of Mid-Eastern Pennsylvania*, 162 F.3d 235, 236 (3d Cir. 1998). Assignment to work on a less desirable shift perceived by co-workers as a "punishment shift" may constitute retaliation. *Mondzelewski v. Pathmark Stores, Inc.*, 162 F.3d 778, 786-789 (3d Cir. 1998). *See Crady v. Liberty National Bank & Trust Co. of Ind.*, 993 F.2d 132, 136 (7th Cir. 1993) ("a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities" may signal "a materially adverse change").

Although Jenkins might have suffered a “bruised ego” from her removal from the wood preserving listing, she remained assigned to the Listing Section and in her same office; and the nature of her listing work as described in her performance standards, her title, her grade and her pay were unchanged. CX 210. That can also be said of her transfer from Scarberry’s to Dellinger’s supervision. Later, when her listings assignments were reduced, her performance objectives for that rating period were also modified, so that her overall score for that year would be based on the work she was actually expected to complete, without penalty for any workload reduction. CX 328, 329, 334. Thus, although Jenkins’ specific assignments were subject to change, the record fails to show a consequential loss of promotional opportunities or other prerequisites of employment. Hence, we conclude that the removal from the wood preserving listing, reassignment to another section, and reduction in listing assignments were not adverse actions under the circumstances.

Lastly, we consider the addition of a performance standard that the Complainant follow “[a]gency policies concerning communicating with the public.” CX 334 at 6. The imposition of that requirement, standing alone, does not constitute an adverse action. It reflects a legitimate management prerogative, is not on its face a restriction on protected activity, and has no tangible effect on her employment. As we see it, such a policy does not become an adverse action without a demonstration that the Respondent took punitive action because of the Complainant’s protected activity involving public communication. We determine that that was not the case here.

Accordingly, we have held that only the denial of the within grade increase and the “unsatisfactory” performance evaluation in 1987 were adverse actions under the facts in this case; and so, Jenkins’ *prima facie* case fails except as to those claims. However, even assuming that the remaining enumerated actions were adverse, we also find that they were not retaliatory, III, E-F, IV, *infra*.

D. Causal nexus between protected activity and adverse action.

The final threshold requirement of the Complainant’s *prima facie* case is that the Complainant must adduce proof of a causal connection between her protected activity and the alleged adverse actions. Here, Jenkins’ evidence of alleged protected activity includes nine letters to Congress and 56 internal documents and her evidence of retaliation includes 13 employment actions over a span of about four years. Without holding that Jenkins has established the requisite causal connection, we simply assume, as we have with respect to other elements of her *prima facie* case, that she has made an adequate preliminary showing, and proceed to the determinative portions of our analysis: the employer’s explanations for its actions, and whether Jenkins has ultimately met her burden of persuasion under the RCRA/SWDA, SDWA and CERCLA.

E. Respondent's explanations/defenses for actions taken

The Complainant's *prima facie* case raises the inference of discrimination. The burden then shifts to the Respondent to produce evidence that it took the allegedly adverse actions for legitimate, nondiscriminatory reasons. *Reeves*, 530 U.S. 133; *St. Mary's Honor Center*, 509 U.S. 502; *Texas Dep't of Community Affairs*, 450 U.S. 248; *McDonnell Douglas Corp.*, 411 U.S. 792. The discussion turns to each of Jenkins' claimed adverse actions and Respondent's explanation/defense for the actions taken. We recount the EPA's evidence of legitimate, nondiscriminatory reasons in some detail, since we rely heavily upon it in the final portion of the discussion in which we conclude that the Complainant has failed to establish violations of the whistleblower protection laws.

1. Explanation for removal from wood preserving issues/options paper

Scarberry's reasons for removing the Complainant from the issues/options paper are primarily articulated in two documents. In a memo from Scarberry to Jenkins dated September 2, 1987, entitled "Options Paper on Wood Preserving Issues", Scarberry responded to Jenkins' assertion that it was "inappropriate and illegal" for the paper to address the "projected treatment/disposal capacity problems that may result from the designation of large quantities of wood preserving residuals as acute hazardous waste, and the possible stigma associated with this designation." CX 42. Scarberry wrote:

You appear to be confused as to the purpose of the options paper and our interest in discussing these issues, as well as with your responsibilities as the work assignment manager of the wood preserving project. . . .

It is our General Counsel who will decide what is legal, and the Administrator or senior management who will decide what are the appropriate factors for making listing decisions and how to regulate a particular industry Matt [Straus] and I have decided that until such time that our General Counsel or senior management make a decision to the contrary, it is appropriate to include these issues [capacity and stigma] in an options paper that seeks to explore regulatory alternatives to the listings defined in the draft Federal Register notice on the Wood Preserving industry. Further, we feel that it is our responsibility to provide fair, unbiased analysis of the options.

It is your responsibility to prepare the technical supporting data for this regulatory effort in an objective and scientific manner, not to make policy and legal decisions that may censor important issues.

CX 42.

In a September 3, 1987 follow-up memo to Jenkins, captioned “Wood Preserving Options Paper,” Scarberry informed Jenkins that he had removed her from the options/issues assignment because:

As I have discussed with you in a recent conversation, Matt [Straus] and I have reviewed your second draft of the Options Paper on the Wood Preserving Issues and have found that it is poorly written and still does not address many of our comments. Also, I have stated in previous memos and in several conversations that it is our responsibility to present unbiased analyses to Agency decision makers in order that they can make informed policy decisions. However, you have written this paper with an obvious bias as reflected in the pros and cons sections.

In regard to the quality of writing, there are many statements that are unclear in meaning or irrelevant to the issues. I have provided you with a copy of our comments that indicates the particular statements for which we feel this is true.

Also, you have not adequately addressed the stigma and treatment/disposal capacity problems that might result from the selection of certain regulatory options. Rather than discuss these problems as Matt and I have asked, you have confused these problems with the impacts that might be associated with the Land Restrictions Disposal Program. My feelings regarding your refusal to address these potential problems are discussed in more detail [in] my September 2, 1987 memorandum to you.

In the original Options Paper and in numerous conversations, you have made no secret of your personal opinions regarding the issues. Although Matt and I have clearly stated that the Options Paper was to present the issues in an objective manner, once again you have used the Options Paper to voice your opinions: you claim not to be able to think of any pros for options that you do not support, or cons that might argue against the options that you support.

In conclusion, I have asked you to make changes to the subject option paper which Matt and I believed were necessary to make these papers of acceptable quality for senior management. These changes were not made and therefore, the decision making on these issues has been delayed. To avoid any further delay, I will assume the responsibility for completing the Paper. You should continue to work on the appendices that will document the

risk posed by the treated wood drippage and the runoff associated with the drippage.

CX 43. *See also* R. D. & O., slip op. at 28-30; T. 1853.

2. Explanation for removal from wood preserving listing

Back in February 1987, Scarberry and Straus met with Jenkins to express concern about her delay in completing the wood preserving Federal Register Notice. Scarberry's memo memorializing the meeting says in part:

On 2/6/87, I asked Cate when she would be able to deliver a draft copy of the Wood Preserving FRN. She replied that she would need approximately two additional weeks to complete the subject FRN. I reminded her that she had been making similar statements and promises to complete the FRN since November, 1986, and the FRN was already over a year late. She acknowledged this to be true; however, went on to state that she was tired of Matt's and my hounding and was not going to get upset about it Later that same day I reported to Matt Straus that it would be at least two weeks before the FRN would be delivered. . . . Matt stated that a two-week delay was not acceptable. . . . [The contractor] Dynamac was going to be instructed to prepare that portion of the FRN for the Wood Preserving Industry which dealt with the toxicological data The deadline for this deliverable would be 2/17/87 and, unless Cate could finish her version by this date, the Dynamac [version of the] FRN would be submitted to the Work Group.

CX 87.

Scarberry's February 6, 1987 memo also noted that Jenkins had been "very secretive about the document" and expressed concerns about Jenkins' inability to work effectively with EPA staff and contractors. His memo stated that Dynamac's toxicologist felt that EPA's Reva Rubenstein would not agree with Jenkins' "approach to evaluating the hazardousness of certain toxic constituents;" and that Jenkins thought that "Dynamac was not qualified to write the section in question." CX 87.

Between February and Scarberry's removal of Jenkins from the listing itself on September 21, 1987, EPA experienced delays and other problems with Jenkins' work. R. D. & O., slip op. at 28-30; T. 1849-65. The reasons for removing her from the project overlap with those EPA gave for denying her within grade increase, discussed next.

3. Explanation for denial of within-grade increase

The primary source document explaining the reasons for the denial of Jenkins' within grade increase is Scarberry's November 4, 1987 memo to her. The introductory page summarized Scarberry's position:

As of September 29, 1987, you completed the two-year waiting period for a within-grade increase. I have found it necessary to disapprove the within-grade increase because your overall performance during the two years has not been at an acceptable level of competence commensurate with your position and grade level.

The criteria used to evaluate your performance includes [sic] meeting deadlines and quality of work. I expect a GS-13 professional, once given an assignment, to be able to work independently and come up with a satisfactory product whether this be the preamble section of a listing rule or an options paper.

Your work should reflect sound analysis and should have no significant omissions, inaccuracies, inconsistencies, or technical errors. Instead, I have found that I have to give you specific work instructions, and your products have to be rewritten with substantial revisions in order to be acceptable. Your work is generally completed late, and I have expressed to you on several occasions over the past two years, both orally and in writing, my concern over the quality and timeliness of your assignments. As a result, an abnormal amount of my time has been used in providing detailed instructions as well as rewriting/editing your assignments. After these discussions, guidance, and recommendations, there has been no demonstrable improvement in your work performance.

CX 65 at 1.

The Scarberry memo then detailed the dissatisfaction with Jenkins' work, dividing the discussion between, "An inability to meet deadlines and place duties and responsibilities in sufficient perspective to ensure the timely and successful completion of assignments" and "Quality of Work Performed." CX 65-2, 5. With regard to avoidable delays, Scarberry noted that her major assignment for the 1987 performance period, the draft Notice of Proposed Rule Making (NPRM) for the wood preserving/surface protection industries, was "well behind schedule," with the draft "originally scheduled to be submitted to the EPA work group on 12/20/85; however, the actual date of distribution was the 2/20/87," 26 months behind schedule. CX 65 at 2.

Scarberry documented five circumstances within Jenkins' control that caused the missed

schedule:

1. “[T]oo much time spent on providing unnecessary detail in the preamble:” A standard introduction should “contain a brief industry profile; a summary of the waste streams that are to be listed as hazardous wastes, including how they are generated, quantities, management practices, and hazardous constituents of concern; and the risks posed by the hazardous constituents.” Supporting documents were to be referenced, not “painstakingly rewritten.” Jenkins’ work on the preamble “consumed weeks of effort; and contractor typing support.” Typically, an entire listing NPRM contains only 20 to 50 pages; Jenkins’ preamble by itself contained over 280 pages. CX 65 at 3.

2. “[T]oo much time spent on collecting supporting evidence:” Jenkins wasted time and resources on compiling data summary tables for the preamble. Scarberry found the tables “poorly formatted” and repetitive. Her Table 1 covered 15 pages that Scarberry thought could easily have been reformatted into a 2-page table. Tables 3, 4, and 5 presenting similar health effects data spanning 17 pages could have been condensed into 2 to 4 pages. Jenkins “contacted regional, state and local officials” to obtain reports of “hundreds of cases involving where environmental harms resulted from wood preserving and surface protection operations” and “summarized, categorized, and assembled [them] into a major document containing over 250 pages,” even though “this type of evidence has never played a necessary or critical role in justifying the listing of wastes as hazardous under RCRA[.]” CX 65 at 3.

3. “[I]nefficient and inadequate use of contractor:” Jenkins “insisted on doing most of the technical work” on the NPRM herself, “judging that the contractor[’s] staff was not capable of performing work of a quality meeting [her] standards.” She only “delegated typing, filing and waste generation calculations (to be performed according to [her] instructions) to the contractor.” Scarberry believed “that the contractor personnel supporting [Jenkins] on this project have excellent technical and writing skills and are well informed regarding the wood preserving industry.” Scarberry advised Jenkins “[o]n many occasions” to give the contractor a “more active role in preparing and assisting in the technical aspects of the NPRM.” CX 65 at 4.

4. “[I]nadequate use of EPA support groups (i.e., CAD Health Assessment and Methods Sections):” “[I]t is the responsibility of the Health Assessment and Methods Sections to provide expert technical assistance to the Listing Section in the areas of their expertise.” Jenkins wrote “sections on health effects and analytical methods, rather than defer these tasks to the support groups.” Contrary to “established procedures” for preparing draft rules, she maintained very little communication with these groups and did not ask these support groups to review your work before submitting the draft NPRM to the Work Group” CX 65 at 4.

5. “[T]oo much time spent on projects outside areas of responsibility:” Jenkins “spent a considerable amount of time providing assistance to states and regions dealing with the general topic of wood preserving at the expense of the listing project. This assistance was not part of your performance standards, nor did I authorize you to provide this assistance.” CX 65 at 4.

In sum, Scarberry told Jenkins that it was “inconsistent” with her GS-13 level for him to

have to plan or manage her time. “[S]cheduling and planning for the steps necessary” to produce “a satisfactory product within the time frame allowed” was her responsibility. CX 65 at 5.

The second area of deficiency discussed in the November 4, 1987 memo from Scarberry to Jenkins was “Quality of Work Performed.” Scarberry and Matt Strauss found her draft NPRM “unsatisfactory,” and they and work group members thought it was “confusing, incomplete, and technically inaccurate.” Reviewers complained that the draft “contained many poorly written passages that were confusing and many sentences that contained blanks to indicate the absence of information or incomplete thoughts.” CX 65 at 6.

Returning to previous points, Scarberry observed that “[a]nother major weakness” was Jenkins’ failure to coordinate with EPA support sections, such as the Methods Section for presentation of test methods in the draft and the Health Assessment Section for toxicological information and current aspects of risk evaluation. Jenkins failed to alert supervisors to “key issues” that would “affect project schedules.” Instead, management learned of them from “Work Group reviewers and supervisory staff after the draft was circulated for review.” The failure to identify issues caused management to request a 6-month schedule extension for the NPRM. CX 65 at 6.

Besides the NPRM, the issues/options paper was “unsatisfactory in quality” to Scarberry and Straus. The first draft revealed a poorly written set of issue papers that were clearly biased in favor of your opinions.” After a month’s time for revision, the second draft “did not adequately respond” to Scarberry’s and Straus’ comments. CX 65 at 6.

Scarberry informed Jenkins that her work would be closely monitored and that she would be eligible for a within-grade increase within 52 weeks upon satisfactory improvement in her work. CX 65 at 7. Scarberry’s trial testimony reiterated many of these points. R. D. & O., slip op. at 30-31; T. 1849-65.

4. Explanation for unsatisfactory performance evaluation

In addition to the denial of the within-grade increase based on unsuccessful performance, EPA management rated Jenkins “Unsatisfactory” overall on her Performance Agreement and Appraisal for October 1, 1986 to September 30, 1987. R. D. & O., slip op. at 3-31; CX-66. She received a score of 1 out of 5, “Unsatisfactory”, on “waste characterization studies . . . to prepare listing background document and federal register notice for the wood preserving industry,” which constituted 60 per cent of her overall evaluation. The form provides that “unsatisfactory” was the appropriate rating under the following measures: “(1) Majority of the milestones in Work Plan are missed[;] (2) Section Chief judges work to be of poor quality.” The rating official’s handwritten notes say,

[P]reamble to FRN was late (milestones were missed by a large margin) and document was of poor quality as it contained too much detail, was poorly written and difficult to comprehend, contained tables with much repeating information and substantial

negative comments (regarding quality, cohesiveness, and accusations that conclusions were not supported by listing justification). Also, it was evident that document was not well-coordinated with members of CAD's support sections such as Health Assessment and Methods. See details on denial Within Grade Increase.

CX 66.

On the balance of the performance standard appraisal, Jenkins received just 2 out of a possible 5 on "Answer[ing] incoming letters." "Employee's responses ranged from good [and] on track to poorly written, late; and on one occasion employee refused twice to complete a request to provide [a] FOIA update" CX 66 at 7. However, Jenkins received numerical 3, "satisfactory" and numerical 4, "outstanding" ratings on portions of the evaluation that dealt with comments and technical documents on the chlorinated aliphatics listings F024 and FO25 and the UDMH listing. CX 66 at 3-5.

5. Explanation for imposition of IDP (individual development plan)

Because Jenkins' performance for the FY 1987 was "unsatisfactory" EPA personnel policy mandated that Jenkins be supervised under an Independent Development Plan (IDP) for 60 days (December 2, 1987, to January 31, 1988), in order for her to cure her unsatisfactory rating and to demonstrate her fitness for continued federal service. R. D. & O. at 33. The author explained the reasons for the unsatisfactory evaluation for FY 1987:

I am concerned about the quality of written work performed over the last year. In particular, the poor quality work has resulted from problems with concepts, style, clarity, grammar and spelling. I believe your low ratings are, in general, due to five factors: failure to assure that all relevant aspects of an assignment are addressed from an unbiased viewpoint, difficulty with writing skills, verbal communication problems, and failure to provide a sufficient level of personal quality control on your work, and failure to develop a sound working relationship with other professionals in the Division and rely on their assistance and expertise.

CX-72. Jenkins was asked to prepare her own IDP, but both her first and her second attempts were of such "poor quality" that management prepared the plan for her. T. 1866; CX 72, 73 at 1. The IDP was signed by her then-chain of command, Edwin F. Abrams, Scarberry, and Strauss.

6. Explanation for raising performance evaluation to "fully satisfactory" following resolution of grievance

Jenkins filed a December 1, 1987 Request for Reconsideration and a December 16, 1987

grievance in which she contested the “unsatisfactory” FY 1987 performance evaluation. CX 80. In his response denying her request Scarberry noted that “[m]ost of the supporting material that you provided concerns events and issues that occurred outside the FY 87 performance period” and “is irrelevant.” CX 81, 84-A at 1-2. Scarberry discussed the fact that the draft NPRM for the wood preserving/surface protection industry was “completed well behind schedule.” CX 81, 84-A at 2. He also attached a table providing a list of requests submitted under the Freedom of Information Act (FOIA), congressional inquiries and letters from industry, which were assigned to Jenkins during the FY 87 performance period. The table showed that twelve of the fourteen assignments were completed late, without Jenkins offering any justification. CX 84-A at 3. “[Y]our consistent and sustained inability to meet deadlines is, by itself, sufficient grounds for an unsatisfactory rating,” Scarberry wrote. CX 81, 84-A at 2.

Initially, Lowrance, as Jenkins’ third line supervisor, denied her request that she reevaluate Jenkins’ grievance regarding her FY 87 performance evaluation. In a February 12, 1988 memorandum to Jenkins, Lowrance stated that she had “carefully considered all the evidence provided by yourself and your managers” and concluded that her “unsatisfactory” performance was reflected in her “failure to follow directions and to complete projects on a timely basis.” CX 83 at 1. Jenkins failed to persuade Lowrance that missed deadlines on the wood preserving project and correspondence were outside her control, that Scarberry did not give her a mid-year evaluation, or that Scarberry had forged or falsified a March 2, 1987 memorandum that memorialized her poor performance. CX 83 at 2. Lowrance denied that Scarberry was motivated to rate her performance “unsatisfactory” out of concern for protecting the wood preserving industry. Rather,

[I]t is an employee’s responsibility to follow orders given to them by their managers. When you are directed by your managers to add certain options to an issue paper, it is your responsibility to do so. Failure to do so would constitute insubordination.

CX 83 at 3.

Subsequently, Lowrance reconsidered her February 12, 1988 denial. Lowrance granted the Complainant’s requests on March 11, 1988, not on their merits, but because she was leaving her position and wanted the issues resolved before Deveraux Barnes came in as the new director. T. 1716. Accordingly, Lowrance granted the following relief: Jenkins’ 1987 performance rating was upgraded to “fully satisfactory” (*i.e.*, “fully successful”) and individual ratings for critical job elements were raised to “satisfactory” (*i.e.*, “fully successful”); her within-in grade salary increase was granted with back pay to the date of denial; and documents concerning her previously unsatisfactory performance were purged from her official personnel file. CX 83-A.

The Complainant was still not satisfied. Although she claimed entitlement to an “exceeds expectations” evaluation, EPA management reached a different conclusion. Jenkins’ supervisors proffered sufficient legitimate, well-documented performance problems with her work to establish that she did not merit even a “fully satisfactory” evaluation, let alone an “exceeds

expectations” rating. R. D. & O., slip op. at 31.

7. Explanation for reassignment from Scarberry to Dellinger, relocation of listings to another branch within three months, resulting in isolation

When Barnes replaced Lowrance as director of the Character and Assessment Division, on June 10, 1988, he reassigned Jenkins from the immediate supervision of Scarberry to Dellinger. Although he also offered Jenkins the opportunity to work directly for Barnes, she chose Dellinger because under him she could continue her listings work. R. D. & O., slip op. at 31; T. 598-99. Barnes regarded Dellinger as an excellent supervisor (T. 1732) and Jenkins’ performance under Scarberry had been poor. She had accused him of sexual harassment and forgery of documents that became part of her personnel file. Barnes believed the move could improve her productivity. T. 1731-32, 1739.

In the summer of 1988, medical waste washed up on the New Jersey and New York shores. Dellinger was put in charge of a newly created medical waste project, and the listing section was transferred to another branch within the division. R. D. & O., slip op. at 32; T. 1803-04. However, Jenkins was not transferred, because it was expected that Scarberry would be the new chief for that branch, and Barnes wanted to ensure that Jenkins would not work for Scarberry again. Consequently, although the reorganization resulted in the relocation of the listing work to another branch, Jenkins remained with Dellinger’s branch; but the personnel decision enabled her to continue to work on listings projects with the same pay and title. T. 1805-07.

8. Explanation for “fully successful,” rather than “exceeds expectations” 1988 performance rating

In December 1988, Jenkins was rated “fully successful,” but not “exceeds expectations.” Although Scarberry previously ranked Jenkins’ work as “unsatisfactory,” he thought she had progressed. T. 1869. Scarberry rated her minimally satisfactory for the period of his supervision from October 1987 to June 1988. T. 1868-69. Dellinger ranked her “exceeds expectations” for the period of his supervision from June 1988 to September 30, 1988. The evaluation of “fully successful” was a combination of the two ratings. R. D. & O., slip op. at 33; T. 1814-15.

9. Explanation for claim of no duties and isolation in 1988-1989

According to Dellinger, Jenkins was responsible for “at least” two hazardous waste listing projects in 1988. T. 1807-08. Jenkins admitted working on a solvents exemption project in 1988. T. 1261. In May 1989 Jenkins complained to Dellinger that her assigned “inordinate work load” was interfering with her EEO and Department of Labor complaints:

As I told you on May 12, my first priorities will not be any HSWA listing work, but instead pursuing my EEO and DOL complaints. This means that any anticipated milestones that you

set up must slip considerably, especially considering the fact that I will need to spend significant time with a District Court suit to force EPA to complete my EEO investigative file during the months of May, June, and July. Your assignment of the inordinate work load of both UDMH, methyl bromide, and chlorinated aliphatics becomes even more infeasible in light of these other duties.

CX 241 at 2-3.

In addition, Jenkins was occupied with various unassigned activities which she asserted were a part of her official duties, such as her April 30, 1989 132-page comment on the proposed wood preserving regulations that had been published in the Federal Register. CX 191.

10. Explanation for elimination of solvents and UDMH listing assignments

Jenkins complained about her removal from the solvents and UDMH II listing work on August 30, 1990. Jenkins wanted to look for dioxins in solvents other than the four listed by the contractor, Dynamac. CX 267, 270. Petruska believed the HSWA required only that the EPA complete solvents listing work that was under way at the time of the law's passage. T. 1558-59, 1583-84. Jenkins prepared a budget and plan dated July 24, 1990, for examining a new solvent listing, which she estimated at \$24 million, which nearly equaled the budget of her entire division. T. 1588-89; CX 273 A at 8. Her supervisor commented "This is absurd" and "This is a farce." CX 273-A at 7, 8. Petruska told Jenkins that they "don't need more data" (T. 1558) on the solvents listing II project; but she should continue to work on the listing, albeit limited to the four solvents listed in the contractor Dynamac's report. CX 261.

In a July 25, 1990 memo, Jenkins advocated that the UDMH listing involving the Olin process should be tested for dioxins. CX 260. On August 30, 1990, Petruska informed Jenkins that, although she should continue the UDMH Uniroyal listing that was already under way, she should stop work on UDMH II. "[W]e may take the position that given the lack of data on the Olin process, that this is not a HSWA listing," Petruska wrote. CX 261. Thus, the rationale offered was that Jenkins was told to stop work on UDMH II because Jenkins' supervisors had made a political or policy decision, not based upon Jenkins' protected activity, about what should be listed, how much time should be spent and at what cost. R. D. & O., slip op. at 35.

11. Explanation for claim of no duties and isolation in 1990-1991

The Respondent proffered evidence that Jenkins did not encounter a period of no duties and isolation in 1990. R. D. & O., slip op. at 35-36. After August 30, 1990, she worked on the remaining four solvents and UDMH listings. She also participated in unassigned duties involving Vietnam veterans groups and Congress regarding dioxin exposure and what she contended was the fraudulent Monsanto study in 1990 and 1991, which she nevertheless asserted was part of her official duties. Complainant's ARB Brief at 135.

However, there is evidence that Jenkins' work was reduced in 1991, for reasons the Respondent explained. R. D. & O., slip op. at 35. When Jenkins disclosed the existence of an ongoing criminal investigation against Monsanto, the Department of Justice, the EPA Inspector General's Office, and EPA's Office of Enforcement considered taking personnel actions against her for revealing the information and thereby violating EPA policy. T. 742. After January 1991, she was taken off work involving Monsanto products. T. 72; CX 326. Petruska explained that Monsanto could have challenged listings Jenkins worked on because of the appearance of bias and that maintaining good relations with the industry without the appearance of partiality was important in listings work. T. 1555-56, 1603.

Petruska considered but decided against assigning Jenkins three other listings projects during this time-frame, either because more data were not needed or the waste need not be listed. R. D. & O., slip op. at 36; T. 1560-62; CX 335, 336. EPA managers found it inadvisable to have her participate in a dye and pigment listing, because she alleged that the industry had made threats against her. T. 1491. Sometime in 1991, Jenkins did experience a reduction in her workload. Management did not have what they viewed to be suitable assignments, the listings were multi-year projects, and there were discussions about transferring Jenkins to another branch. T. 1492, 1602-07.

12. Explanation for inclusion of performance standard with regard to public communications

After Jenkins publicized the existence of the criminal investigation against Monsanto, after being advised by investigators not to disclose the investigation, Petruska in April or May of 1991 provided her final performance standards for the fiscal year that ended on September 30, 1991. T. 737-38. Under the performance objective that required her to "answer incoming letters and respond to inquiries, . . . assist criminal investigations of environmental fraud" certain requirements had to be met to receive an "outstanding" or "fully successful" rating. In addition to work that was on time, well written and correct, the performance measure required that, "Agency policies concerning communicating with the public are followed." CX 334 at 6. Otherwise, Jenkins would be rated "Unsatisfactory" for that performance standard. In part because EPA policy prohibited revelation of pending criminal investigations and Petruska wanted to ensure that Jenkins knew and understood the importance of that requirement, he incorporated the "policies concerning communicating with the public" language into her performance agreement. When she failed to adhere to that standard, her performance was downgraded. R. D. & O., slip op. at 32; CX 334 at 6; T. 1220, 1600.

13. Explanation for "fully successful," rather than "outstanding" 1991 performance rating

Subsequent to incorporation of the communications policy criteria in her performance standards, Jenkins violated the provision by again discussing the Monsanto investigation. CX 324. Thus, in her October 29, 1991 performance rating she was rated "unsatisfactory" in that category, which, combined with satisfactory ratings in other categories, enabled her to receive an

overall evaluation of “fully successful,” but not “outstanding.” R. D. & O., slip op. at 37; T. 1600-01, 1632; CX 334.

F. Complainant’s failure to establish intentional discrimination

The Respondent has thus met its burden of producing evidence that it took the enumerated claimed adverse actions for legitimate, non-discriminatory reasons. The last – and obviously most crucial – question we need to address is whether the Complainant has proved by a preponderance of the evidence that the Respondent intentionally discriminated against her in violation of the employee protection (whistleblower) provisions of the RCRA/SWDA, SDWA and CERCLA. *Reeves*, 530 U.S. 133; *St. Mary’s Honor Center*, 509 U.S. 502; *Texas Dep’t of Community Affairs*, 450 U.S. 248; *McDonnell Douglas Corp.*, 411 U.S. 792. For reasons we now discuss, we find that the legitimate reasons proffered by EPA, discussed in III, E, *supra*, were the true reasons for its actions, and not a pretext for discrimination. We therefore hold that the Complainant has failed to prove intentional discrimination. In reaching this conclusion, we consider Jenkins’ credibility and conduct; her rebuttal evidence on the scientific issues, the quality, efficiency of her work, and ability to work with others; and finally the absence of discriminatory intent on the part of EPA managers.

1. Complainant’s credibility and conduct

We agree with the ALJ that Jenkins’ credibility and conduct are central to the resolution of the case, not only because of the “frequent conflict between her version of events and that of other witnesses” but also “because her perception of events is the principal component in her belief that she has been discriminated against for her protected activity.” R. D. & O., slip op. at 21. As noted, we defer to an ALJ’s demeanor-based credibility findings. *Stauffer v. Wal-Mart Stores, Inc.*, ARB 99-STA-2, slip op. at 9 (ARB July 31, 2001). *Accord Lockkert v. United States Dep’t of Labor*, 867 F.2d 513, 519 (9th Cir. 1989). The ALJ observed:

Getting right to the point, Cate Jenkins is the most disingenuous, evasive, and self-serving witness I have ever observed. She is an intense woman who believes that any means are acceptable if, in her view, the ends are desirable, including lying (even under oath), searching through co-workers’ personal effects, and leaking confidential information. She further believes that any person, rule, or law which stands in her way can be ignored. She has acted and continues to act as if she believes she is the only person at EPA who is concerned with the public interest and everyone else is selling out to the industries regulated by EPA. Accordingly, she irrationally assumes that every criticism of her job performance, no matter how obviously valid, is part of a plan to impede her efforts to protect the public and the environment. It does not appear to have entered her mind that proposals which differ from hers may nevertheless be meritorious or even worthy of consideration, nor does it appear to have occurred to her that her

“ends justify the means” philosophy may compromise both her credibility and that of the EPA. Dr. Jenkins’ sanctimonious, condescending, and distrusting attitude toward her colleagues made it inevitable that serious problems would develop in her employment relationships.

R. D. & O., slip op. at 21-22.

The ALJ continued:

Complainant’s utter lack of credibility could only truly be appreciated through personally observing her six days of testimony. I do not often rely solely on demeanor in determining a witness’s credibility, but the complainant’s demeanor was so disquieting that it is dispositive here by itself. Complainant often appeared to be in her own world, divorced from reality. She frequently answered questions with long discourses that quickly became unfocused. During her period on the witness stand complainant lied with impunity and did not appear the least embarrassed when she was caught in these lies (*e.g.*, TR 968-82, 1014-17). She bragged about her bizarre behavior which she seemed to have no idea was in any way aberrant or unusual (*e.g.*, TR 1245-55). In addition, she had alleged lapses of memory on unfavorable points so frequently that it was obvious the problem was one of honesty rather than memory. She has her own moral standards which are not in accord with those of the rest of society. She has no concept of team or organization, refuses to recognize the authority of her supervisors, and has no sense of loyalty to anything other than herself. She also has an enormous ego.

R. D. & O., slip op. at 21-22.

The ALJ finished the credibility discussion by saying, “The longer [Jenkins] testified, the more rambling and accusatory her testimony became. She is so emotionally involved that she can not possibly be objective.” R. D. & O., slip op. at 27. “In sum, I find that her testimony was inherently unreliable, and absent corroborating evidence is insufficient to establish any controverted fact.” R. D. & O., slip op. at 27.

The ALJ emphasized that Jenkins’ “bizarre behavior at work” was the source of internal conflicts and resulting estrangement from the EPA staff. R. D. & O., at 21; T. 790-92. We summarize the ALJ’s findings with respect to this conduct, for which there is ample support in the record.⁷ R. D. & O., slip op. at 22-27.

⁷ The Complainant argues that the ALJ’s findings about her credibility and conduct are evidence of bias and should be rejected. Complainant’s ARB Brief at 6-9; Complainant’s ARB

- Jenkins signed Scarberry’s name without his permission to a letter attached to a revised draft of the listing background document. R. D. & O., slip op. at 3-4; T. 1846.
- After February 13, 1987, Jenkins began to secretly tape record conversations with supervisors, which was prohibited under EPA regulations. Jenkins tape recorded a conversation with Scarberry on July 20, 1987, about her draft issues and options paper. CX 46-H; T. 275-79. Jenkins wanted to tape record her mid-year review in April 1988 with Scarberry and Edwin Abrams, but they postponed it when they found out. T. 623, 1868. Despite an EPA order prohibiting employees from secretly tape-recording conversations, Jenkins surreptitiously tape recorded conversations with EPA managers. R. D. & O., slip op. at 23.
- Jenkins used the EPA letterhead, even that reserved for the EPA administrator, for outside correspondence, to give her personal opinions EPA’s imprimatur. R. D. & O., slip op. at 23. Jenkins testified that she was unaware that it was impermissible to send out her own unauthorized letters on EPA letterhead, although she admitted that Scarberry had informed her that her April 13, 1988 memo to EPA Region 9 was improperly written on EPA letterhead because it contained her personal opinion. T. 1068-69. As examples of the misuse, she used EPA letterhead in letters to Congress on June 13, 1988, accusing EPA of a cover-up. R. D. & O., slip op. at 17; CX 151. She used EPA letterhead on an October 7, 1988 letter to Congress alleging “consultant abuses at EPA and cover-up” regarding the Radian Corporation. CX 157. Jenkins sent a February 7, 1990 letter to Congress regarding the Toth study of UDMH out on the EPA Administrator’s letterhead. She also put her December 21, 1989 letter to Congress charging “corruption by the EPA Inspector General in Investigating Criminal Acts by EPA Officials” on EPA stationery. CX 197.

Rebuttal Brief at 3-5. The Respondent counters that the ALJ’s credibility determinations are fully supported by the record and do not show improper bias. Respondent’s ARB Brief at 9-28. As the Respondent points out, *Liteky v. United States*, 510 U.S. 540 (1994), held that

judicial rulings alone almost never constitute a valid basis for a bias or partiality motion. . . . The judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards [a party], who has been shown to be a thoroughly reprehensible person. But the judge is not thereby recusable for bias or prejudice, since his knowledge and the opinion it produced were properly and necessarily acquired in the course of the proceedings, and are indeed sometimes (as in a bench trial) necessary to the completion of the judge’s task.

510 U. S. at 550-51, 554. Following our review of the entire record, we agree with the Respondent’s position and decline to disturb the ALJ’s findings on the basis of improper bias.

- Jenkins accused Scarberry of forging documents in her personnel file that supported the decision that she not receive a within-grade pay increase (CX 80 at 51), but then refused to participate in the Inspector General’s November 1988 investigation of the accusation she initiated. Finding “no evidence to warrant further investigation” the IG’s office closed the case. CX 76.
- Jenkins collected information from co-workers and managers by looking at folders on desk tops, reviewing branch files, reading incoming and outgoing mail on secretaries’ desks, going through the boxes of documents to be photocopied, and once removing a file from Petruska’s desk. T. 528-32, 1245-52. She rationalized, “[I]f anything’s private, you should keep it locked up. . . . I was very diligent at looking at anything around.” T 1245-46, 1248.
- Jenkins falsely claimed she was receiving death threats (R. D. & O., slip op. at 23), which she used as justification for carrying a look-alike gun at work. T. 1027-32.
- When she was taken off the wood preserving listing, she copied much of 40 file drawers of documents for her personal use, without EPA permission and using EPA time and resources. R. D. & O., slip op. at 26; T. 349-50.
- Jenkins publicized the existence of a pending criminal investigation against the Monsanto Company, despite specific instructions to keep this information confidential. R. D. & O., slip op. at 19-20, 23-24; T. 1201-04, 1207, 1575; CX 305. Jenkins’ conduct was contrary to the policy of EPA, which issued memoranda to its staff not to disclose the existence of ongoing criminal investigations. R. D. & O., slip op. at 24; T. 737-38, 1210-12; CX 326, 332. Petruska considered disciplining Jenkins for revealing the investigation. R. D. & O., slip op. at 20; T. 1574. The EPA Inspector General’s Office, EPA Office of Enforcement, and the Department of Justice also considered taking action against her. R.D. & O., slip op. at 20; T. 742; CX 326.

While not the articulated basis for various management decisions discussed at III, E, *supra*, this unusual behavior has a place in the discussion because it bears on Jenkins’ fitness as an employee, the supervision problem she presented to her managers, and, ultimately, on their lack of discriminatory animus toward her; notwithstanding her insubordination and disrespect for traditional conduct in the work place, her EPA managers did not discipline her for any of this behavior. The picture created is one in which Jenkins’ supervisors worked diligently to provide her fair treatment as opposed to retaliating against her for her protected activity.

We of course consider, but here reject, Jenkins’ rebuttal arguments regarding her credibility and conduct. Complainant’s ARB Brief 6-27; Complainant’s ARB Rebuttal Brief at 5-12; exhibits cited in those briefs. Since we did not have the benefit of witnessing Jenkins’ testimony, we defer to the ALJ’s demeanor-based observations about her credibility. However, informed by our review of her recorded testimony, we draw the same conclusions as the ALJ did about her qualities as a witness. She changed her testimony (T. 400, 604, 625, 1017, 1095, 1097, 1122, 1151, 1202, 1224); was evasive, non-responsive and “could not recall” unfavorable facts

(T. 593, 657, 760, 763, 850, 858, 972, 1015, 1043, 1044, 1047, 1088, 1093, 1191, 1202, 1258, 1280, 1284, 1347); was rambling and loquacious (T. 767, 804-07, 811, 903, 1414); used hyperbole (T. 814, 820); provided self-serving answers (T. 833, 840-41, 1070, 1244, 1315-16); refused to acknowledge the obvious (T. 996, 1018, 1050, 1111, 1144); and showed herself to be narcissistic (T. 1259). If anyone disagreed with her or took an action she did not like, she would accuse them of illegality, fraud, forgery, cover-up, and/or falsification rather than considering the possibility that such disagreement resulted from a legitimate difference of opinion. T. 70, 108, 110, 125, 217, 275, 350, 443-44, 484-85, 486, 802, 809, 817-18, 851, 856, 912, 922, 1093.

Jenkins the witness gives us insight into Jenkins the employee. Throughout Jenkins' tenure with EPA's Waste Characterization Branch, no one was exempt from her rhetoric and intemperate charges: For example, she asserted to Lowrance and the EPA IG that Scarberry had created false personnel documents (CX 74, 75) but, after witnesses denied the allegations, the IG's office found "no evidence to warrant further investigation" and closed the case. CX 76. She tried to initiate a "Congressional Investigation and Oversight of EPA" with a letter that charged: "cover-up and falsification of exposures from Superfund site;" "deals with industry for national wood preserving regulations;" "failure to regulate other hazardous wastes;" "reprisals against EPA staff scientist;" and "illegal use of public sector contractors." CX 151. In another letter, she complained of "Consultant Abuses at EPA and cover-up," including: "consultant conflicts of interest;" "consultant role in inherently governmental functions and personal services;" and "contract tampering." That letter criticized the EPA IG for not acting on her information. CX 157. At Jenkins' insistence, the IG had opened an investigation of the contractor Radian (CX 159), but the inquiry was closed when the IG's office found "no evidence to warrant further investigation." CX 158. When the IG failed to act to her satisfaction, Jenkins then stepped up her campaign against the IG with a further petition to Congress alleging "corruption by the EPA Inspector General in investigating criminal acts by EPA officials," *i.e.*, failing to investigate her complaints of conflicts of interest. CX 197. Jenkins had also taken aim at Congress for "Illegal interference by certain members of Congress in the regulatory process at EPA," namely for, as she saw it, capitulating to the wood preserving industry and in turn putting pressure on EPA to relax the regulations. CX 192. As a final illustration, she lobbied the EPA administrator to retract what she labeled an "illegal" policy that prohibited the surreptitious tape recording of conversations. CX 222.

As we have said, we assume without specifically ruling that these complaints to supervisors, the IG and Congress are protected under the environmental whistleblower statutes at issue; but we also note that none of the Jenkins-sponsored investigations ever resulted in a finding of conflict of interest, fraud or illegality, a consideration which we think bears on her credibility and motivation. Jenkins presents to us as a very difficult employee whose potential effectiveness as a scientist was largely compromised by her lack of consideration of others, insubordination, and failures of personal integrity. In short, her qualities as a witness cast doubt upon her interpretation of the evidence and give credence to EPA managers' testimony that they made decisions pertaining to her based upon considerations that the law recognizes as legitimate and non-discriminatory. We, like the ALJ who observed the witnesses, find none of the disingenuousness in EPA witnesses' testimony that we note in Jenkins' and therefore credit their testimony over hers.

2. **Jenkins’ rebuttal evidence on the scientific issues, quality, efficiency of her work, and ability to work with others**

Our charge is not to enter the scientific discussion between Jenkins and, EPA policymakers or to second-guess her EPA supervisors with respect to Jenkins work assignments and evaluations. *E.g.*, *Ransom v. CSC Consulting, Inc.*, 217 F.3d 467, 471 (7th Cir. 2000), (“[t]his court does not sit as a super-personnel department and will not second-guess an employer’s decisions”); *Kariotis*, 131 F.3d at 678 (“a court must observe its limitations and not sit as a super-personnel department that reexamines an entity’s business decisions”); *Skouby v. The Prudential Ins. Co. of America*, 130 F.3d 794, 795 (7th Cir. 1997) (same); *Bienkowski v. American Airlines, Inc.*, 851 F.2d 1503, 1507-1508 (5th Cir. 1988) (discrimination statute “was not intended to be a vehicle for judicial second-guessing of employment decisions, nor was it intended to transform the courts into personnel managers;” statute cannot protect employees “from erroneous or even arbitrary personnel decisions, but only from decisions which are unlawfully motivated”). Rather, we scrutinize the record for evidence that the Respondent’s proffered explanations are false and a pretext for discrimination.

Jenkins appears to associate a validation of her scientific viewpoint with success on the merits of her reprisal claims. Complainant’s Post-hearing Brief at 101-154; Complainant’s ARB Brief at 30-34, 46-56; Complainant’s ARB Rebuttal Brief at 18; exhibits cited in those briefs. We need not take a position on that portion of the debate. Throughout her stint with the Waste Characterization Branch, Jenkins’ preoccupation was with the perceived carcinogenic effects of dioxins thought to exist in chemical wastes under EPA regulation. According to Jenkins, with EPA’s regulatory mission confined to the impact of chemical wastes on health and the environment, the search for dioxins had to occur without regard to the amount of time spent, the cost incurred, or Congressional directives. *E.g.*, CX 5, 20, 25, 26, 28, 30, 32, 33, 34, 80 at 43-48, 89, 92, 151, 191, 250, 267, 269, 270, 275, 278, 288, 296, 301, 302, 308, 309. For EPA managers, other considerations obtained: Congressional priorities established in the HSWA amendments of 1984, temporal and budgetary constraints, and practicalities, such as the impact on the environment if waste disposal sites refused to accept products labeled “acutely hazardous.” As we divine our role, it is not to resolve those scientific or policy questions, but to determine whether EPA managers retaliated against Jenkins for expressing her views. Under the environmental whistleblower laws, Jenkins should have been free vigorously to report what she considered to be violations of the environmental laws without reprisal. On the other hand, as an EPA GS-13 staff chemist, it was her responsibility to carry out EPA policy as senior management determined it. CX 1. In other words, she was not at liberty to disregard or thwart the instructions of her supervisors, which, from our review of the record, is what she did. After considering the evidence and arguments offered by both parties, we conclude that Jenkins was not removed from assignments like the wood preserving, solvents and UDMH listings because of her scientific advocacy *per se*, but on account of EPA’s business needs, its discretion in allocation of staff resources and its prioritization of the listings required by the HSWA amendments of 1984. R. D. & O., slip op. at 28-30. In short, we distinguish between protected complaints and unprotected failures to complete work assignments as requested; and we accept

the Respondent's managers' rationale for the entire spectrum of their assignments to Jenkins as non-discriminatory.

Next, Jenkins disputes EPA management's explanations that her work was of poor quality, that she was inefficient and missed deadlines, and that she was unable to work effectively with others. Complainant's Post-hearing Brief at 210-232; Complainant's ARB Brief at 28-40; Complainant's ARB Rebuttal Brief at 16-19; exhibits cited in those briefs. As events were evolving, Jenkins issued memoranda focused on refuting criticism and maintaining her positions. *E.g.*, CX 44, 80, 83-C, 84, 277. In general, these chronicle her attacks on management for bias, contractors for incompetence and EPA support groups for non-cooperation with her points of view. Correspondingly, hundreds of pages of testimony and exhibits reveal Jenkins' unwillingness to accept responsibility and inability to internalize criticism. Remarkably, Jenkins testified that spelling errors were an "unreasonable thing to fault an employee for" and correcting disagreement between a subject and verb and spelling mistakes did not constitute rewriting. T. 841. She refused to acknowledge that extensive comments on her work were criticisms. T. 1013-14. Deletions of what she had written were to her examples of bias on the part of her supervisors, not reflections of her performance. T. 169-71, 198-9, 1307-10. In her proposed IDP, Jenkins announced that she would "Provide management with very rough, probably misspelled, ungrammatical draft of what the simple, three-page amendment [to the spent solvents exemptions] will look like" T. 1866; CX-73 at 1. Although Jenkins denied personal bias, in her issues/options papers for the wood preserving listings, she failed to list pros for positions she opposed and cons for those she espoused. CX 34, 43. And in a performance evaluation she scored herself a perfect 500 out of 500, while her supervisors gave her a score of 190. R. D. & O., slip op. at 25.

On the other hand, abundant examples of Jenkins' work with heavy edits and notations objectify management's evaluations:

- June 23, 1986 draft listing background document (CX 11): "Cate: I have reviewed approx[imately] ½ of this [and] I have a no. [number] of concerns. Please set up [a] time so we can discuss. Matt." CX 11 at 1.
- February 13, 1987 draft proposed rule (CX 14-B): "[T]his discussion is not clear" (CX 14-B at 77); "[T]his section is too long" (CX 14-B at 108); "[T]his section is out of order" (CX 14-B at 128); "[O]nce again, can't this be shortened[?]" (CX 14 at 141).
- May 5, 1987 draft response to the work group comments (CX 27): "I'm not sure I understand" (CX 27 at 6); "This is not the way to respond" (CX 27 at 13); "This statement is not true. Need to discuss" (CX 27 at 28).
- June 24, 1987 issues/options paper (CX 30): "It needs a lot of work" (CX 30 at 1); "So what. I don't understand your pt. [point]" (CX 30 at 12); "So what. I think your [sic] missing the pt. I don't agree with these pts. [points]" (CX 30 at 12); "I'm not sure this is really true" (CX 30 at 13).

- February 9, 1988 issues/options paper for “Headworks” (CX 266): “You are expected to do the best job possible in the time frame available. You did not focus on the objectives of this assignment: provide examples that will assist us in clarifying the definition of headworks. The examples presented deal with many issues outside the scope of this assignment.” (CX 266).

Objective evidence also shows that Jenkins missed deadlines and worked inefficiently. Although the original deadline was December 20, 1985, she did not submit a draft wood preserving listing background paper until June 23, 1986. T. 1840; CX 11, 65 at 2. On December 1, 1986, the Complainant committed to having a re-worked draft wood preserving regulations completed “in another two weeks or so” (CX 13 at 3), but the revisions were not back to the work group until February 19, 1987. R. D. & O., slip op at 5; T. 1846, 2094; CX 15. Because the draft had originally been scheduled to be submitted to the work group on December 20, 1985, Jenkins was 26 months behind schedule. CX 65 at 2. Although Scarberry expected Jenkins to have the wood preserving issues/options document prepared in two weeks from May 29, 1997 (T.1851-52), she did not have the first draft until June 24, 1997, or the second until August 6, 1987. CX 30, 34. By September 2, she had not completed the assignment and was removed from it. During the FY 87 performance period Jenkins was assigned requests submitted under the Freedom of Information Act (FOIA), congressional inquiries and letters from industry. She completed twelve of the fourteen assignments late, without justification. CX 84-A at 2. Each of her projects would turn into a “monster” with the need for an “unlimited budget.” CX 271. Her preamble for the wood preserving NPRM was 280 pages, when the total document was expected to be 20 to 50 pages. CX 65 at 3. After Jenkins was removed from the assignment, the entire published regulation was just 48 pages. CX 189.

Jenkins takes issue with the conclusion that she did not work well with contractors and internal support groups. Complainant’s Post-hearing Brief at 69-74. While Jenkins proffered evidence of her interaction with contractors and support groups (*e.g.*, CX 11, 13, 14, 20, 27), in general, the record demonstrates that Jenkins was distrustful of EPA contractors and regarded them as inadequately skilled and biased in favor of industry by whom they were also employed. For instance, she claimed that Dynamac produced “incompetent and highly biased health summaries” that did not properly evaluate carcinogens or disagreed with her on how they should be studied. T. 96, 125, 248-49; CX 14 at 2-3. Scarberry dealt with Dynamac himself at one point, because it was his view that, rather than utilizing the contractor to provide information on toxic constituents, Jenkins merely delegated clerical work. R. D. & O., slip op at 5; T. 1845, 1850. At a later point, Jenkins accused the contractor Radian of a conflict of interest. CX 157, 159. Similarly, there was discord between Jenkins and EPA health assessment section head Dr. Reva Rubenstein (T. 1850-51), with Jenkins deciding to “write the toxicity section in question [herself] and let[ing] Reva decide for herself whether it should stay in the document.” CX 87. Consequently, we find that Jenkins’ criticism of Dynamac’s performance, disharmony with Rubenstein and other obstacles reasonably convinced Scarberry that Jenkins in her role as WAM failed to work well with others and to utilize resources effectively to achieve a timely result. Hence, we are unable to infer that in citing the “inefficient and inadequate use of resources” rationale as grounds for downgrading Jenkins’ performance Scarberry was “dissembling to cover

up a discriminatory purpose.” *Reeves*, 530 U.S. at 147.

Certain other evidence establishes that Jenkins’ superiors did not manufacture concerns about her work as a pretext for retaliation. Testimony offered by Paul Jean, a former EPA employee-relations specialist, established that EPA managers had discussed difficulties with Jenkins’ performance among themselves as early as March, May and June 1987. T. 1751-1752, 1754-1755, 1774, 1788-1789. The applicable Performance Agreement and Appraisals give discretion to the first line supervisor in grading the quality of the employee’s work. *E.g.*, “Section chief judges work to be . . . outstanding . . . satisfactory . . . [or] poor . . . with respect to quality.” CX 66, 328, 329, 334. Under our analysis, the FY 1987 “unsatisfactory,” increase to “fully satisfactory” following resolution of Jenkins’ grievance, FY 1988 “fully successful,” and FY 1991 “fully successful” evaluations were supported by the evidence and not a pretext for discrimination.

3. Absence of discriminatory intent

Jenkins’ assertions to the contrary, we find that she was not subjected to disparate treatment that would assist her in proving pretext. Manifestations of Respondent’s alleged hostility toward her protected activities, according to the Complainant, include that: the wood preserving took additional time to complete after she was replaced; other EPA hazardous waste listings were also behind schedule; and EPA did not take adverse action when Jenkins’ other assignments were late. Complainant’s Post-hearing Brief at 61-68; Complainant’s ARB Brief at 41-43. We discuss these in order.

Jenkins notes that, as a result of further delays, the proposed wood preserving regulations were not published until December 30, 1988. T. 516; CX 189; 53 FR 53282. The final regulations differed substantially from the Jenkins draft. *Compare* CX 15 with CX 189. We cannot infer that the deadlines given to Jenkins were unreasonable, hence discriminatory, from the time it took her successor to complete the assignment. Jenkins also observes that EPA missed HSWA deadlines in 13 out of 24 listings and speculates that the only adverse action taken was against her. As we have observed, Jenkins’ removal from the wood preserving listing does not establish discriminatory intent. It was not just the repeated delays that triggered her removal, but also the poor quality of her work. She has failed to show unequal treatment, since the record is silent on whether others whose listings projects were also late did not experience lower performance appraisals. Finally, Jenkins suggests that EPA’s failure to take adverse action when she missed deadlines on other listings is probative of retaliation for her protected activities related to the wood preserving listing. We find that argument unpersuasive. Since Jenkins was engaged in protected activities that did not relate to the wood preserving listing, the failure to take action against her for missing other deadlines may also be indicative of EPA’s lack of animus toward Jenkins.

Finally, we note that, throughout the relevant time period, *i.e.*, from 1985 to 1981, EPA’s managers sought to find ways to accommodate the Complainant’s interest in continuing with listings work while still meeting EPA’s policy objectives: from tolerating ongoing delays in the completion of the wood preserving listing, to allowing her to continue to do listings work under

Dellinger after her transfer out of Scarberry's Listings Section, to Petruska's attempts to finding her suitable listings assignments. A management group genuinely motivated by discriminatory animus is unlikely to have made those efforts.

Accordingly, reviewing the record as a whole, we find that Repondent's reasons for its actions are non-pretextual and that the Complainant has failed to establish by a preponderance of the evidence that EPA intentionally discriminated against her.

IV. COMPLAINANT'S HOSTILE WORK ENVIRONMENT CLAIM

Finally, we address Jenkins' hostile work environment claim. In addition to the 13 separate claims of adverse action over a period of four years, Jenkins asserts that "hostility from her supervisors, isolation, estrangement and stigmatization from her colleagues, and false and defamatory comments cumulatively resulted in a hostile work environment, and resultant emotional distress, humiliation, and personal indignity." Complainant's Post-hearing Brief at 177.

Our cases draw heavily on the body of hostile work environment law that developed under the Civil Rights Act of 1964. *E.g.*, *National Railroad Passenger Corp.*, 122 S.Ct. at 2074; *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 754 (1998) (explaining difference between specific claims and hostile work environment claims; latter require proof of "severe or pervasive conduct"); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). Under this theory of recovery, a complainant is not required "economic" or "tangible" job detriment such as that resulting from discharge, failure to hire or reassignment to an inferior position, but is required to prove that: 1) she engaged in protected activity; 2) she suffered intentional harassment related to that activity; 3) the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment; and 4) the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant. *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ Nos. 97-ERA-14 *et al.*, slip op. at 13 (ARB Nov. 13, 2002); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ Nos. 97-CAA-2, -9, slip op. at 16-17, 21-22 (ARB Feb. 29, 2000); *Freels v. Lockheed Martin Energy Systems*, ARB No. 95-110, ALJ Nos. 94-ERA-6, 95-CAA-2, slip op. at 13 (Sec'y Dec. 4, 1996); *Varnadore v. Oak Ridge Nat'l Lab.*, Nos. 92-CAA-2, -5; 93-CAA-1, slip op. at 90-101 (Sec'y Jan. 26, 1996). Circumstances germane to gauging a work environment include "the frequency of the discriminatory conduct; its severity, whether it is physically threatening or humiliating, or a mere offensive utterance, and whether it unreasonably interferes with an employee's work performance." *Berkman*, slip op. at 16. A respondent is liable for the harassing conduct of a complainant's coworkers or supervisors if the employer knew, or in the exercise of reasonable care should have known of the harassment and failed to take prompt remedial action. *Williams*, slip op. at 55; *Varnadore*, slip op. at 75-78.

We have extensively reviewed the 13 alleged adverse actions, and concluded that only the denial of within grade increase and the "unsatisfactory" performance evaluation in 1987 were adverse actions, III, E, *supra*. However, even assuming the other 11 personnel actions involving

the “satisfactory” evaluations and reduction in work assignments were adverse actions, they were not in the aggregate “sufficiently severe or pervasive . . . to create an abusive working environment” and “detrimentally affect[]” Jenkins’ work. *Williams; Berkman; Freels; Varnadore*. Although the Complainant testified that Scarbery “harassed” her, the evidence is limited to what we have determined to be well-founded criticisms of her work, and to a compliment about her smile. T. 924, 114, 1151, 1174, 1176. She also recounted her “stigmatization” and the deterioration of her relationship with co-workers (T. 353, 767-73, 790, 1369), but failed to show either that it rose to the requisite level of hostility or that it was attributable to the Respondent’s negligence. The ALJ noted that Jenkins’ “aberrant” behavior at work and inability to get along with supervisors and co-workers resulted in the “discordant” and “tense” work environment that she described. R. D. & O., slip op at 26-27. We agree that that is what the evidence shows. While the Complainant may have suffered from emotional distress sufficient to merit therapy (T. 1289, 1405), she has not met her burden of establishing that employer based or sanctioned retaliation for protected activity was its source. We therefore conclude that her hostile work environment claim fails.

CONCLUSION

To recapitulate, we have held as follows:

1. We have ruled that the Complainant’s April 11, 1988 complaint was untimely. Therefore, the claims made in that complaint – removal from the wood preserving issues/options paper, removal from the wood preserving listing, denial of the within-grade increase, and unsatisfactory performance evaluation, and imposition of IDP – are **DISMISSED**.
2. We have held alternatively that we would address those claims and the Complainant’s remaining claims that we have determined not to be time-barred. We have concluded that the Complainant failed to establish a *prima facie* case with respect to any claims except her denial of the within-grade increase and unsatisfactory performance evaluation, since only those were adverse actions.
3. Reaching the merits on the denial of the within-grade increase and unsatisfactory performance evaluation, or alternatively on all 13 of the claims the Complainant identified as retaliatory, we rule that she failed to show by a preponderance of the evidence that the Respondent EPA intentionally discriminated against her in violation of the employee protection (whistleblower) provisions of the RCRA/SWDA, CERCLA and SDWA.
4. Finally, we have held that she was not subjected to a hostile work environment as a consequence of her protected activity.

Accordingly, the Complainant's complaints are in their entirety **DENIED**.

SO ORDERED.

WAYNE C. BEYER
Administrative Appeals Judge

M. CYNTHIA DOUGLASS
Chief Administrative Appeals Judge

JUDITH S. BOGGS
Administrative Appeals Judge