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Office of Administrative Law Judges
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Issue Date: 10 May 2005

CASE NUMBER 2003-SDW-0001

In the Matter of

GREGORY CALDWELL,
Complainant,

v.

EG&G,
Respondent.

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For the Complainant

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For the Respondent

Before: Paul A. Mapes
Administrative Law Judge

RECOMMENDED DECISION AND ORDER

The above-captioned matter arises from a complaint by Gregory Caldwell (hereinafter "Caldwell" or "the Complainant") against EG&G (hereinafter "the Respondent") under the employee protection provisions of the Solid Waste Disposal Act, also known as the Resource Conservation Recovery Act ("RCRA"), 42 U.S.C. § 6971; the Toxic Substances Control Act ("TSCA"), 15 U.S.C. § 2622; the Clean Air Act ("CAA"), 42 U.S.C. § 7622; the Comprehensive Environmental Response, Compensation and Liability Act of 1980 ("CERCLA"), 42 U.S.C. § 9601; the Clean Water Act ("CWA"), 13 U.S.C. §1367; and the Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300j-9. A trial on the merits of the complaint was held in Salt Lake City, Utah on March 15-19 and 22-26, 2004. The following exhibits were admitted into evidence: Complainant's Exhibits (CX) 1-47, Respondent's Exhibits (RX) 1-32, 33 (as a demonstrative exhibit). The Complainant submitted a post-trial brief on September 7, 2004, and a reply was filed by the Respondent on October 18, 2004. The Complainant's response to the Respondent's reply was received on December 13, 2004.

BACKGROUND

A. Description of Respondent

The Respondent operates the Tooele Chemical Agent Disposal Facility (hereinafter, "TOCDF") at the Desert Chemical Depot in Tooele, Utah under a contract with the United States

Army ("the Army"). CX 26 at 682. The TOCDF facility is responsible for removing toxic chemicals from weapons stockpiles and destroying the chemicals in incinerator furnaces. CX 26 at 682, Tr. at 1553. At TOCDF, the toxic chemicals are commonly called "agents" and the solutions used to decontaminate the agents are typically referred to as "decon." After a batch of agent is neutralized by mixing it with decon in a secured area, the mixture is drained or otherwise moved into collecting sumps and storage tanks. Later, the mixture is destroyed in TOCDF's liquid incinerators. Tr. at 1553. The Respondent employs approximately 750 people at TOCDF and Batelle, a subcontractor providing laboratory monitoring services to EG&G, employs approximately 100 additional workers at the same site. Tr. at 1552. In addition, the Army has about 12 people on-site for supervision and liaison, and another Army contractor, SAIC, employs 15 to 20 people to support the Army personnel. Tr. at 1553. During the time period relevant to this case, Tim Olinger was the TOCDF Plant Manager and Steve Frankiewicz was the General Manager. Tr. at 672, 706. Other EG&G managers included Terry Thomas, the engineering manager; Debbie Sweeting, the human resources manager; and Dick Snell, the environmental manager. Tr. at 72, 566, 955. Curtis Goodell, an engineering supervisor reporting to Terry Thomas, was the Complainant's direct supervisor in the TOCDF Engineering Department. Tr. at 1331-32.

The TOCDF facility operates under a Resource Conservation and Recovery Act permit administered by the State of Utah's Division of Solid and Hazardous Waste (hereinafter, "DSHW"). Tr. at 36, 1559. The permit identifies mechanical and safety-related requirements of TOCDF operations, such as the use of sumps to collect spilled liquids and the size and capacity of TOCDF's various agent and decon storage tanks. Tr. at 1560, CX 14. In addition, detailed management procedures for planning, scheduling, and documenting work activities at TOCDF are reviewed and approved by Army personnel supervising the operation of TOCDF. RX 7. When monitoring equipment inside the facility detects elevated levels of a toxic chemical in the air, termed "agent migration," EG&G must report the incident to DSHW and conduct a follow-up investigation to identify the source and cause of the agent migration. Tr. at 1610-11. These investigations are conducted by teams whose members are drawn from various functional areas at TOCDF. Tr. at 955-57, RX 10 at 155.

B. Description of Complainant

The Complainant, Gregory Caldwell, testified that he began working at the TOCDF facility in approximately 1993, when he was employed as a maintenance engineer on the payroll of a contract engineering service. Tr. at 1313, 1322-24. Around August of 1994, Caldwell became an EG&G employee while continuing to work as a maintenance engineer. Tr. at 1324, 1328. In 1996, Caldwell transferred into the capital improvements section of EG&G's Engineering Department, where he performed "project engineer duties." Tr. at 1329. Goodell, who was Caldwell's last supervisor at EG&G, testified that Caldwell's job title was actually "engineering technologist" and that he wasn't classified as a "system engineer." Tr. at 454. However, Goodell also testified that engineering technologists can be assigned to work as "system engineers" at EG&G. Tr. at 453. Caldwell testified that his direct supervisors in the Engineering Department during the period from 1996 to 2003 were manager Camp Greer, supervisor John Sieg, and Goodell. Tr. at 1330-32.

In his EG&G employment application dated March 18, 1994, Caldwell indicated he had completed four years of college, attended a college or university named Texas Tech in Houston, Texas from 1973 to 1977, and graduated from there with a degree, but he failed to check a box indicating what type of degree had been awarded. RX 14 at R179. The application also indicates he attended classes at the University of Idaho and "Utah Tech." RX 14 at R179. Both the resume Caldwell submitted along with his application and a more recent resume list the same three educational institutions but provide no information concerning dates of attendance, courses of study, or degrees awarded. RX 14 at R182, RX 27 at R273. On the 1994 application, Caldwell listed mechanical engineering as his "major/minor concentration" and indicated that he could produce a copy of his college transcripts. RX 14. During the trial, Caldwell testified that he attended night classes in Houston, Texas from 1974 to 1977 while working, and that he received an associate's degree, which he also described as "a certificate, diploma," from Texas Tech, which he described as "a technical school" that "wasn't a university." Tr. at 1314, 1319, 1489, 2394-96. However, Caldwell did not offer either a transcript or diploma from Texas Tech into evidence. Tr. at 1382, 1392, 1494-95. Moreover, the Respondent presented a letter from Texas Tech University of Lubbock, Texas stating that it had no registration or application records matching Caldwell's name and social security number. RX 28 at R306. On cross-examination, Caldwell testified that he searched his house but was unable to find his diploma, and agreed that if a new employer required documentation of his Texas Tech degree he would need to locate his diploma or do research to find the school, but that he has not done so yet. Tr. at 1492. Caldwell also admitted that in a prior case he had testified that he took engineering courses from several colleges but did not graduate from any of them. Tr. at 1498. Caldwell explained that in the context of the questions asked in the prior proceeding, he thought the questions referred to a bachelor's degree. Tr. at 1499-1500.

During the period between 1999 and 2002 Caldwell received four job performance evaluations from Goodell. On Caldwell's 1999 performance appraisal, Goodell marked Caldwell as either fully meeting or exceeding job performance levels in 25 of the 30 rating categories used in that evaluation, but indicated that Caldwell needed "some improvement in specific areas" in the remaining five categories. CX 4 at C33 and C38. In addition, Goodell also noted that Caldwell would come across "as overbearing," tended "to focus more on the problem than on a potential solution," and needed to improve his writing skills. CX 4 at C34, C35. For 2000, Goodell gave Caldwell an overall "total average rating" of 2.00 ("at standard") in eight rating categories, despite instructions on the rating form directing evaluators to give every employee a "1" or "needs development" score in at least one category. CX 4 at C29, C30. In 2001, Goodell rated Caldwell as having performed above level 2 in two categories ("innovation" and "developing people"), at level 2 in five other categories, and below level 2 in one category ("teamwork"), thereby producing a "total average rating" of 2.09. CX 4 at C14. According to Caldwell, this 2.09 was a "standard rating." Tr. at 1336, CX 4 at C14. The 2001 performance evaluation also contains comments indicating Caldwell needed to "develop a better working relationship with the Maintenance Supervision," but also commended him for continually mentoring other engineers and for being "[w]illing to take on major projects with high visibility." CX 4 at C14. In the 2002 evaluation Goodell gave Caldwell a level 2 rating in every category except "teamwork," for which the rating was 1.5. The "total average rating" on this

evaluation was thus 1.93.[1] CX 4 at C25. Goodell also noted in the 2002 evaluation that Caldwell "[c]ontinues to have issues with departments and/or individuals outside of Engineering," but added that he had "shown a willingness to support the Systems Engineers with project support for multiple critical projects." CX 4 at C25. According to Goodell, Caldwell received the "below standard" ratings in the teamwork categories in both 2001 and 2002 because he continued to have problems getting work orders and "FCC packages" completed by other departments. Tr. at 2178-79, CX 4 at C14, C25.

C. Chronology of Events

1. Agent Exposure Incident of July 15, 2002

On July 15, 2002, there was a release of the chemical agent "GB" within one of TOCDF's liquid incinerator ("LIC") rooms and a worker in the room suffered a serious exposure to the agent. Tr. at 1588. Tom Olinger, the plant manager, described the event as being the most serious incident in the history of the TOCDF. Tr. at 1588. Following the incident, EG&G conducted an internal investigation and TOCDF's operations were suspended for approximately nine months. Tr. at 1603, CX 26 at 682. An Army Board of Investigation also conducted an inquiry and issued a report. Tr. at 1602. The major corrective action taken at TOCDF was the creation of a comprehensive management planning and control document called PRP-MG-015, or, more commonly, "MG-15." RX 6, Tr. at 1589. One change that resulted from the adoption of MG-15 was higher performance standards for engineers. Tr. at 1590. In particular, engineers were expected to take more responsibility for seeing that their project or modification designs were assembled and installed correctly. Tr. at 114-16, 1272-74, 1589-90, 1960-62, RX 6 at R73, R75, RX 7 at R102, R107.

In addition to the Army and EG&G investigations, the Office of the Inspector General of the Department of Defense (hereinafter, the "OIG") conducted an independent review of the Army inquiry into the incident and issued its own report. CX 26. The OIG report concluded that although EG&G's own investigation report of the July 15, 2002 incident "was insufficient, the subsequent Army report was comprehensive." CX 26 at 682. The OIG report noted that the Army report identified "12 direct causes" and "20 indirect causes" of the incident, and noted that "the facility would not resume operation until corrective actions related to direct causes were implemented." CX 26 at 682. The OIG report also stated:

> Valve failure allowed agent migration beyond the expected agent boundary. In the report, the [Army] Board identified failed components as an indirect cause of the accident, and the failure of EG&G engineers to verify agent migration as an observation.

CX 26 at 691-92.

[1] A rating key printed on the October 2002 performance evaluation form lists the following numerical ratings: 3 for exceptional performance, 2.5 for above standard, 2 for standard, 1.5 for below standard, and 1 for needs development. CX 4 at C25.

2. The Complainant's Discussion with Thomas Regarding the Use of Check Valves

According to Caldwell, in late 2002 or early 2003 he attended a meeting in which Thomas informed those present that "no check valves were to be placed in agent lines." Tr. at 1477-78, 1517. Caldwell further testified that after the meeting he spoke to Thomas privately and told him that there were still check valves in "part of the agent sampling system for the utility line." Tr. at 1478. According to Caldwell, Thomas replied that another engineer named Mike Burch must have missed these check valves when he reviewed the system, and directed Caldwell to talk to Burch and get the check valves out of the utility line.[2] Tr. at 1478. Caldwell also testified that Thomas indicated that he had already "told the Army or government that that's all been taken care of and … there's no more of them in there."[3] Tr. at 1478. When asked whether he thought there was anything in his conversation with Thomas that would motivate Thomas to retaliate against him, the Complainant responded:

> No, I thought I said I didn't—I don't—I'm not conclusive that it was. But I don't know what he was thinking. So therefore, I said it's not conclusive either way, so no, I can accept that, not conclusive in my mind.

Tr. at 1521. However, Caldwell affirmed that in earlier deposition testimony he had agreed that there was nothing about the conversation that would have given Thomas any motivation to retaliate against him. Tr. at 1520-21.

According to Thomas, his representations to the Army regarding the use of check valves pertained only to the use of check valves in utility lines, whereas Caldwell's remarks to him concerned "the agent system itself." Tr. at 625, 627.

3. Re-Opening of TOCDF

In approximately March of 2003, the TOCDF was allowed to resume operations. By that time, Caldwell had completed a design for modifying TOCDF's system for transporting the fluid that results from mixing fresh decontamination liquid known as "clean decon" with a toxic agent. The resulting mixture is known as "spent decon" and the system for transporting the spent decon from various sumps to storage tanks and liquid incinerators is called the "Spent Decon System" or "SDS."[4] Tr. at 472, 1032-33, 1406-07. Caldwell's modification of the SDS was called the "multi-basket strainer system" and was intended to strain debris from the spent decon as it was being pumped from collecting sumps to storage tanks. Tr. at 456. However, delays in obtaining

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[2] "Utility lines" carry air, water, natural gas, and clean bleach or hydrochloride used as a decontaminant. "Agent lines" contain the hazardous chemical agents to be destroyed at the plant. Tr. at 625-27.

[3] On cross-examination, Caldwell confirmed that the check valves in question were "on paper and designed" but that he did not know whether they were actually installed. Tr. at 1517-19. However, Caldwell claimed, the assurance that Thomas had given the Army included even check valves on drawings. Tr. at 1519.

[4] According to Goodell, Burch was the system engineer for the SDS system and Caldwell was the system's "back up engineer." Tr. at 451-52.

all of the regulatory approvals for the new system prevented it from being put into operation when the TOCDF resumed operations in March 2003. Tr. at 443-44, 459, RX 22a at R232.

As a result of the delays in obtaining the necessary approvals for the multi-basket system, a temporary system had to be installed to bypass the modified strainer until all the necessary approvals had been obtained. Tr. at 460. According to Caldwell, he was assigned the task of designing the temporary bypass assembly by Thomas, Goodell's supervisor. Tr. at 1363-65. Caldwell also testified that Thomas made the final decision on the configuration of the temporary bypass and that "Steve Wallace in operations" decided to put "check valves" in the bypass system. Tr. at 1366-67, 1377. It appears that Caldwell and Burch then decided that the check valves should be "spring-loaded" in order to reduce the chances that toxic liquids or fumes could backup ("backflow") and escape through the SDS bypass. Tr. at 2378-82 (Caldwell testimony), Tr. at 2443 (Burch testimony). As the name implies, spring-loaded valves use spring-operated components to prevent liquids from backing up through a piping system. Tr. at 900 (Burch testimony). An alternative type of check valve known as a "swing valve" relies on gravity. Tr. at 943 (Burch testimony). As a result, swing valves have to be installed in a certain orientation or they will not effectively stop a backflow. Tr. at 943. As part of his duties, Caldwell was responsible for ordering the spring-loaded valves for installation in the temporary bypass and for drafting a work order that would give other TOCDF employees instructions for installing the bypass. According to Caldwell, he verbally ordered spring-loaded valves from a supplier, who told him that they could not be delivered that same day. Tr. at 1534, 1544. Caldwell also completed a purchase requisition which is dated December 26, 2002. RX 1, Tr. at 2067, 2079. It specified "carbon steel flanged valves" but did not set forth a part number or state that the valves should be spring loaded. RX 1, CX 7 at 143-46, Tr. at 577-78, 2196. According to Caldwell, he failed to include a part number on the purchase requisition because it "definitely wasn't available." Tr. at 1725-27. However, he also testified that he didn't call the vendor about the valves until after he had submitted the purchase requisition. Tr. at 1534.

4. Goodell Sends Draft Performance Improvement Plan to Human Resources Department

According to Goodell, by early April of 2003, he had become so dissatisfied with Caldwell's work performance that he began drafting a Performance Improvement Plan ("PIP") for Caldwell. Tr. at 2187, RX 9. Goodell further testified that he had decided to prepare the PIP for Caldwell because of "performance issues that had been building" relating to Caldwell's failure to raise the quality of his work packages and engineering change proposals to comply with the heightened performance expectations for all engineers outlined in the MG-15 document. Tr. at 2188, RX 9 at R153. Goodell also asserted that Caldwell "wasn't meeting that standard, so we were trying to bring him up to that standard." Tr. at 2188. Goodell noted that his draft of the PIP document did not have Caldwell's name inserted because he wanted to avoid any inadvertent disclosure of that sensitive personnel information. Tr. at 2188, RX 9 at R 152. The two-page draft PIP, however, was never formally approved by "the HR department" and was never given to Caldwell. Tr. at 2189. According to Goodell, he had given PIPs to two of his other subordinates in recent years and had heard of PIPs given to two other employees he knew by name. Tr. at 2187. According to Thomas, he saw the draft PIP document that was intended for Caldwell at some time prior to April 8, 2003. Tr. at 639.

5. Agent Migration Incident of April 22, 2003 and Subsequent Investigation

At about 11:40 a.m. on April 22, 2003, a so-called "migration incident" occurred when an ACAMS[5] monitoring unit went into alarm after TOCDF personnel entered an XRF[6] room to obtain a sample of clean decon from the TOCDF's Central Decontamination Supply.[7] RX 10 at 154. Because the XRF room was secure and unoccupied at the time of the alarm and because the decontaminating solution "is a known VX ACAMS interferent," the control room did not initially issue a formal alert. RX 10 at 157. After additional tests were performed to confirm the cause of the alarm, the event was classified as an "AL3 event" and at 3:08 p.m. notifications of the incident were made. RX 10 at 157.

Because of the potentially catastrophic consequences of agent migrations, on April 23, 2003 an investigating team was directed to determine the causes of the April 22 incident and recommend corrective actions. RX 10 at 155. Dick Snell, TOCDF's environmental manager, chaired the investigation team, which also included Bob Banks, Steve Bunn, Brent Culley, and Jim Wilcox.[8] RX 10 at 155, Tr. at 782, 1770, 1803, 1865. The team's assignment was as follows:

> Gather information surrounding the events, including instrument logs, associated drawings and pictures, ACAMS trending data and DAAMS[9] sample data from corresponding ACAMS and conduct personnel interviews to determine the cause of the agent alarms in the category "C" areas. Perform investigative analysis identifying contributory, direct and root causes, and recommending corrective actions necessary to preclude recurrence.

RX 10 at 155. In simpler terms, the team tried to identify and investigate "potential pathways for [the] agent vapors" that caused the alarms to activate on April 22.[10] RX 10 at 159.

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[5] ACAMS stands for Automatic Continuous Air Monitoring System. RX 10 at 154. Each ACAMS unit provides a sample reading every five minutes. Tr. at 1112.

[6] XRF stands for X-ray Fluorescence. RX 10 at 154.

[7] When VX is the agent, the decontaminating solution in the Central Decontamination Supply is sodium hypochlorite, *i.e.*, bleach. RX 10 at 156, Tr. at 1405-07.

[8] Bob Banks is an operations specialist; Steve Bunn, an agent munitions safety specialist; Brent Culley, a computer programmer; and Jim Wilcox, an environmental auditor. Mel Herl, who worked in the Surety Office, and Randy Roten, who worked in the Monitoring Department, were also on the investigating team. RX 10 at 155, Tr. at 782, 1770, 1803, 1865.

[9] DAAMS is a separate air monitoring system backing up the ACAMS system. Tr. at 731.

[10] In its report, the investigating team identified several events in the ten days prior to the April 22 incident that might have contributed to the vapor that triggered the ACAMS monitoring units for the XRF room. One of these events occurred on April 13 and 14 when SDS tank 102 was pumped to a sump in the "Toxic Cubicle" and then into SDS tank 101. Another event occurred on April 17 when tank 101 was pumped back into tank 102.[10] RX 10 at 160. Finally, on April 20, sumps [in alarm] were pumped into the SDS – but not into a storage tank – while TOCDF

One of the pathways of possible agent seepage that the team initially identified was the SDS bypass designed by Caldwell. As a result, the members of the investigative team interviewed Caldwell on four different occasions during the first 10 days after the April 22 incident.

According to Caldwell, he was first invited to talk with the investigating team on or about April 25. Tr. at 1404, 1409. Caldwell recalled that during this first meeting with the team, the team members wanted to know whether clean decon in the Clean Decon System (CDS) could have been the source of the agent migration into the "C" areas of the TOCDF. Tr. at 1405-06. Caldwell testified that he told the team there was no way he could think of that the CDS could be the source of the migration. Tr. at 1408. In contrast, Banks testified that during the first interview with Caldwell there "[w]as a general discussion about the SDS system" in what he described as "a fact finding mode." Tr. at 1905. On cross-examination, Banks affirmed his recollection that "the questions were about the SDS system," not the CDS system. Tr. at 1918. Banks' testimony is partially corroborated by the testimony of Brent Culley, who testified that during the "initial interview, [Caldwell] just explained the temporary change configuration and how there were some spring loaded check valves in place to stop back flow of agent to category C areas." Tr. at 1805. Bunn's recollection of the meeting was that Caldwell firmly denied that the SDS bypass could be the source of the leak. Tr. at 1873-74.

Approximately two days after this first meeting, Caldwell recalls, he met with the team for a second time and answered inquires about the temporary SDS bypass system. Tr. at 1409-11. Caldwell testified that he responded by asking the team where the leaking agent was coming from and was told that "agent from the agent tanks had been dumped on the floor," then into sumps, then "pumped into the SDS." Tr. at 1411-12. Caldwell claims that he then offered to provide the team a drawing which showed the configuration of the temporary bypass system. Tr. at 1412. The next morning, according to Caldwell, he provided an isometric drawing of the temporary bypass system to Culley and noted in pencil the location of the check valves, which did not appear on the drawing itself. Tr. at 1413-14. At that time, Caldwell claims, he told Culley that if the check valves were failing, that would be the "problem." Tr. at 1414.

Culley acknowledged that he might have met with Caldwell "on an informal basis to get a drawing or some paperwork" and remembered that Caldwell provided a drawing to the team. Tr. at 1854. However, contrary to Caldwell's claim, Culley testified that he could not recall that Caldwell had ever expressed an opinion suggesting the cause of the April 22 leak. Tr. at 1807. Moreover, Cully testified, Caldwell said that he did not think the SDS bypass could have been the source of the leak. Tr. at 1807. According to Cully, Caldwell's stated reason for this opinion was the use of check valves in the bypass system. Tr. at 1807. Cully's testimony on this topic is consistent with the testimony of Snell, Banks, and Bunn. In particular, Snell testified that Caldwell was defensive when talking to the team about the temporary bypass system and that he never told the team that a check valve problem could account for the agent migration incident. Tr. at 1028. Likewise, Banks testified that when the team asked Caldwell detailed questions

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managers contacted DSHW to secure permission to use tank 103 while performing procedures to decontaminate agent levels in tanks 101 and 102. RX 10 at 160.

during the second interview about the configuration of the temporary bypass system, the nature of the check valves, and whether "the orientation of the check valves would impair their function, Caldwell had replied that "the check valves were compatible, and that the check valves were spring loaded, so there was no problem with the orientation." Tr. at 1906. Banks also testified that prior to this second interview, he and Culley had looked at the temporary bypass, taken a picture of it, and started looking at the configuration. Tr. At 1906. At that time, Banks asserted, they noticed differences between the original design and what was actually installed. Tr. at 1906. According to Bunn, during the second meeting Caldwell said he wasn't 100 percent sure that there were spring-loaded check valves in the SDS bypass, but was nonetheless adamant in his opinion that there was no risk of agents migrating through the SDS system. Tr. at 1874-75. Bunn also testified that he was less suspicious of the SDS bypass after talking with Caldwell. Tr. at 1878.

Caldwell's third meeting with the investigating team occurred on April 30, 2003. During this meeting, he was accompanied by Goodell and Burch. Tr. at 454, 477-78, 1414-15. According to Caldwell, on the way to this meeting he informed Goodell for the first time about his two earlier meetings with the team.[11] Tr. at 1415. Caldwell asserted that as soon as they arrived at the meeting, Banks told Goodell that the team was giving him "a heads up that we have concluded that the check valves in the hose bypass is the source for our problem that we're investigating." Tr. at 1416. Caldwell further testified that he told the team that the leak could be related to the SDS bypass if two check valves failed, but then added "It's definitely the problem, it's the only source, it's not the likeliest, it's the only source, and so we just need to take care of it here, plant procedures, you know, to, you know, get it fixed and if you guys as a team need to verify it and report it, you know, these things." Tr. at 1419. However, Caldwell also asserted that as the meeting ended, "Curtis [Goodell] and Mike [Burch]" were telling Snell and Banks: "We will sample at the check valves, right at the check valves to verify the agent did get there or what, you know, verify the check valve failed, basically." Tr. at 1420. According to Caldwell, this discussion about checking for a check valve failure made him "kind of frustrated" because "all valves, no matter what, will fail. So it's the only source." Tr. at 1420-21. Caldwell also testified that he "kind of felt they were coming up with a procedure that delayed, delayed this again instead of you know." Tr. at 1421. In addition, Caldwell testified that both he and Burch told the team that the check valves should be spring-loaded and that therefore the orientation of the valves when installed would not matter. Tr. at 1417-18.

Caldwell's statement that he had not informed Goodell of his first two meetings with the investigating team until April 30 was corroborated by Goodell. Tr. at 2206-07. In addition, Caldwell's statement that he told the team that there were spring-loaded valves in the temporary SDS bypass system was confirmed by both Snell and Wilcox. Tr. at 1036, 1772. Wilcox also testified that when the team asked Caldwell whether a toxic agent could have migrated through the SDS if the check valves failed, Caldwell replied that "if they failed, yes, it could be a

[11] Goodell testified that he was not at the workplace the week of the April 22 incident because a family member was undergoing surgery. Tr. at 2205. He testified that he first became aware of the April 22 agent migration incident when the team chair telephoned him on Wednesday, April 30, to inform him the team was looking at the temporary bypass system as a possible cause and to request that he bring himself and the engineers responsible for the temporary bypass system over to talk with the team. Tr. at 2205-06.

source." Tr. at 1132. In addition, Snell testified that during the various meetings with Caldwell, including the meeting attended by both Caldwell and Goodell, the members of the team conveyed their strong suspicion that the SDS bypass was the source of the leak. Tr. at 965-66. However, much of Caldwell's testimony concerning the occurrences at the April 30 meeting have been contradicted by other participants in that meeting, including Banks, Goodell, Wilcox, and Snell.

Most significantly, Banks disputed Caldwell's assertion that Banks told Goodell at the April 30 meeting that the team had determined that the SDS bypass was the source of the leak. According to Banks, as early as April 23 or 24 team members had viewed the SDS bypass through a camera and developed a suspicion that the bypass could be the cause of the April 22 incident, but even after the April 30 meeting the team was still considering a variety of potential sources for the agent migration. Tr. at 809-11, 1909-10. Banks also denied ever telling Caldwell that the team had concluded that the check valves were the problem. Tr. at 1909. Furthermore, Banks unequivocally disputed Caldwell's assertion that Caldwell had suggested that the team conduct sampling at the check valves to confirm that agent had migrated through the temporary bypass system. Tr. at 803-04. In fact, Banks testified that he viewed Caldwell as "an unwilling participant" in the investigation, who "only volunteered answers to questions that were directly asked him." Tr. at 1908. Indeed, Banks testified, at the April 30 meeting, Caldwell "folded up the drawings and set them on the table and said, 'My [temporary change] design is not your problem,' and left." Tr. at 1907. Moreover, Banks testified, if Caldwell had told the team that the check valves were not spring-loaded, it would have made a difference in the team's progress. Tr. at 1912. In fact, Banks asserted, Caldwell was so "very, very forceful in saying that his design was adequate to prevent" agent migration through the temporary bypass system, that the team initially put the idea of a bypass leak "on the back burner and went after some other issues." Tr. at 1907-08, 1912.

Like Banks, Wilcox testified that if Caldwell had told the investigating team that the check valves were not spring-loaded, the team "would've let management know" that they were "the source of the agent migration." Tr. at 1775. Wilcox also corroborated Banks' testimony that the team members had not reached a definite conclusion on the cause of the April 22 agent migration by the time of the April 30 meeting. Tr. at 1773-74. In addition, Wilcox testified that he didn't think Caldwell had ever said the check valves were the likely problem, and could not recall Caldwell expressing an opinion on the cause of the agent migration or saying that the SDS bypass should not be used. Tr. at 1772, 1774.

Banks' account of the April 30 meeting was also partially corroborated by Goodell, who testified that when Snell called him to invite him to attend the meeting, Snell said that the team thought the SDS bypass was just a "suspected possibility" for the agent migration. Tr. at 2205-06. In addition, Goodell testified that during the meeting Caldwell was asked whether anything could have gotten by the check valves and Caldwell had replied "'no, because they're spring-loaded.'" Tr. at 2207.

Although Snell couldn't recall the specific dates of the various discussions with Caldwell, his testimony also contradicts Caldwell's assertions that the he warned the team that they needed to get the SDS bypass "fixed." In fact, Snell testified that Caldwell had never told the team that

the failure of the check valves in the SDS system could account for the leaks or that the SDS bypass should not be used. Tr. at 1028.

According to Caldwell, his fourth and last encounter with the investigating team occurred on May 2, 2003, when he and Goodell participated in a teleconference call with Snell and the investigating team. Tr. at 967-68, 1433-34. According to Caldwell, Snell reported that the team had viewed the orientation of the check valves in the temporary bypass system using closed circuit cameras. Tr. at 1435. Caldwell claims that in this telephone conversation he repeated his earlier assertions that "if they're spring loaded, the orientation doesn't matter, that any valve can fail." Tr. at 1435. Caldwell also testified that during the conversation Goodell took the phone off of speakerphone by picking up the handset and asked Snell to keep "between us" the fact that "these things are leaking." Tr. at 1436. However, Goodell stoutly denied making any such request of Snell, either in person or by telephone. Tr. at 2211. Conversely, Snell denied that Goodell ever requested that he keep information regarding leaks from the sumps from being circulated and testified that he had "never heard anything like that" from Goodell. Tr. at 969. Likewise, Culley testified that Goodell was "more than helpful" in his communications with the investigating team and even offered to make Caldwell or other departmental resources available to the team as needed. Tr. at 1811. Culley also testified that Goodell made no effort to conceal or hide any information that Caldwell was sharing with the team. Tr. at 1815.

6. Migration Incident of May 3, 2003 and the Subsequent Investigation

At 3:16 p.m. on Saturday, May 3, 2003, a second VX migration incident occurred when alarms sounded from an ACAMS unit in an observation corridor. RX 10 at 154. An alert was sounded and the second floor of the Munitions Demilitarization Building (MDB) was evacuated. RX 10 at 154. Next, additional ACAMS units further down the ventilation system flow path began going into alarm. RX 10 at 154. Subsequently, water was added to sumps in the corridor, which were then covered with plastic after their contents had been pumped into storage tanks. At 7:56 p.m. further tests confirmed readings at less than the reportable limit, but the second floor of the MDB remained "upgraded to a category 'B' area with guards posted." RX 10 at 159. A short while later, Snell's team was asked to expand its investigation to include the May 3, 2003 incident. RX 10 at 155.

According to Caldwell, Goodell called him from TOCDF on Sunday, May 4, to tell him that "alarms are going off all over out here" and that "someone dumped pure agent into the sump" that "got into the SDS." Tr. at 1442. Caldwell claims that he then expressed surprise that the SDS system was still being used and asked whether the check valves had been sampled as had been proposed earlier. Tr. at 1442-43. As well, Caldwell testified, he told Goodell that the multi-basket strainer system was ready to be used but still lacked formal approval from EG&G and the government. Tr. at 1443. According to Caldwell, Goodell called back 30 minutes later and said they would install the multi-basket strainers on Monday. Tr. at 1444.

Goodell's testimony contradicts several important aspects of Caldwell's testimony about their telephone conversations. In particular, Goodell directly disputed Caldwell's assertions that he had expressed surprise that the SDS bypass was still being used and asked if the check valves had yet been tested. Tr. at 2274. Goodell also denied Caldwell's claims that Goodell had said

that someone had dumped pure agent into a sump and discussed plans to put the multi-basket strainer system into service. Tr. at 2274.

According to Goodell, he made the first call to Caldwell because he needed Caldwell's help to locate the purchasing documents for the SDS bypass check valves. Tr. at 2208-09, 2274. During the second call, Goodell testified, he contacted Caldwell to tell him the check valves in the SDS bypass were not spring-loaded and to ask Caldwell for some details concerning his purchase of the valves. Tr. at 2273. Goodell further testified that after finding the purchase requisition he was able to obtain other purchase documents from the TOCDF receiving department and the Internet. Tr. At 2209, RX 11, RX 12. These documents confirmed that, in fact, swing valves, not spring valves, had been received from the parts supplier and installed into the SDS bypass. Tr. at 2199-2200, RX 10 at 162. Goodell also testified that he then began to believe that the valves were not working correctly because they had been installed with the wrong orientation. Tr. at 2211, RX 10 at 162. Specifically, he testified, the check valve on the line leading to the C sump was mounted in the horizontal position and, once opened, would not close. Tr. at 2212. Furthermore, Goodell asserted, the work order prepared by Caldwell for installing the check valves was inadequate insofar as it failed to properly describe the direction of flow and the vertical or horizontal orientation of the valves to be installed. Tr. at 2201. Inspection of the check valves after the temporary SDS bypass had been removed confirmed they were not spring-loaded and also "identified a lot of sludge material in the valves." RX 10 at 162. Based on this evidence, the members of the team concluded in their final report that the "direct cause" of the two agent migration incidents was that "the temporary configuration of the SDS system provided a pathway for agent contamination in category 'C' areas." RX 10 at 162. Four "contributing causes" were also noted: inadequate review of the temporary bypass design, inadequate review of extension requests for the temporary bypass, failure to properly identify the valves ordered for the temporary bypass, and inadequacies in the work planning package associated with the temporary bypass. RX 10 at 162-63. Finally, the "root cause" was stated as "inadequate design and installation of the SDS temporary change." RX 10 at 163.

7. Suspension and Termination of the Complainant's Employment at TOCDF

According to Joe McKea, who was a Human Resources Representative in EG&G's Human Resources Department, on Monday, May 5, 2003 Goodell came to his office "concerned about an agent event that had happened to a system that Mr. Caldwell was heavily involved in." Tr. at 292-94. McKea further testified that Goodell told him "I need to get him out of here," to which McKea replied that he would do an investigation to find out what happened and what to do about it. Tr. at 295. McKea then telephoned members of the investigative team, including Banks, Snell, and Wilcox. Tr. at 296. McKea testified that Snell told him that Caldwell was "very laid back, didn't take responsibility for anything" when talking to the investigating team. Tr. at 299. Snell also sent McKea a copy of the team's draft report on the two recent agent migration incidents. Tr. at 298, CX 27, RX 3 at R37. According to McKea, Banks told him that Caldwell "blew us off," and Wilcox told him that Caldwell was "not responsive" and "didn't really care much about what had happened, didn't inquire." Tr. at 301-02, RX 3 at R29. McKea testified that he also spoke with Thomas, Olinger, and Sweeting and that at some point during his discussions determined that a suspension was warranted. Tr. at 304, 310, 327-29. He also

testified that neither he nor his supervisor, Debbie Sweeting, considered interviewing Caldwell as part of the investigation. Tr. at 330. McKea testified that he then drafted a letter notifying Caldwell of his suspension, based in part on input from Sweeting and Goodell. Tr. at 332.

According to McKea's notes, when he and Goodell had their initial meeting, Goodell said he was worried "that this might turn into a whistleblower case." Tr. at 295, RX 3 at 26 (McKea's handwritten notes). When these notes were shown to Sweeting, she testified that Goodell probably made this comment because he had heard that Caldwell was going to contact a specific attorney with a reputation at EG&G for representing people in whistleblower cases. Tr. at 267-68. She thus acknowledged that management and Human Resources personnel were talking about the possibility of a whistleblower complaint as early as the day of Caldwell's suspension. Tr. at 268-69. However, she added, such concerns are "not unusual" at EG&G. Tr. at 269.

The testimony of Terry Thomas indicates he also participated in a meeting with Goodell and McKea on the morning of May 5, 2003 to discuss Caldwell's possible suspension. Tr. at 571. According to Thomas, they talked specifically with Goodell about the events immediately following the second agent migration incident on May 3. Tr. at 574. Thomas further testified that Goodell "related the information about the purchase req[uisition] for the check valves and what we actually received in the check valves and the orientation of the check valves and the temp change and how it related." Tr. at 575. Based on this information, Thomas testified, they decided "that the information we had warranted that suspension." Tr. at 571, 573.

According to Caldwell, late on the afternoon of Monday, May 5, Goodell asked Caldwell to accompany him to the Human Resources Department where they held a meeting with Thomas and McKea. Tr. at 1445. According to Caldwell, during the meeting Goodell handed him a copy of his suspension letter, which reads in part:

> Your response [to the investigating team's inquiries] that the orientation did not impact the valve operation biased the team's decision, which in turn delayed critical actions by the team, which would have prevented the chemical event on 3 May 2003. … In addition, you were contacted by the team members concerning the situation on 23 April 2003. No attempts to inform your management were made on your part. … This in turn again delayed any response to correct the situation.

CX 1. According to Caldwell, he was "shocked" when given the letter and asked, "What's this about?" Tr. at 1446. The subsequent conversation, according to Caldwell, touched on his conversations with the investigating team, his participation in meetings with the investigating team without first talking to Goodell or Thomas, and his conveyance of incorrect information to the team. Tr. at 1446-48, RX 3 at R26 (McKea's notes of the meeting). According to Caldwell, he disputed those points, but he claimed that "[n]o one ever asked me a question during that meeting or any meeting. I was never interviewed. I never even got asked one question." Tr. at 1448. According to McKea, during the meeting both Goodell and Thomas told Caldwell words to the effect that managers need to know what's going on. Tr. at 346, 349.

According to McKea's contemporaneous notes, he continued his investigation into Caldwell's performance in the days immediately following Caldwell's suspension. For example, notes dated May 6, 2003 of McKea's conversation with Snell state "check valves ordered were incorrect—engineer" and "PR [purchase request] did not specify part #." RX 3 at R27. Notes dated May 9, 2003, record Snell telling McKea that "he blew us off." RX 3 at R29. On May 9, McKea made notes of a conversation with Eloy Zambrano, the EG&G buyer who actually placed the order for the check valves requested by Caldwell on a purchase order dated December 26, 2002. Tr. at 2066-68, RX 1. In McKea's notes, Zambrano denied being told anything about the requested check valves needing to be "spring" check valves. RX 3 at R30. Also on May 9, McKea wrote that Banks said the "[a]gent boundary study said that check valves shouldn't be used" and that Caldwell had told him the "configuration didn't matter because they were spring loaded." RX 3 at R31. On May 13, McKea noted Goodell's replies when asked to explain remarks apparently made at the suspension meeting to the effect that Caldwell had not properly informed Goodell about his communications with the investigating team. RX 3 at R32. The notes record Goodell as saying:

> When issues arise, come back [and] let us know afterward. Give us a heads-up that this was coming. We just didn't want to get blind-sided. Come talk to me first—I could help you, get more resources.

RX 3 at R32. McKea was assisted in his investigation by a timeline of Caldwell's performance problems that Goodell prepared just after the letter of suspension was delivered to Caldwell. Tr. at 2181, RX 3 at R36. The timeline prepared by Goodell notes such issues as Caldwell's engineering change proposals constantly being returned by the review committee for rewriting or additional details, Caldwell's failure to keep his managers informed of problems that would arise with the projects he was working on, and differences between Caldwell and Goodell concerning extensions and technical details of the SDS-063 temporary change bypassing the SDS strainer system. RX 3 at R36. The timeline notes a "very heated" conversation between Caldwell and Terry Thomas in early 2002, Goodell's decision to stop rewriting Caldwell's engineering change proposals in October 2002, and Caldwell's failure to give Goodell "any information" on the projects he was working on after early March 2003. RX 4 at R36.

According to McKea, in addition to conducting interviews he reviewed the MG-15 document, consulted the EG&G policy on purchase requisitions, and spoke with both Sweeting and EG&G's senior corporate Human Resources director, Marion Hyder. Tr. at 374-76.

Around May 12, 2003, Caldwell filed a whistleblower complaint with the Occupational Safety and Health Administration. CX 3a. The complaint letter states in part:

> On or about May 6, 2003, EG&G without advance notice suspended Mr. Caldwell for five days pending investigation of some apparently alleged misconduct on his part in relation to one or more chemical incidents that occurred at TOCDF. The reasons and allegations stated by EG&G in the memo given Mr. Caldwell at the time of his suspension were incorrect and unfounded. After Mr. Caldwell challenged the reasons stated in the memo ... he was given different reasons verbally as to why the suspension action was taken against him.

CX 3a at C3. A copy of the complaint faxed to EG&G by the Complainant is stamped "Received, Human Resources, May 13, 2003." CX 3b at C7.

On May 14, there was a teleconference between Sweeting, McKea, and Hyder about terminating Caldwell. Tr. at 394-95, RX 3 at R33 (McKea's notes). The following day Sweeting, McKea, Goodell, and Thomas held a second meeting about terminating Caldwell. Tr. at 394, RX 3 at R34 (McKea's notes).

According to McKea, after he consulted Sweeting and Hyder, he decided to bypass progressive discipline and go directly to the termination of Caldwell's employment. Tr. at 412. He also testified that his two primary reasons for this decision were that "the responsibilities that Mr. Caldwell had in the whole process of ordering the part, making sure it was installed correctly, testing it" were not properly carried out and the evidence that Caldwell "was not communicating with his management on his work and what he was doing …." Tr. at 413. McKea further asserted that the decision to bypass progressive discipline was also based on Caldwell's failure to provide adequate detail in the work order for installing the temporary bypass system check valves and his failure to specify a test plan that would have tested for backflow. Tr. at 414. However, McKea admitted that the failure to provide adequate detail in the work order was based on the assumption that Caldwell ordered swing check valves, not spring-loaded check valves, from the vendor. Tr. at 423. He also admitted that he was not aware that Goodell's statement to him on May 5 that Caldwell lied to the investigating team when he said that the orientation of the check valves did not matter was likewise predicated on the assumption that Caldwell was not referring to spring-loaded valves. Tr. at 410. However, McKea denied that his conclusion that Caldwell had lied to the investigating team was the reason that Caldwell was terminated. Tr. at 411. McKea testified that he became aware that Caldwell had filed a complaint with the Department of Labor after the suspension letter was delivered but before the termination letter was given to Caldwell. Tr. at 369.

According to Thomas, after Caldwell was suspended Goodell "worked with our HR department to gather the facts, to discuss the issues," then brought Thomas a recommendation to terminate Caldwell. Thomas therefore characterized his involvement in the decision as being "indirect." Tr. at 607-08. Thomas acknowledged that he never spoke directly with Caldwell regarding the termination. Tr. at 608.

At some point, McKea personally drafted a termination letter but reviewed drafts of the letter with Goodell to get help "with the wording on some of the system information." Tr. at 370, 378, 387.

On May 15, 2003, Caldwell reported back to work, at which time he was asked to attend a meeting with Thomas and McKea. Tr. at 1451. According to Caldwell, after Thomas told him that he was being terminated, McKea collected his badge and gave him his final paycheck and a letter of termination. Tr. at 1451-52. The letter stated that Caldwell's employment with EG&G was terminated as of May 16, 2003. CX 2. The letter of termination reads in part:

> This [termination] action is a result of your failure to follow PRP-MG-015, resulting in an agent release into a category "C" area and for issues related to continued unacceptable past work performance.
>
> In relation to the chemical incident on May 03, 2003, the investigation team concluded that a temporary change (SDS-063), which you had initiated and for which you were responsible, was a main contributor to the agent release. Under the requirements of PRP-MG-015, it is the engineer's responsibility, among other things, to "review impacts to permits, regulations and standards; develop detailed work instructions; identify special conditions; and approve conditional and/or full release for equipment operation." As the principal engineer responsible for the temporary change, you failed to fully comply with the procedure.
>
> Past performance evaluations have documented areas for improvement. The October 2002 Continuous Improvement Summary noted "continues to have difficulties with departments and/or individuals outside of Engineering" and the Performance Appraisal dated September 19, 2001 states "needs to develop a better working relationship with the Maintenance Supervision." Your current supervisor, Curtis Goodell, has observed no improvement in these performance areas. He has received comments from personnel in other departments regarding your inability to communicate professionally. Strained relations have caused significant delays with projects critical to plant operations. Strong interdepartmental communication is critical to the success of Project Engineering and the Site overall.[12]

CX 2. At the bottom of the letter, Caldwell inserted the following comment before signing the letter of termination: "Yes I understand But disagree; under protest." CX 2. According to Caldwell, he was asked no questions in the meeting. Tr. at 1452. After the meeting, he received a final health screening by a doctor at the on-site clinic, then returned home. Tr. at 1452. McKea's notes of the termination meeting, dated March 5, 2003, indicate that Thomas told Caldwell: "Investigation info is in. Results in term[ination]." RX 3 at R35. The notes also state that Caldwell was asked to "sign to acknowledge receipt" of the termination letter. RX 3 at R35.

[12] A longer, draft version of the termination letter, dated May 13, 2003, with "Investigation Summary" handwritten in large print at the top of the letter, provides some details not included in the final version of the termination letter given to Caldwell. RX 3 at R47. The draft states that Caldwell had initiated and was responsible for the temporary bypass system, that "installation of incorrect check valves was the direct cause of the agent release," and that Caldwell's statement that the orientation of the check valves did not matter "biased the investigation team's decision, which in turn delayed critical action by the team." RX 3 at R47.

ANALYSIS

A. Jurisdiction

As previously noted, the Complainant has cited the RCRA, CERCLA, TSCA, and CAA as providing the basis for this whistleblower complaint against the Respondent. The allegations in the Complainant's complaint are sufficient to establish jurisdiction under the statutes. *See Mugleston v. EG&G Defense Materials, Inc.*, Case No. 2002-SDW-4 (ALJ Feb. 12, 2004), *Jones v. EG&G Defense Materials, Inc.*, Case No. 1995-CAA-3 (ALJ Aug. 1, 1997) (both assessing the applicability of the various environmental whistleblower statutes to complaints brought against the Respondent by other complainants). In addition, the Complainant noted that two other statutes, the Clean Water Act ("CWA"), 13 U.S.C. §1367, and Safe Drinking Water Act ("SDWA"), 42 U.S.C. §300j-9, might apply in this case. The CWA prohibits discharge of any chemical warfare agent into navigable waters. 33 U.S.C. §1311(f). The SDWA was enacted to ensure that public water supply systems meet minimum national standards for the protection of public health. *National Wildlife Federation v. EPA*, 980 F.2d 765, 768 (D.C. Cir. 1992). Because toxic agents discharged into the air can eventually find their way to navigable waters or public water supplies, it had been determined that jurisdiction over the claims in this case also exists under both the CWA and the SDWA.

B. Legal Standard

In order to establish retaliation in violation of any of the six environmental whistleblower statutes that apply in this case, a complainant must initially show that he or she engaged in an activity protected under the statute, that a covered employer was aware of the activity, that he or she suffered an adverse employment action, and that some type of nexus exists between the protected activity and adverse action. *See Schlagel v. Dow Corning Corp.*, ARB No. 02-092 (Apr. 30, 2004). Various judicial decisions under the statutes governing this case have established that the activities protected under these statutes include informal internal complaints to supervisors. *See Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1510-12 (10th Cir. 1985); *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474, 478-80 (3rd Cir. 1993). However, complaints that lack a reasonable, good faith basis do not constitute protected activities. *See Melendez v. Exxon Chemicals of America*, ARB No. 96-051 (July 14, 2000) at 18-23. If a complainant makes an initial showing of retaliation, the burden then shifts to the employer to produce evidence or an explanation indicating that it took the adverse actions for legitimate, non-discriminatory reasons. At that point, the inference of retaliation disappears and the complainant then has the burden of proving intentional retaliation by a preponderance of the evidence. *See St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993); *Reeves v. Sanderson Plumbing Products, Inc.,* 530 U.S. 133 (2000); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). If a complainant establishes that an unlawful reason was even one of multiple motivating factors for an adverse action (i.e., the existence of "mixed motives"), the employer must prove by a preponderance of the evidence that it would have taken the same actions absent the unlawful reason. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 258 (1989) (plurality opinion); *Desert Palace, Inc., dba Caesars Palace Hotel & Casino v. Costa*, 539 U.S. 90 (2003).

C. Contentions of the Parties

In his post-trial briefs, the Complainant alleges that he engaged in a series of protected activities that were known to EG&G officials and that EG&G illegally retaliated against him by suspending and ultimately terminating his employment.[13] The protected activities alleged by the Complainant include: (1) statements he made to Terry Thomas in December of 2002 or January of 2003 allegedly reporting that, contrary to EG&G's representations to the Army, there were still some check valves in EG&G's utility lines; (2) statements he made in April and May of 2003 allegedly telling the members of the Snell team that there was likely to be a relationship between the agent migration incident of April 22, 2003 and the SDS bypass; (3) statements he made to Goodell in May of 2003 allegedly expressing surprise that Snell's team had not taken steps to act on his advice concerning his alleged warnings to the team that there was likely to be a relationship between the April 22 agent migration incident and the SDS bypass, and (4) statements he made on or about May 3, 2003 indicating that he would be making a whistleblower complaint concerning the suspension of his employment. The Complainant further argues that the Complainant's statements to the Snell team were protected activities even if those statements were incorrect, as alleged by EG&G's witnesses.

The Complainant also contends that there is both direct and circumstantial evidence indicating that the suspension and termination of his employment were taken in retaliation for his protected activities. In particular, the Complainant asserts that direct evidence of EG&G's retaliatory intentions can be found in Goodell's statement to McKea on May 5, 2003 that he was concerned that Caldwell's involvement in the investigation of the agent migration incidents "might turn into a whistleblower case" and in evidence indicating that Goodell was irked that Caldwell had spoken to the Snell team without having first notified his managers in the Engineering Division. According to the Complainant, circumstantial evidence of a retaliatory motive by EG&G can be found in: (1) the close temporal proximity between the adverse actions and his protected activities in connection with the agent migration investigation, (2) the alleged inconsistency between EG&G's policy of progressive discipline and its decision to terminate the Complainant's employment rather than first imposing lesser sanctions for the alleged performance problems, (3) the alleged lack of an adequate investigation into the charges against the Complainant, and (4) the fact that EG&G had a lot to lose if the Complainant were to reveal the alleged negligence of the Snell team in failing to heed the Complainant's alleged warnings concerning the SDS bypass.

The Complainant further argues that EG&G's stated reasons for suspending him and terminating his employment are pretexts. As support for this contention, the Complainant asserts that even if he was partly responsible for the agent leaks from the SDS bypass, there were many other EG&G employees who made mistakes that contributed to the leakage but were not disciplined for their mistakes. In fact, the Complainant alleges that at least the following 13

[13] During the trial, the Complainant also suggested that EG&G's failure to promptly send him a notice of his COBRA rights to obtain extended medical care coverage. However, this allegation was not set forth in the Complainant's Pre-Trial Statement, as required in the Pre-Trial Order, and there is virtually no evidence in the record concerning the reasons for the delay in sending the notice. For this reason, no consideration has been given to the legality of this alleged adverse action.

alleged mistakes contributed to the leaks: (1) the failure of PMCD to approve use of a needle valve for the new multi-basket strainer system, (2) the decision of EG&G managers not to install the new multi-basket strainer system without a needle valve, (3) the decision by EG&G managers to use a temporary SDS system that included hoses and check valves, (4) the decision by an EG&G manager to make the check valves a rush order, (5) the failure of the purchasing department to record the part numbers on the purchase order (or recording part numbers on the purchase order without asking the Complainant to confirm that the part numbers were correct), (6) the alleged failure of the personnel in the Receiving, Quality Control, and Maintenance Departments to confirm that the parts received were the parts ordered, (7) failure by other EG&G employees to drain the water from the agent tank before VX agent was added to the tank in April 2003, (8) the failure by other EG&G employees to make sure there was no water or foreign material in the agent tank before adding VX agent to the tank and thereby causing an exothermic reaction, (9) the decision by other EG&G employees to dump the products of the exothermic reaction into the sump and then pumping the products into the spent decon system, (10) the failure of EG&G management to issue an order shutting down the SDS system to prevent more agent from being poured into it, (11) the failure of the Snell team and Goodell to sample the SDS check valves before the occurrence of the second agent migration incident on May 3, 2003, (12) the alleged failure of Goodell to promptly report that the VX agent was migrating through the sumps in the Category C area, and (13) the decision by other EG&G employees to dump more VX agent into the SDS system thereby allowing the second migration incident to occur on May 3, 2003.

Moreover, the Complainant argues, EG&G's retaliatory intent is shown by the fact that even the adverse actions taken against the system engineer that was responsible for the July 15, 2002 agent migration incident were not as severe as the adverse actions imposed for the Complainant's alleged errors. Tr. at 1255-56. This argument is supported by the testimony of the system engineer, Kermit Jackson. According to Jackson's testimony, he was not terminated but did lose his system engineer job title and had his payroll classification changed from ES-6 to ES-5, which had the effect only of rendering him "no longer eligible for any raises." Tr. at 1258.

Finally, the Complainant alleges that because of sludge and wire ties in the SDS, even the use of spring valves in the SDS bypass would not have prevented the agent migration incidents in April and May of 2003.

In its post-trial reply brief, the Respondent claims that the Complainant did not engage in any activities protected under whistleblower statutes and that mere proximity in time between the allegedly protected activities and the adverse actions against the Complainant is by itself insufficient to show a violation of whistleblower statutes. The Respondent further contends that the Complainant was terminated for inadequate job performance rather than for any kind of protected activity. As evidence, the Respondent offers prior performance reviews and a drafted (but never delivered) Performance Improvement Plan, as well as testimony from the Complainant's supervisors. The Respondent also argues that the Complainant's failure to provide accurate information to the investigating team contributed to the May 3, 2003 agent migration incident by delaying the identification of the cause of the initial incident. EG&G also contends that the Complainant has failed to produce evidence sufficient to establish that it has engaged in disparate treatment of other employees who did not engage in protected activities. In

particular, it points out that the Complainant has not even specifically identified most of the other employees who were allegedly treated less harshly, and, in the case of Mr. Jackson, has failed to show that they did not engage in protected activities.

D. Conclusions of Fact and Law

EG&G has produced evidence allegedly showing lawful motivations for the adverse actions taken against the Complainant. Therefore, it is unnecessary to determine if the Complainant has established a *prima facie* case and it is permissible instead to proceed directly to resolving the question of whether a preponderance of the evidence shows a violation of one or more whistleblower statutes. *See Williams v. Baltimore City Public School System*, ARB No. 01-021 (May 30, 2003); *Jenkins v. United States Environmental Protection Agency*, ARB No. 98-146 (Feb. 28, 2003). After so weighing the evidence, it has been concluded that the Complainant has not met his burden of proving by a preponderance of the evidence that the Respondent had any illegal, retaliatory motives for the adverse actions taken against him. There are nine reasons for this conclusion.

First, although the Complainant would have been engaged in a protected activity if he had in fact warned the members of the Snell team that the SDS bypass was the likely cause of the April 22 agent migration incident, his testimony that he gave such a warning to the team is far from credible. Indeed, none of the team members corroborate the Complainant's testimony on this topic and several of the team members have directly and credibly contradicted that testimony. For the same reason, the Complainant's testimony concerning his alleged complaints to Goodell on May 3, 2003 about the team's purported failure to heed his alleged warning also lacks credibility. The Complainant's credibility is also undermined by his inability to in any way substantiate his claim that he received an engineering degree from Texas Tech of Houston, Texas.

Second, the weight of the evidence shows that EG&G's management had legitimate reasons for deciding to suspend and ultimately terminate the Complainant's employment at EG&G. Most significantly in this regard, the preponderance of the evidence indicates that the Complainant's unwarranted assurances to the Snell team that spring-loaded valves had been installed in the SDS bypass system unnecessarily delayed the team's discovery of the source of the agent leaks and thereby contributed to the second agent migration incident on May 3, 2003. This error of the Complainant's was compounded by the fact that the team's inquiry also showed that the Complainant had been careless in failing to ensure that spring-loaded valves were in fact purchased and installed into the SDS bypass. As the testimony shows, in the eyes of both Goodell and some of the members of the Snell team, the Complainant's apparently indifferent attitude toward the team's investigation made both of these errors particularly egregious. Although such performance deficiencies might not have ordinarily led to the termination of an Engineering Department employee who had an otherwise good job performance record, the evidence in this case fails to show that the Complainant had such a performance record. Rather, the record indicates that in the four years preceding the Complainant's termination, his job performance at EG&G had been mostly mediocre and in the last months of his employment had declined to the point that his supervisor had begun drafting a Performance Improvement Plan. It is also very important to recognize that the Complainant's errors materially contributed to two

agent migration incidents that occurred only two months after the conclusion of a nine-month suspension of EG&G's operations as the result of a prior agent exposure incident. It is therefore reasonable to conclude that by the time of the second agent migration incident, EG&G's management was strongly predisposed to severely punish any employee whose errors contributed to new leaks of toxic agents.

Third, although the Complainant did engage in a protected activity when he apparently warned Thomas that check valves were possibly still being used in places that were purportedly unacceptable to the Army, the weight of the evidence does not even come close to suggesting that the statement contributed to the adverse actions taken against the Complainant. In fact, the statement occurred approximately six months before the adverse actions against the Complainant and even the Complainant admitted during pre-trial deposition testimony that he didn't believe there was anything in his statements that would have motivated Thomas to retaliate against him. Indeed, it is entirely possible that Thomas was grateful for having the situation called to his attention so that it could be corrected before it caused a problem.

Fourth, even though the evidence does show that when Goodell first contacted McKea regarding his intention to take adverse actions against the Complainant, he was concerned that this matter "might turn into a whistleblower case," the weight of the evidence does not support a conclusion that Goodell was seeking to retaliate against the Complainant for having engaged in a protected activity. Rather, Sweeting's testimony suggests that Goodell made the statement because he feared that the Complainant would use the whistleblower complaint procedures as a tactic for preventing or reversing any disciplinary action against him, as is apparently a common practice by EG&G employees. Even more probative in this regard is the evidence showing that in the months preceding the Complainant's suspension and termination he had not in fact engaged in any significant form of protected activity that would have caused Goodell to regard him as being a *bona fide* whistleblower. It is of course recognized that the Complainant now asserts that he had in fact engaged in protected activity by warning the Snell team about the likelihood of leaks through the SDS bypass. However, as previously explained, the weight of the evidence does not support this assertion and indicates instead that the Complainant negligently misled the team by assuring them that the SDS bypass was not a likely source of leaks. It is further acknowledged that the Complainant argues that Goodell was probably seeking to terminate the Complainant's employment in order to prevent him from disclosing the alleged failure of the Snell team to act on the Complainant's alleged warnings concerning the source of the April 22, 2003 agent migration incident. However, this argument is unconvincing because it is also based on the erroneous assumption that the Complainant did in fact warn the Snell team. Moreover, the argument is founded on the illogical supposition that the Complainant would not disclose the team's alleged errors if his employment were terminated, but would refuse to cover up for the team if he was still an EG&G employee.

Fifth, the weight of the evidence indicates that the whistleblower complaint that the Complainant filed just days before EG&G terminated his employment does not qualify as a protected activity. In this regard, it is recognized that under nearly every whistleblower statute, including all of the statutes involved in this case, filing a whistleblower complaint is ordinarily a protected activity. However, in this case the preponderance of the evidence indicates that the Complainant's whistleblower complaint was filed for the sole purpose of deterring EG&G from

imposing further discipline upon him and that his complaint lacked a reasonable, good faith basis. Accordingly, the Complainant's actions in filing the complaint did not qualify as a protected activity. *See Melendez v. Exxon Chemicals of America*, ARB No. 96-051 (July 14, 2000) at 18-23 (explaining that whistleblower statutes do not provide protection for complaints that lack a reasonable, good faith basis). In this regard, the strongest evidence that the Complainant's whistleblower complaint lacks a reasonable, good faith basis is the fact that his claim is almost entirely based on his false assertions that he repeatedly warned the Snell team that the SDS bypass was the likely source of the April 22 agent migration incident. In fact, as the evidence in this proceeding establishes, the Complainant gave no such warnings to anyone. Although the Complainant also made an allegation that EG&G's adverse actions against him were motivated by his statements to Thomas concerning the use of check valves, the absence of a reasonable, good faith basis for this allegation is found in the Complainant's own admission during a pre-trial deposition that he did not believe there was anything in his statement that would have motivated Thomas to retaliate against him.

Sixth, although the Complainant emphasizes that EG&G has admitted that one of the reasons for the adverse actions against the Complainant was his failure to have informed his supervisors in the Engineering Department of his meetings with the Snell team, this evidence does not warrant a conclusion that the adverse actions were taken in retaliation for having engaged in the protected activity of making safety reports or complaints to the team. Rather, the evidence indicates that the sole concern of the EG&G supervisor in this regard was the Complainant's failure to have informed his supervisors that the meetings were occurring. The Complainant's supervisors had both a responsibility and legitimate interest in knowing of all important events involving the Engineering Department. It is further noted that there is no evidence that anyone on the Snell team ever asked the Complainant to conceal the fact that he had been interviewed or even had any such desire. In short, the Complainant's failure to inform supervisors of the Snell team's interest in the SDS bypass was not a protected activity.

Seventh, the Complainant is unconvincing in arguing that because statements made during a "proceeding" are protected activities under whistleblower statutes even if the statements are inaccurate, EG&G necessarily violated whistleblower statutes when it took adverse actions against him based on his inaccurate statements to the Snell team. Although case law indicates that statements to internal fact-finding bodies like the Snell team can constitute the first step in a "proceeding" if such statements constitute reasonable, good faith complaints or inquiries about suspected violations of environmental statutes, there is no case law indicating that every single statement or inquiry before such informal, non-governmental bodies is a protected activity regardless of the content of the statement or inquiry. In fact, the various appellate decisions extending the definition of the term "proceeding" to include internal statements about real or suspected environmental violations have made it clear that such holdings are based on the premise that the statements being protected are "complaints" that constitute the first step in a "proceeding." *See Kansas Gas & Electric Company v. Brock*, 780 F.2d 1505, 1510-12 (10th Cir. 1985); *Passaic Valley Sewerage Commissioners v. United States Department of Labor*, 992 F.2d 474, 478-80 (3rd Cir. 1993). Any more expansive rule would in effect mean that every statement by every employee of every employer subject to a whistleblower statute would constitute a protected activity. Indeed, any such rule would give protected status to statements that do nothing to achieve Congressional purposes or actually work contrary to those purposes.

Such an interpretation would obviously be inconsistent with the intent of Congress when these statutes were enacted. As the Tenth Circuit noted in its decision in *Trimmer v. United States Department of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999), whistleblower statutes are not intended "to be used by employees to shield themselves from the consequences of their own misconduct or failures." In this case, the weight of the evidence indicates that the Complainant's statements to the Snell team did not include any complaint about possible violations of any environmental protection statutes or even any suggestion of such violations. Indeed, the preponderance of the evidence indicates that the Complainant's statements to the Snell team did just the opposite. Hence, his inaccurate statements to the team concerning the types of valves installed in the SDS bypass were not protected activities and cannot provide a basis for finding that EG&G violated any whistleblower statute.

Eighth, the Complainant is unconvincing insofar as he argues that EG&G's stated reasons for his suspension and termination are undermined by testimony suggesting that even if spring-loaded valves had been installed in the SDS bypass, the presence of sludge and wire ties in the SDS system would have prevented such valves from stopping the migration of toxic agents. Even if the speculative testimony on this subject were accurate, it would not in way refute the evidence that EG&G's management had a *bona fide* belief that adverse actions were justified by the Complainant's inaccurate statements to the Snell team, his failure to have ensured that spring-loaded valves were installed in the SDS bypass system, and by the other job performance deficiencies set forth in the Performance Improvement Plan drafted by Goodell in early April of 2003.

Finally, it has been determined that although the Complainant has presented circumstantial evidence of the type that has sometimes been held sufficient to justify an inference that an employer engaged in illegal discrimination, the circumstantial evidence presented by the Complainant in this case is not sufficient to outweigh the countervailing evidence that that EG&G's adverse actions against the Complainant were not even partly motivated by retaliatory animus. In this regard, it is recognized that the Complainant has presented evidence indicating (1) that he was given the most severe type of discipline (termination) for what could be characterized as a first offence, (2) that his termination was based on an investigation that didn't seek his version of events, and (3) that none of the other EG&G employees who arguably contributed to agent migration incidents had been given comparable discipline. In some circumstances, this kind of evidence alone might support a conclusion that an employer violated a whistleblower statute. However, in this case the record also contains evidence that substantially offsets or diminishes the probative value of the Complainant's circumstantial evidence. Most significant in this regard is the evidence indicating that although the Complainant had never been previously disciplined, his errors in connection with the SDS bypass materially contributed to two agent migration incidents at a time when EG&G's management was under considerable pressure to prevent any further leaks of toxic substances. Likewise, although the Complainant was not given an opportunity to provide his version of events to the Human Resources Department's investigation of his role in the agent migration incidents, the evidence shows that the investigation was nonetheless extensive and consistent with the procedures typically followed by many human resources departments. In addition, the evidence that other employees were not so severely punished for errors that resulted in agent leaks is of limited probative value because the errors of the other employees occurred in different

contexts and involved people who had different work records than the Complainant. Moreover, the evidence appears to indicate that the severity of the adverse actions against the Complainant were primarily the result of the fact that the toxic leaks associated with his errors happened at a time when safety concerns were being given increased priority at EG&G. In any event, the sparseness of credible evidence of protected activities by the Complainant indicates that it is highly unlikely that the adverse actions were in violation of any whistleblower statute.

ORDER

It is recommended that the whistleblower complaint of Gregory Caldwell be denied.

A

Paul A. Mapes
Administrative Law Judge

NOTICE: This Recommended Decision and Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. §24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Frances Perkins Building, 200 Constitution Avenue, NW, Washington, DC 20210. Such a petition for review must be received by the Administrative Review Board within **ten business days** of the date of this Recommended Decision and Order and shall be served on all parties and on the Chief Administrative Law Judge. *See* 29 C.F.R. §§24.7(d) and 24.8.