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Issue Date: 19 May 2016

CASE NO.: 2015-SDW-1

In the Matter of:

FREDERICK B. WRIGHT,
Complainant

v.

RAILROAD COMMMISSION OF TEXAS
Respondent

Appearances:

Frederick B. Wright, *pro se*
For Complainant

Michael J. Deponte, Esq.
Julie C. Tower, Esq.
Jackson Lewis, P.C.
For Respondent

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

Complainant brought this case under the employee protection (whistleblower) provisions of the Safe Drinking Water Act (SDWA), 42 U.S.C. § 300j-9(i), and the Federal Water Pollution Control Act, (FWPC) 33 U.S.C. 1367, and the implementing regulations at 29 C.F. R. Part 24 based upon Complainant's assertion that Respondent terminated him on June 20, 2013 due to his protected activities under these statutes. For the reasons set forth below, I find that this case must be dismissed, because Complainant did not establish by a preponderance of evidence that he engaged in protected activity which was a motivating factor in Respondent's decision to terminate him. Therefore, Complainant has failed to establish an action cognizable under either act. Further, even if could establish such a connection, Respondent established that it would have terminated him for a legitimate, non-discriminatory reason absent any alleged protected activity.

PROCEDURAL BACKGROUND[1]

On July 19, 2013, Complainant filed a complaint against Respondent with OSHA. In his complaint, Complainant alleged that Respondent terminated him on June 20, 2013 because he complained to management about being asked to approve completion reports and certifying that oil and gas operators had complied with rules pertaining to the protection of fresh water when in fact these operators had not complied. On April 9, 2015, OSHA issued its findings stating it found no cause to believe that Respondent violated either the SDWA or FWPCA. On May 6, 2015, Complainant timely appealed OSHA's finding. Pursuant to Complainant's appeal, a hearing was held before the undersigned in Houston, Texas on December 9 and 10, 2015.

Sovereign Immunity

Prior to the hearing, Respondent filed a motion for summary judgment on November 16, 2015. Respondent contends I lack subject matter jurisdiction in this matter since it is an arm of the State of Texas and administrative proceedings brought against states by private citizens are barred by the eleventh amendment. Specifically, Respondent maintains Congress has not waived state sovereign immunity with respect to claims brought under the whistleblower provisions of the Safe Drinking Water Act and Federal Water Pollution Control Act.

On the other hand, Complainant contends Respondent has waived its sovereign immunity to whistleblower complaints for violations of federal and state laws. Specifically, Complainant argues Respondent acknowledged the Court's subject matter jurisdiction by litigating the merits of the case before and after filing its answer to his complaint.

Correction of Record

At the hearing, Complainant testified, called two supervisory witnesses (Ramon Fernandez and Charles Teague), and identified 28 exhibits, of which I admitted 22. In addition to questioning Fernandez and Teague, Respondent called two management witnesses, Peter Fisher and Mark Bogan, and introduced 35 exhibits. Both parties filed briefs. Before receipt of briefs, Complainant filed a motion to correct the record in 71 places. Respondent agreed with corrections 1-6, 20-21, 23-25, 33, 36-37, 42, 44-45, 48, 50, 58, 59-63, 65-69, and 71. Respondent objected to Complainant's other proposed changes as substantive and not involving grammatical, typographical, or spelling changes appropriate for such a motion. After reviewing the record, I agree with Respondent's objections, except for objections to numbers 12, 16, 18, and 30-31 referring to centralizers "bow" out not "bore" out (Tr. 29:1); "non-critical" not "nautical" cement (Tr.51:2); "re-cement" rather than "resubmit" (Tr.60:10); Complainant asking questions and not the undersigned speaking (Tr. 121:19-20); and Complainant, rather than the undersigned, commenting on Complainant's conduct. (Tr.125:7-10).

Also before receipt of briefs, Complainant filed a 16 page document entitled "Complainant's Notice of Exhibits, Objections, Fatal Errors and/or Fatal Variances" (Complainant's Notice") to be included with his post-hearing brief. Complainant's Notice

[1]References to the record are as follows: Transcript: Tr. __; Complainant's Exhibits (listed by bates numbers): CX-__; Respondent's exhibits: RX-__; Stipulated definitions: STD; Stipulated facts: STF.

erroneously contends the undersigned accepted Complainant's exhibits 1-78 to Complainant's First Amended Complaint and exhibits 89-223 to Complainant's Motion for Summary or Partial Summary Decision. Complainant's Notice also objects to testimony at various pages of the record as being presented in surprise and in violation of "28 FRCP 37(a)(4)" as hearsay.[2] Finally, Complainant's Notice cites variances with Respondent's pleadings and answers to interrogatories.

Complainant also seeks to have the undersigned categorize the testimony of Fernandez relating to complaints he received about Complainant as representing Fernandez's state of mind rather than factual incidents. As for Bogan's testimony, Complainant seeks to have me treat complaints about him as nothing more than disagreements about technical aspects of his work. Having reviewed the file, the undersigned finds no merit to any of these arguments.

Complainant also requests a determination by the undersigned that adverse actions are only limited to the 30 day time bar as opposed to protected activity which is not so limited. That request is discussed later in legal analysis portion of this decision. To the extent Complainant seeks to exclude the adverse testimony of Respondent's management officials regarding reports they received about Complainant's rude and unprofessional treatment of staff and operators as hearsay, the undersigned finds no basis for such a request even if such reports are hearsay (which they are not). 5 U.S.C. §§556-557.

Technical Terms

Due to the use of multiple technical terms in this proceeding, the undersigned asked the parties to submit a list of defined technical and industrial terms applicable to this case which appears below:

1. Alternate Surface Casing Request- a request for an exception to the surface casing requirements in 16 TAC § 3.13 as allowed by § 3.13(b)(2)(G).

2. Alternate Surface Casing Request Form- the form used by District 3 of the Commission's Oil and Gas Division on which an operator requests an exception to the surface casing requirements in 16 TAC § 3.13.

3. Annulus- the space between two concentric objects such as between the wellbore and casing or between casing and tubing where liquid can flow.[3]

4. Annular Disposal- the practice of pumping drilling waste down the annulus between the surface casing and the next size casing string.

[2] Complainant apparently refers to Fed. Rule of Civ. Pro. 37, which pertains to the failure to make disclosures or to cooperate in discovery and sanctions. Rule 37 does not apply in this case.

[3] Although the parties stipulations do not include definitions for the following terms, my review of the records indicates Respondent provided these definitions in its prehearing exchange on November 16, 2015 without objection from Complainant: aquifer, reservoir, and surface casing.

5. Aquifer- a geologic formation, group of formations, or part of a formation that is capable of yielding a significant amount of water to a well or spring.

6. Casing String- an assembled length of steel pipe configured to suit a specific well bore. The sections of pipe connected and lowered into a wellbore and then cemented in place with the top of the pipe coming into the casing head.

7. BUQW (Base of Usable Quality of Water)- the depth below ground surface, above which ground water has generally less than 3,000 mg/L total dissolved solids, but may include higher levels of total dissolved solids if identified as currently being used or identified by the Texas Water Development Board as a source of water for desalination.

8. Casing head- the device at the surface terminus of wells to which all casings are connected and which facilitates pumping between any two strings of casing.

9. Circulating cement- this term pertains to the conditions in which cement is placed; it is not a type of cement. To circulate cement means to pump enough cement into a well bore and up through the annular space between the casing and the earth (or the casing and the next larger casing and string) such that some quantity of cement is returned (i.e., circulated) back to the ground surface.

10. Conductor Casing- the pipe running into wells, instead of or in addition to drive pipe, to prevent the collapse of soil or water into the well. Conductor casing typically runs deeper than drive pipe if the drive pipe is also used.

11. Completion report- a set of documents required to be filed with the Railroad Commission pursuant to 16 TAC § 3.16. including form W-2 or G-1, as applicable.

12. Centralizers- devices placed on casing to keep the casing centralized with the wellbore, facilitating efficient placement of cement sheath around the casing and between the casing and the wellbore.

13. D-O- the inspection report completed to describe an inspection.

14. Fresh water- water having bacteriological, physical, and chemical properties which make it suitable and feasible for beneficial use for any lawful purpose as defined TWC, Title 2. Subtitle D, Chapter 27, Subchapter A, Sec. 27.002(8).

15. Freshwater Strata- geologic formation(s) or portion(s) thereof containing fresh groundwater

16. Groundwater- water percolating below the surface of the earth.

17. Intermediate Casing- a casing string that is generally set in place after the surface casing and before the production casing. The intermediate casing string provides

protection against caving of weak or abnormally pressured formations and enables the use of drilling fluids of different density necessary for the control of lower formations.

18. Pollution- the alteration of the physical, thermal, chemical, or biological quality of, or the contamination of, water that renders the water harmful, detrimental, or injurious to humans, animals, vegetation, or property, or to the public health, safety or welfare or impairs the usefulness of the public enjoyment of the water for any reasonable purpose.

19. Production Casing- a casing string that is set across the reservoir interval and within which the primary completion components are installed.

20. Remedial Cementing- a cementing operation performed to repair primary cementing problems or to treat conditions arising after the wellbore has been constructed. The two main categories of cementing include squeeze cementing and the placement of cements plugs.

21. Reservoir- a natural or artificially created subsurface sedimentary stratum, formation, aquifer, cavity, void, or coal seam from which hydrocarbons may be produced.

22. Shoe- the bottom of the casing string including the cement around it, or the equipment run at the bottom of the casing string.

23. Surface Casing- the outer casing cemented in the upper portion of the well bore to protect fresh water formations from contamination. Surface Casing also refers to the well pipe inserted as a lining nearest to the surface of the ground to protect the well from near-surface courses of contamination.

24. USDW ("Underground Sources of Drinking Water")- an aquifer or its portion which is not an exempt aquifer as defined in 40 CFR section 146.4 and which (A) supplies any public water system; or (B) contains a sufficient quantity of ground water to supply a public water system; (i) currently supplies drinking water for human consumption; or (ii) contains fewer than 10,000 milligrams per liter (mg/l) total dissolved solids.

25. UQW (Usable Quality Water)- water containing 3,000 parts per million (ppm) total dissolved solids or less.

26. Wellbore- the hole drilled into the ground.

27. Well Completion- a generic term used to describe the assembly of downhole tubulars and equipment required to enable safe and efficient production from an oil or gas well.

28. Cement with 24-hr compressive strength of at least 250 psi-SWR 13(b)(1)(D) "Cement Quality," provides as follows: An operator may use cement with volume extenders above the zone of critical cement to cement the casing from that point to the ground surface, but in no case shall the cement have a compressive strength of less than 100 psi at the time of drill out nor less than 250 psi 24 hours after being placed.

29. Cement with 72-hr compressive strength of at least 1,200 psi-SWR 13(b)(1)(D), "Cement Quality," provides as follows: Surface casing strings must be allowed to stand under pressure until the cement has reached a compressive strength of at least 500 psi in the zone of critical cement before drilling plug or initiating a test. The cement mixture in the zone of critical cement shall have a 72-hour compressive strength of at least 1,200 psi.

FACTUAL BACKGROUND[4]

Respondent is a Texas state agency responsible for the regulation of the oil and gas industry in the state of Texas, including administration and enforcement of the underground injection control program under the federal Safe Drinking Water Act for class 2 injection wells associated with oil and gas exploration and production activities as well as brine mining activities. Respondent also serves as the certifying agency for federal permits under sections 401 and 404 of the Federal Clean Water Act, formerly referred to as the Federal Water Pollution Control Act (FWPCA), for projects associated with oil and gas exploration and production activities. (Tr. 211-213; 40 CFR §147.2201).

Respondent's District 3 Director, Guy Grossman, hired Complainant on October 1, 2007, as an engineer specialist II for its Houston District 3 Office, Field Operations Section, Oil and Gas Division. (CX-52; STF-1, 3). Prior to his employment with Respondent, Complainant worked as a petroleum engineer for the U.S. Bureau of Land Management, car sales manager, and as a project engineer for Gulf Oil, Union Texas Petroleum, and Exxon. (CX-196-201). As an engineer for Respondent, Complainant's duties included conducting surveys, making inspections, investigating complaints, and collecting and analyzing engineering data. (RX-1). As an engineer specialist, Complainant was assigned as a technical staff person to work with the regulated industry to secure compliance by oil and gas operators with the rules and statutes assigned to Respondent for enforcement. (RX-31; Tr. 93-95).

Regarding the alternate surface casing program which was the primary activity involved in this proceeding, Complainant had two responsibilities: (1) to insure that the operator was going to circulate cement to the surface and (2) to determine the number of centralizers to be used in this process. (Tr. 219-220, 230, 231-233).

[4] The factual background consists of not only the parties' stipulations but the undersigned's factual determination of the record consisting of admitted exhibits and credibility determinations. In general, I was not impressed with Complainant's denial of his mistreatment of operators and refusal to work with staff personnel. Management was very lenient with Complainant and tried to encourage him to work with, as opposed to working against, independent contractors and fellow employees.

As of June 20, 2013, Complainant had received two promotions to engineer VI with his last bonus effective December 1, 2012. (RX-2; 27, STF-2). Respondent terminated Complainant on June 20, 2013, at which time he was under the supervision of District Director Charles Teague and assistant director Peter Fisher, who both reported to Deputy Director Raymond Fernandez[5].

At his first employee evaluation (EPE) on April 29, 2008, supervisor Gil Bujano, Director of Respondent's Oil and Gas Division, and Guy Grossman rated Complainant as meeting the requirements of his position. (RX-3). On his next two evaluations on October 21, 2008, and October 28, 2009, Complainant received similar evaluations. (RX-4, 5).

At the next evaluation (EPE) on October 28, 2010, Complainant maintained an overall rating of meeting the requirements of his position on average but was told that he needed to improve his relations with personnel in the office and industry who hesitated to approach him because they perceived Complainant was unwilling to work out amenable solutions at times. (RX-6). In reply, Complainant stated:

> I am taking this comments option to file a complaint that the District Director and the Assistant District Director are using their official capacities to harass me, with the intent to create a hostile work environment and adversely impact my employment opportunities. The baseless comments in this EPE about my lack of professionalism, me engaging in debates with operators, as well as the implication that unbiased individuals are hesitant to approach me, is part of the manifestation of this harassment.

In response, Guy Grossman and Raymond Fernandez stated there was no attempt to harass or create a hostile work environment for Complainant. Rather, they were suggesting ways Complainant could improve his performance for the betterment of Respondent. On appeal, HR Director Mark Bogan reviewed Complainant's harassment allegations and denied any evidence of harassment indicating that Houston's District Office management comments were suggestions for work improvement. (RX-7-8).

In support of his evaluation of Complainant, Respondent produced an e-mail from Douglas Storey of Fidelity Exploration & Production to Grossman dated June 15, 2010, in which Storey complained of Complainant's arrogant manner of treating him. Complainant acted as though he was the only individual who knew anything about engineering or regulatory issues and accused Storey of not properly calculating the correct number of centralizers. Complainant also demanded Storey write a letter of apology indicative of a lack of professionalism. (RX-17).

[5] Raymond Fernandez retired from Respondent on August 31, 2014. Prior to his retirement, Fernandez served as Respondent's Deputy Director of Field Operations for its Oil and Gas Division for three years. In that position, he managed nine district offices, including Houston's District 3 Office. As Deputy Director, he had overall supervision for 250 employees. Before his promotion to Deputy Director, he held a numerous other positions with Respondent. As a professional petroleum engineer, he worked with oil and gas operators in dealing with and resolving regulatory issues. (Tr. 812-92).

Storey submitted another e-mail dated April 16, 2013 indicating other instances of Complainant arbitrarily holding up completion reports. (RX-19).

On his next employee evaluation (EPE) on October 28, 2011, Complainant had an overall average evaluation with suggestions of taking more field trips and working for better relations with all operators to make "every effort to assist operators in keeping wells on production but also complying with the rules and regulations" and viewing violations from practical standpoint "in addition to the straight rules and regulations." (RX-9).

On the next employee evaluation (EPE) of November 14, 2012, Respondent evaluated Complainant as average but still needing to improvement relations with operators with the goal of providing excellent customer service and making the path to compliance quick and uncomplicated while working on better relations with staff as well. (RX-16). In support of its suggested improvements, Respondent cited instances of Complainant requiring analyst Marsha Vogel to report string depths on a completion package when she had never been required to do so in 20 years of regulatory reporting. (RX-13). Complainant denied causing any delays in processing completion reports and informed Fernandez his processing of completion reports "…significantly exceeds the rest of the District." (CX-31).

On September 6, 2012, Complainant filed a complaint with Gil Bujano, Director of Respondent's Oil and Gas Division, concerning the temporary assignment of Terry Papak to run the District 3 office in the absence of Teague and Fisher. Complainant claimed former district director Ron Smelley initiated this practice of appointing Papak, who was only specialist IV, as opposed to Complainant, who was a specialist VI, in order to demean Complainant. According to Complainant, he contacted Mark Bogan about this appointment and was advised it was only a temporary appointment and should not be concerned about it. Complainant disregarded Bogan's advice and when Fisher later made a similar appointment, Complainant again filed a formal complaint with Bujano. (CX-32).

Rather than working with operators to resolve compliance problems, Complainant continued to play "hard ball" with operators by refusing to help them resolve problems. For example, operator Paul Hendershott met with Complainant on April 10, 2013 and indicated he had taken over some "orphan" wells that had numerous violations. Hendershott sought Complainant's help in resolving these violations. Rather than helping Hendershott, Complainant laughed and told him that he could come up with more violations. Fellow employee Mark Motal overheard the exchange and apologized for Complainant's conduct, after which Hendershott stated he had never been so humiliated, talked down to, and made fun of in his entire life. The following day, Hendershott spoke with District Director Charlie Teague, who resolved Hendershott's problems and answered his questions. (RX-12).

Besides the Hendershott incident, Respondent produced an e-mail from fellow employee Michael Sims to Charlie Teague dated March 21, 2013, wherein Complainant, rather than helping Sims to resolve an issue of burial of oil based mud, continued to argue with Sims, which resulted in Sims having to seek assistance from Complainant's supervisor, Charlie Teague, and Peter Fisher, Deputy District Director, because Complainant refused to listen to anything Sims had to say. (RX-14).

As a further example of Complainant's unwillingness to work with operators and a lack of professionalism, Respondent provided an e-mail from Carla Martin of Enervest to Fernandez dated April 12, 2013, wherein she reported submitting a new form approved by Teague for use in a SWR 13(b)(2) request (alternative surface casing exemption request) for Strake #1 H well in Grimes County only to be told by Complainant that she had to use an old form to get her request approved. In addition, she complained that Complainant had a problem working with women and cited her experience of being interrupted by Complainant when she called to explain the purpose of her call. (RX-18).

Complainant's refusal to work with operators was exemplified also by his dealing with Douglas Storey of Fidelity Exploration & Production Co. which was also set forth in an e-mail dated April 16, 2013. The email states Complainant rejected Storey's revisions to completion package tracking no. 71248 without letting Respondent's proration and engineering personnel determine whether they were going to give Storey the necessary allowance. Upon receiving Complainant's response, Storey e-mailed Fernandez indicating that everything he submitted to Complainant was rejected even for things that Complainant was incorrect on. Further, Storey told Fernandez that if necessary he could provide three years of issues with Complainant. (RX-19).

EVENTS LEADING TO COMPLAINANT'S DISCHARGE

Operators continued to file complaints against Complainant regarding his inability or unwillingness to provide practical solutions to drilling problems. In December 2012, Monty L. McCarver, operations manager for Nabors Completion & Production Services Company, complained to Teague that every time they called to get a variance in plugging operations, Complainant came up with costly and impractical methods. In turn, Teague assigned other personnel, including himself and Fisher, to address these problems while removing Complainant. In response, Complainant filed a formal complaint with Gil Bujano, contending his removal was in retaliation for a previous complaint he filed against Teague and Fisher in September 2012 and to demean him and to impair his ability to have operators comply with the rules. (CX-32-34).

On April 17, 2013, Fernandez informed Teague that Complainant had filed a complaint alleging that District 3 management had created a hostile work environment due to their lack of understanding of the rules, regulations, and engineering principles associated with the responsibilities of a district office. In support of his complaint, Complainant cited instances wherein Teague approved a completion packet involving the use of partial plugs in inappropriate situations and wherein Fisher, in consultation with Anton Motal, improperly approved the remedial squeezing of a surface casing of a new well followed by an improper remedial cementing of another surface casing. Complainant also asserted Teague had improperly limited his access to information and made other assertions which Teague denied. (CX-37-47). Regarding Fisher, Complainant alleged he came to District 3 without a proper understanding or regard for the rules and improperly turned over responsibilities for reviewing completion reports to clericals, which Fisher also denied. (CX-56-59).

On May 17, 2013, Fernandez and Bill Miertschin from Respondent's Austin office travelled to the Houston District Office to conduct a Form P-112 "Performance Counseling" session of Complainant. Teague and Fisher attended this counselling session. A summary of the counseling in RX-20 stated the following:

> This counselling session is to remind you of past conversations we have had with you regarding your performance, along with suggested improvement that has been addressed in your earlier EPE's. All issues that you may have regarding your work assignments should first be brought to the attention of your District Director before you contact the Deputy Director of Field Operations or the Director of the Oil and Gas Division. Exceptions may be limited to those issues outlined in the Equal Employment Opportunity section of the Employee Handbook. The use of the "chain of command" has been brought to your attention in the past and you are reminded that you are expected to follow these instructions.
>
> Unsolicited complaints continue to be received regarding your relationship with operators. This continues to occur despite our efforts to help you with your work relationships. Operators report that you are difficult to work with, you exhibit rude behavior, and you are condescending in your dealings with them, and that you have resorted to "name calling". Operators complain that you are unreasonable and do not attempt to offer solutions to bring them into compliance with Commission rules. The Commission expects you to behave in a professional manner with Commission staff and industry representatives.
>
> Your work assignment does not include any management duties. Yet, you continue to insert yourself into managing co-workers when that is clearly not your assignment. This behavior disrupts the workplace. You are not to intervene in the management of the district office and its staff. If you believe there is a need for your involvement, you must contact the District Director or Assistant District Director.
>
> A great deal of time has been consumed by management at the district office and in Austin in dealing with your issues. Improvement in your behavior is required. Failure to do so may result in further disciplinary action up to and including termination of your employment with this agency.

In response, Complainant appealed by asking for specific incidents supporting the above evaluation, claiming he had not been provided with such information in the past. (RX-20, p. 2). On May 23, 2013, Gil Bujano replied, indicating Complainant's response demonstrated resistance to supervisor guidance, which if not corrected could lead to his termination. (RX-24).

On May 31, 2013, Complainant informed Kathryn Jaroszewicz, a consultant with Miller Consulting Inc. who had applied for an alternate surface casing program and utilized a new form approved by Teague in January 2013 (which did not require the number of centralizers to be listed for the BUQW on the second string when a short casing is run and did not address the issue of whether the bottom 20% of the surface casing was going to be cemented with critical cement), that she needed to use an older form which was attached and list the correct number of centralizers.[6] Ms. Jaroszewicz stated she would supply the requested information but was confused as to the correct form, new or old (which required more information), to be used. (STF-6-8). When Teague learned of Complainant's treatment of Ms. Jaroszewicz, he informed her she did not have to fill out another form. Rather, she could e-mail or phone Complainant and give him the number of centralizers needed to fulfill the requirements of Rule 13 whereupon Complainant could alter the form she submitted, initial the alteration, and approve it. (RX-25).

On June 4, 2013, Teague e-mailed Complainant and told him the new form contained enough information to approve Ms. Jaroszewicz's request regarding the issue of the sufficiency of cement addressed by the question of whether the operator planned on circulating cement to the surface on all casing strings protecting usable-quality water. Teague then asked Complainant if he had approved her request as Teague had informed her. (RX-23).

On the following day, Complainant e-mailed Teague, telling him that the new form did not address all issues raised by SWR 13(b)(2)(F), unless Teague was re-interpreting SWR 13(b)(2)(F) to eliminate the requirement that centralizers be run from BUQW to the surface with the new form by not asking for the centralizers that had been required from the BUQW on the second string when a short surface casing was run. Further, SWR 13 requires the bottom 20% of the surface casing be cemented with critical cement which the new form did not address or require the operator to provide the data to verify. Complainant then stated that the RCC's failure to review the data that operators had been submitting for the past five years amounted to "gross negligence" since operators made errors in the past that did not comply with the regulations intended to protect fresh water.

Complainant then stated:

> If you are informing me that it isn't my job to conduct the RCC's due diligence review of these applications and/or that you're revising these criteria, I will proceed accordingly. Your e-mail below appears to indicate your position on cement; however I will hold the application for your interpretation of the centralizers issue or the operator's response.

(RX-23, p.1).

[6] In January of 2013, Teague approved use of an Alternate Surface Casing Program form (January ASCF) in District 3. In a February 5, 2013 e-mail, Teague requested comments from District 3 technical staff on changing the January ASCF form to a form he had used in other districts (February ASCF). On February 6, 2013, Complainant advised Teague he would have to get additional information from operators to review their alternate surface requests if Teague adopted the February ASCF form, which he did. (STF3-5).

On June 6, 2013, Teague, in an e-mail to Bogan and Fernandez, recommended further disciplinary action of Complainant due to Complainant's refusal to comply with the directives of his counseling session. (RX-25). On June 10, 2013, Ms. Jaroszewicz submitted the correct number of centralizers for the alternate surface casing request for the well named "Ol Army Unit #1," which was the well Ms. Jaroszewicz had originally requested an alternate surface casing form. On June 10, 2013, Complainant approved Ms. Jaroszewicz's request. (STF-8-14).

On June 20, 2013, Respondent terminated Complainant due to his refusal to comply with Commission directives to work with management and staff and to assist operators in resolving compliance problems, including the most recent issue of assisting an operator on how to resolve a casing exception request. Complainant initially reviewed the operator's request, found it deficient, and directed the operator to re-file a new form with the required information. Teague intervened and instructed the operator to call or e-mail the additional information to Complainant and instructed Complainant to resolve the issue by making the necessary changes to the form and to submit it to the operator with the corrections to avoid the need to re-file. Instead of resolving this issue as instructed, Complainant engaged Teague in an e-mail debate and turned a simple resolution into a complex process by accusing Teague of incorrectly reinterpreting rules, interfering with Complainant's ability to perform his duties, and characterizing Teague's actions as "gross negligence." In so acting, Complainant ignored prior warnings that such action could lead to his termination.

TESTIMONY OF COMPLAINANT

Complainant testified that he used the Alternate Surface Casing Program Form (ASCF) approved in January 2013 rather than the ASCF approved by Teague in February 2013, because the January form provided more information. Further, he interpreted Fernandez's comments that Complainant's use of January 2013 form was not required by his job to be the primary reason for his termination even though Complainant allegedly insisted on using the January form to protect underground sources of drinking water in furtherance of the Safe Drinking Water Act. (Tr. 518-519).

Regarding Complainant's communication on May 31, 2013 with Ms. Jaroszewicz, Complainant advised her that the use of seven centralizers was insufficient and that she should fill out the January ASCF form with the correct number of centralizers. (CX-70). Previously, she had used the February ASCF form. Complainant testified that the January ASCF form allowed the reviewer to evaluate more detailed information regarding cement volume, the placement of centralizers on the surface and second string of casing, and the strength of the casing. (Tr. 522).

Twenty minutes later, Ms. Jaroszewicz responded to Complainant's e mail saying she would update the information concerning the centralizers when she received it from the operator. Further, she requested information as to which ASCF form to use. About 5 minutes later, employee Marie Blanco informed Peter Fisher of the correspondence and within seven minutes Teague sent an e-mail to Ms. Jaroszewicz telling her it is not necessary to submit another form but simply to e-mail or phone Complainant and advise of the number of centralizers to fulfill the requirement of Rule 13. On June 3, 2013, Complainant e-mailed Teague, with copies to

Fernandez and Fisher, stating it appeared that Teague was telling him that he could no longer request information from the operators regarding whether they were planning on using sufficient amounts of cement to comply with the rules. (CX-168-70; Tr 524-526). On June 3 and June 7, 2013, Ms. Jaroszewicz e-mailed the operator indicating ‘’They (Complainant) would not indicate the number of centralizers needed to proceed with the application" to which the operator indicated on June 7, 2013 that he would run at least 20. On June 10, 2013, Ms. Jaroszewicz relayed with this information to Wright, and he approved the application. (CX-186-192, 531-532).

Complainant testified that his use of the January form, which requested additional information, constituted protected activity. Further, Complainant was told by Teague that the February form contained sufficient information to approve operators' request. However, Complainant disagreed with Teague, because the February form did not ask for the number of centralizers from the base of usable quality water in the second string. Teague accused Complainant of doing a detailed analysis of alternate surface request, which was not his job, and told Complainant he could calculate the number of required centralizers from the February form. (Tr. 544-549). Complainant complained of being subject to a hostile work atmosphere in February 2013 when he was assigned to bring wells into compliance. According to Complainant, Teague stated operators accused Complainant of being unreasonable and not offering solutions. As a result, Teague ordered him to approve completion reports and refer them to Austin for resolution. (Tr. 591-596).

On cross examination, Complainant denied being told by his supervisors that he needed to improve his relationships with co-workers and industry operators by not only pointing out violations but suggesting alternative ways to achieve compliances. (RX- 9-11, 16; Tr. 634-641). Yet, in the counselling session, he admitted being reminded of his duty to improve relations or be terminated for failing to do so. (Tr. 648-652).

Regarding the alternate surface casing request of Ms. Jaroszewicz for "Ol Army Unit #1" (CX-146, RX-25) which she submitted on May 31, 2013 using the February form, Complainant knew the number of centralizers (7) was more than enough for the surface casing set at 825 feet but not enough for the base of usable quality water set at 2025 feet which had to be protected. Rather than get on the phone and ask additional questions to determine the proper number and placement of the centralizers, Complainant sent Ms. Jaroszewicz the January form to complete, although in doing so he was going beyond what his duties required. (Tr. 679-681).

TESTIMONY OF RAYMOND FERNANDEZ, CHARLES TEAGUE, PETER FISHER, AND MARK BOGAN

Fernandez testified that he and Gil Bujano, Division Director, recommended to Milton Rister, Executive Director, that Complainant be terminated for unprofessional and unacceptable behavior with industry operators and staff, including incidents reported directly to them by operators and outside experts who claimed that Complainant had been rude to them, called them "stupid" and "liars," and refused to work with them in resolving problems. (Tr. 106-108, 126-131). As a result of Complainant's misconduct, Respondent fell far behind in its work due to an

undersized staff and a booming industry as well as due to the delays caused by dealing with the complaints generated by Complainant. (Tr. 134-135).

Regarding the May 31, 2013 alternate surface casing request of Ms. Jaroszewicz, Fernandez found fault with the manner in which Complainant handled the request and how Complainant dealt with the deficiencies in this request. Instead of calling the operator and resolving the deficiencies over the phone, Complainant chose not to do as Teague had instructed him to do in similar situations and complete the process in a few simple steps. Rather, Complainant told Ms. Jaroszewicz to fill out the older and more detailed form as opposed to the less detail form approved in February. Teague told Ms. Jaroszewicz it was not necessary to fill out the older and more detailed January form but simply to inform Complainant of the number of centralizers to be used. Then, Complainant could initial the changes on the February form and submit it for approval (assuming it correctly identified the number to Austin for approval). It was not necessary to provide the additional information relating to cement volume as long as the operator indicated that it was going to circulate cement to the surface. (Tr. 164-166). In essence, Fernandez stated it was not the duty of the commission employee to redesign the operator's casing program but rather to determine if the operator was going to circulate cement back to the surface and the number of centralizers to be used. (Tr. 181-187).

Fernandez testified that Complainant was terminated not for insisting on completion of the older January alternative casing form but for the unprofessional manner in which he handled the May 31, 2013 alternate surface casing request of Ms. Jaroszewicz which could have been determined by use of the February alternative surface form, initializing the correct number on the February form she had already used, and approving it as corrected. Instead, he instructed Ms. Jaroszewicz to fill out the January form, which caused unnecessary confusion and delay on Ms. Jaroszewicz's part (Tr. 216-221, 225-227, 231-238, 287, 288).[7] In so doing, Complainant admittedly went outside of his instructions and demands of his office. (Tr. 271-281).[8]

In deciding to terminate Complainant, Fernandez took into consideration Teague's June 6, 2013 e-mail in which Teague stated that Complainant refused to correct the errors on the February alternative casing form, initial the changes, and sign it. Complainant failed to inform Ms. Jaroszewicz of what was needed for approval, and Complainant's behavior was not the

[7]A copy of the new and more streamlined application for alternate surface casing program form as authorized by District Director Teague and used by Ms. Jaroszewicz appears at RX-21. A copy of the older form that Complainant insisted that Ms. Jaroszewicz fill out in addition to the newer form appears as RX-23, pp. 4-5. Respondent admitted the older form required more detailed information.

[8] Fernandez testified about other instances of unprofessional conduct by Wright in April 2012 when Fernandez received unsolicited complainants from regulatory analysts alleging Wright was rude, called one stupid, and was impossible to work with. (Tr. 106, 131, 248). Fernandez also received other complaints about Wright being unable to work with by a former employee who had retired and was working for an outside contractor and from another contractor accusing Wright of calling him a liar. (Tr. 107-108, 247, 313-314). Fernandez cited another instance of Complainant not getting along with fellow employee, Terry Papak, when he complained about an instance when Papak was appointed to supervise the Houston office for several days. (Tr. 311-313). Former employee Doug Storey complained to Fernandez about Complainant unduly processing his applications after leaving Respondent and going to work for an outside contractor. (Tr. 315-316).

correct way to handle the problem. Instead, Complainant characterized Teague's efforts as incompetent and a disregard for rules by creating a hostile work environment. In his e-mail, Teague stated that Complainant's conduct was not professional and a manifestation of being difficult to work with, about which he had been warned during his counselling session on May 17, 2012. (CX-67; RX-20, 26; Tr. 289).[9]

Teague, who retired from Respondent on December 31, 2014, and was District Director for District 3 from May 1, 2012 to December 31, 2014, testified that he recommended additional disciplinary action (not necessarily termination) due to Complainant's refusal to follow the directives of his counselling session of May 21, 2013. Specifically, Complainant was directed to behave in a professional manner with Commission staff and industry representatives and to cease being arrogant, insolent, and insulting to Commission managers and operators, presenting unnecessary obstacles to getting paper work done or approval, holding up approval of requests form minor issues, issuing a vague request for information, telling individuals to refile applications when the simple solution would have been to get on phone, and advising operators of deficiencies. (Tr. 338-339).[10] Teague cited instances of misconduct by Complainant, including instances where Complainant made compliance unnecessarily difficult and unpleasant, especially the May 31, 2013 request by Ms. Jaroszewicz. (RX-34; Tr. 347-367, 369-378).

Teague testified that Complainant, rather than accepting his directive, accused him and Respondent of gross negligence and suggested it was not his job to diligently review alternative surface casing requests. (RX-25, p.2; Tr. 445- 450). Teague then cited Complainant's inappropriate treatment of former employee Doug Storey by demanding an apology for not allegedly calculating the correct number of centralizers, his refusal to work with Michael Simms, Respondent's Manager of Technical Permitting, on a mud pit issue in March 2013, and his humiliation operator Hendershott, who asked for his help in resolving compliance issues only to be met with threats of finding additional violations in April 2013. (RX-12, 14; Tr. 469-477).[11]

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[9] RX-26 sets forth Fernandez's reasons for terminating Complainant, which amounted to Complainant's unacceptable behavior with Commission staff and regulated industry personnel who had previously complained about Complainant's refusal to work with them in resolving regulatory issues as exemplified by his treatment of Ms. Jaroszewicz's May 31, 2013 surface application request wherein he challenged Teague's directive, accused Teague of changing criteria related to the approval process and accused Teague's action as gross negligence. Instead of following Fernandez's admonition to improve his working relationship with staff and outside contractors as directed in the May 21, 2013, counselling session, Wright ignored this advice knowing such conduct could lead to his termination. Fernandez summarized his position in a subsequent affidavit to DOL. (RX-33). Complainant also ignored the May 31, 2013 instruction of Gil Bujano, Director of Respondent's, Oil and Gas Division to improve his conduct or be terminated. (RX-24).

[10] After the counselling session of May 23, 2013, Complainant appealed what he had been told to Gil Bujano, Director of the Oil and Gas Division who concluded Complainant was continuing to reject the guidance of his supervisors. In turn, he advised Complainant that continued rejection could result in his termination. (RX-24). Complainant's subsequent treatment of Ms. Jaroszewicz on May 31, 2013 led to his termination on June 21, 2013. (RX-26-27).

[11] Storey cited other examples of Complainant's lack of professionalism. On June 15, 2010, Complainant arrogantly accused Storey of not correctly calculating the correct number of centralizers and demanded a letter apologizing and stated it would never happen again. (RX-17). On April 16, 2013, Storey informed Fernandez of Complainant again unreasonably demanding a letter of apology from Storey for allegedly miscalculating the number of

Fisher (currently District Director for District 3 since August 17, 2015 and formerly Assistant Director for District 3) confirmed the Terry Papek and Hendershott incidents. (RX-11; Tr. 698-700). Fisher also testified that Complainant, in handling Ms. Jaroszewicz's May 31, 2013 alternate surface request, could have calculated the number of centralizers to be run, informed her of that number, and then approve that request as modified without having her complete the older form. Instead, Complainant turned a simple request into a more complex proceeding in disregard of Respondent's policy of streamlining the approval process while protecting ground water. (Tr. 704-709).

Bogan, the Human Resources Director for Respondent, testified that in response to internal complaints Complainant filed against Teague and Fisher for creating a hostile work environment, he learned that Complainant had occasional problems with co-workers concerning the location of thermostats and operators such that they went out of their way to avoid contact with Complainant because they found him difficult to work with. (RX-7-8; Tr. 760-762). Bogan testified Complainant was terminated for not following Respondent's procedures. (Tr. 752-753). Further, when terminated, Complainant did not claim he was being retaliated against for engaging in protected activity in violation of the Federal Water Pollution Act or the Safe Drinking Water Act. More importantly, Respondent did not terminate Complainant for engaging in such activities. (Tr. 754-755).

DISCUSSION

A. The Eleventh Amendment & Sovereign Immunity

Respondent contends administrative proceedings brought against states by private citizens are barred by the eleventh amendment, unless a state has waived its immunity. Respondent argues Congress has not abrogated state sovereign immunity with respect to claims brought under the whistleblower provisions of the Safe Drinking Water Act and the Federal Water Pollution Control Act. Thus, Respondent maintains Complainant's claims must be dismissed in their entirety. (Resp. Post-Hrg. Br., pp. 12-15).

In response, Complainant argues Respondent has waived its sovereign immunity with regard to whistleblower complaints for violations of federal and state laws. Specifically, Complainant contends Respondent acknowledged the Court's subject matter jurisdiction by litigating the merits of the case before and after filing its answer to the complaint. (Comp. Post-Hrg. Br., pp. 7-10).

The "whistleblower protection" provisions of 42 U.S.C. § 300j-9(i)(1) and (2) of the Safe Drinking Water Act ("SDWA") provide in pertinent part:

> (i)(1) No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the

centralizers and holding up completion reports for punitive reasons. (RX-19). In essence, Complainant was refusing to work with operators.

> employee (or any person acting pursuant to a request of the employee) 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 or underground injection control programs of a State,
>
> (B) testified or is about to testify in any such proceeding,
>
> (C) assisted or participated or is about to assist or participate in such a proceeding or in any other action to carry out the purposes of this subchapter.
>
> (i)(2) Any employee who believes that he has been discharged or otherwise discriminated against **by any person** in violation of paragraph (1) may, within 30 days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor…alleging such discharge or discrimination. Upon receipt of such a complaint, the Secretary shall notify the personal named in the complaint of the filing of the complaint.

(emphasis added).

The SDWA defines a person as "an individual, corporation, company, association, partnership, **State**, municipality, or Federal Agency (and includes officers, employees, and agents of any corporation, company, association, **State**, municipality, or Federal Agency." 42 U.S.C. § 300f(12). (emphasis added).

The "whistleblower protection" provision of 33 U.S.C. § 1367 of the Federal Water Pollution Control Act ("FWPCA") provide in pertinent part:

> (a) No **person** shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or authorized representative of employees by reason of the fact that such employee or representative has 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.

(emphasis added).

The FWPCA defines a person as "an individual, corporation, partnership, association, **State**, municipality, commission, or **political subdivision of a State**, or any interstate body." 33 U.S.C. § 1362(5). (emphasis added).

Based on a clear reading of the statues above, I find that Respondent is not entitled to sovereign immunity and that subject matter jurisdiction is proper in the instant matter. The SDWA and FWPCA whistleblower statutes and implementing regulations unequivocally *include* a State in the definition of "person." 42 U.S.C. § 300f(12); 33 U.S.C. § 1362(5) (emphasis added). Since both statutes define a State as a "person," I find Congress had the intent to abrogate sovereign immunity in regards to the whistleblowing provisions when enacting both statutes. Thus, the undersigned has subject matter jurisdiction to decide the merits of Complainant's claims.

In addition, the ARB has provided guidance on whether Congress has exercised its power to abrogate sovereign immunity. When determining whether sovereign immunity exists, the ARB has focused on the enforcement and remedial provisions of the whistleblower statute at issue to determine if the provisions include a governmental entity. If the enforcement and remedial provisions include a word that is defined to include a "State, agency, or municipal body," then the ARB has found no sovereign immunity under the Eleventh Amendment exists. However, if the enforcement and remedial provisions of the whistleblower statute do not include a word defined to include a "federal, state, or local governmental agency," then the ARB has concluded sovereign immunity exists, since Congress did not intent to abrogate sovereign immunity for that specific whistleblower statute.

In *Minthorne v. Commonwealth of Virginia*, the ARB held that Congress unequivocally intended the CAA's employee whistleblower protection provision to apply to the states. In *Minthorne*, the complainant alleged his employer, the Commonwealth of Virginia, violated the Clean Air Act's (CAA) employee protection provision by denying him compensation for his accrued annual leave in 2008. The administrative law judge dismissed respondent based upon sovereign immunity under the Eleventh Amendment. Specifically, the ALJ found Congress had not abrogated sovereign immunity in the CAA. *Minthorne v. Commonwealth of Virginia*, ARB No.09-098 (ARB July 19, 2011).

On appeal, the ARB found the CAA's inclusion of "State" in its definition of what constitutes a "person" indicated Congress's clear and unambiguous intent to abrogate State sovereign immunity regarding whistleblower protection provisions. *Id*. In support of its finding, the ARB cited the Tenth Circuit's analysis in *Osage Tribal Council v. Department of Labor*, 187 F.3d 1174, 1181 (10th Cir. 1999), which addressed sovereign immunity under the Safe Drinking Water Act's whistleblower protection provisions. *Id*.

However, in *Mull v. Salisbury Veterans Administration Medical Center*, the ARB held sovereign immunity is not waived under the Energy Reorganization Act (ERA), since the definition of word "person" is not defined within the statute. *Mull v. Salisbury Veterans Administration Medical Center*, ARB No. 09-107 (ARB. August 31, 2011). In particular, the ARB found the ERA's employee protection provisions did not contain any language that expressed Congress's intent to waive sovereign immunity. *Id*. The ARB supported its conclusion by stating the undefined term "person" under the ERA provided a lack of clarity in determining whether Congress abrogated sovereign immunity for ERA whistleblower suits. *Id*.

Applying the holdings of the two cases above, it is clear that Congress waived sovereign immunity for whistleblowers suits under the SDWA and the FWPCA. Both statutes provide a clear definition of the term "person," which includes a State or an agency of the State. See 42 U.S.C. § 300f(12); 33 U.S.C. § 1362(5). Upon an examination of the enforcement and remedial provisions of both statutes at issue, the analysis in *Minthorne* and *Osage Tribal Council* applies to this matter. By including State and an agency of the State in the definition of the term "person" in both acts, Congress intended to waive sovereign immunity in regards to whistleblowers suits under the SDWA and FWPCA.

Respondent also contends dismissal is proper based upon the decisions in *Rhode Island Dept. of Environmental Management, State of Rhode Island v. United States of America, et al*., 304 F.3d 31 (1st Cir. 2002) and *State of Ohio Environmental Protection Agency v. United States of America Department of Labor*, 121 F. Supp. 2d 1155 (S.D. Ohio 2000). Specifically, Respondent contends the holdings in *Rhode Island* and *Ohio* bar Complainant's suit against Respondent, unless the Secretary of Labor intervenes in the proceeding or the state waives its immunity. *Rhode Island Dept. of Environmental Management*, 304 F.3d at 40. Respondent contends dismissal is proper since neither of the exceptions has occurred. However, Respondent's reliance on these two cases is misguided.

Contrary to Respondent's contentions, I find the decisions in *Rhode Island* and *Ohio* do not warrant dismissal of this case. First, both *Ohio* and *Rhode Island* involved a deferential review of a district court's order enjoining the administrative adjudication proceedings regarding the employees' claims. (121 F. Supp. at 1160; 304 F.3d at 31). Unlike those suits, this matter is not a review of an injunction, but rather a de novo evidentiary hearing on the merits. Second, the First Circuit in *Rhode Island* found nothing in the Solid Waste Disposal Act's whistleblower protection provision at issue expressed an intention to abrogate the states' sovereign immunity. (304 F.3d at 47-48). As discussed above, the employee protection provisions under the SDWA and FWPCA do express a clear and unambiguous intent to abrogate the states' sovereign immunity. Third, the court's holding in *Ohio* that a state's sovereign immunity can be defeated if the Department of Labor elects to intervene as a party in the matter violates the purpose and procedures of the SDWA and FWPCA as well as unduly prejudices a complainant whose employer is a state agency. (121 F. Supp. at 1167-69). An application of the *Ohio* court's decision would create a double standard for employees depending on whether their employer is a state or agency of a state, denying employees of a state or state agency access to a de novo evidentiary hearing afforded to them by the whistleblower statutes. Upon review of the SDWA and FWPCA, I am doubtful that Congress intended to create different procedures based on employer status that could potentially deprive a complainant the right to object to OSHA's findings and request a de novo evidentiary hearing.

Therefore, Respondent's argument that dismissal of the instant matter is proper under the doctrine of sovereign immunity fails, and this Court has subject matter jurisdiction to decide the merits of Complainant's claim.

B. Elements of Safe Drink Water Act (SDWA) and Federal Water Pollution Control Act (FWPCA) Violation

To establish a violation of either the SDWA or FWPCA, Complainant must establish by a preponderance of evidence that (1) he or she engaged in protected activity; (2) Respondent was aware of the protected activity; (3) he or she suffered an adverse action, and (4) the protected activity caused, or was a motivating factor in, the adverse action. Relief may not be ordered if Respondent demonstrates by a preponderance of evidence that it would have taken the same adverse action in the absence of the protected activities. 29 C.F.R. § 24.109(b)(2).

An employee engages in protected activity if he or she:

1. commenced, caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the federal statutes listed in §24.100(a) or a proceeding for the administrative or enforcement of any requirement of any requirement impose under such statute;

2. testified or is about to testify in any such proceeding; or

3. assisted, participated, or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of such statute.

29 C.F.R.§ 24.102(b).

Protected activities include external and internal complaints, written or oral, and extends to the filing of complaints under OSHA when such complaints touch on the concerns for the environment and public health and safety that are addressed by the statute. (*Melendez v. Exxon Chemical Americas*, ARB No. 96-051, ALJ 1993-ERA-6, slip op. at 17 (ARB July 14, 2000)). Whistleblower protection requires an employee's complaints be grounded in conditions constituting violations of the environmental acts. (*Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No.2007-SDW-1 at 5 (ARB Jan 5, 2001)). The reasonableness of a whistleblower's belief regarding statutory violations by an employer is determined on the basis of the knowledge available to a reasonable person in the circumstances within the employees training and experience. (*Melendez*, ARB No 96-051, ALJ No. 1993-ERA-006, at 27).

In this case, there is no evidence that Complainant (1) ever referred to SDWA or FWPCA in any communication to Respondent, (2) notified or accused Respondent of any violation of the SDWA or FWPCA, (3) refused to engage in any practice made unlawful by the SDWA or FWPCA, or (4) filed or testified before Congress or at any federal or state proceedings regarding any provision of the SDWA or the FWPCA. 29 C.F.R. § 24.109 (c)(1)-(3).

Complainant nonetheless contends that his use of the older January AFCS form which requested more information than the February AFCS form as well as his follow-up June 5, 2013 e-mail to Teague questioning whether Teague was instructing him not to use due diligence in reviewing operator application constitutes protected activity. Further, Complainant asserts that

Teague knew he was referring to violation of the SDWA and the CWA when he objected to use of the February AFCS form by his comments.

The undersigned does not agree with Complainant's assertion, especially since Complainant, from the undersigned's observation of his behavior, appears to be a person who prides himself on attention to detail. If Complainant was concerned about Respondent's alleged disregard of the SDWA or FWPCA, then it is only logical that he would have referred to such in his correspondence with Respondent, which he failed to do. Accordingly, I find no credible evidence of protected activity.

.

Assuming for sake of argument that Complainant did engage in protected activities as asserted (a position I do not credit), then I find that Respondent obviously knew about such action. Further, Respondent admits that Complainant suffered adverse action when he was terminated. Thus, the only remaining question to be resolved is whether Complainant proved by a preponderance of evidence that the alleged protected activity was a motivating factor in Complainant's discharge. To answer that question, I have looked at Complainant's entire employment record, including his most recent evaluations. From these evaluations which clearly preceded his discharge, I note a documented history of interpersonal conflicts with operators and Respondent's own staff. Indeed, Complainant demonstrated an unwillingness to work with operators in identifying alternative ways to become compliant such that operators went out of their way to avoid dealing with Complainant by calling outside Complainant's schedule hours of work. (RX- 6, 9, 16; Tr. 105-109, 631, 633-634, 640-641, 691-693, 746-747).

Teague observed Complainant's behavioral problems when he became District 3 Director. Teague found Complainant to be arrogant, insulting, and insolent in dealing co-workers, supervisors, and operators. (RX-17; Tr. 335, 338-340, 465, 466, 477). Instead of helping operators obtain specific information to process applications, he instead would locate a piece of missing or inaccurate information, issue a vague request for more information, or ask operators to refile their applications without providing any guidance. (Tr. 340). Teague cited examples of Complainant's inappropriate conduct with former employee Doug Storey, to whom he demanded an apology for submitting incorrect centralizers and observed Complainant's laughing at operator Paul Hendershott when Hendershott asked for help in resolving well violations. (RX-12, Tr. 476-477). Teague also testified about Complainant's inability to work with Respondent employee Michael Simms on a technical issue. (RX-14, Tr. 469-470).

Fernandez testified that he continued to receive complaints about Complainant in 2013 from Storey and two regulatory analysts who found Complainant rude and impossible to work with. (Tr. 106, 130-131, 318). One of these analysts, Carla Martin, e-mailed Fernandez on April 12, 2013, and complained about Complainant sending her an old alternate surface casing request to fill out when Teague had already sent her a new form. (RX-18, Tr. 314).

On May 21, 2013, Complainant received a P-112 employee counseling from Fernandez warning Complainant of his misconduct and telling him further misconduct could result in disciplinary action including termination. (RX-20, Tr. 320). Despite this admonition, Complainant continued to require operators to submit the old form. The new form required less information from operators than the old form but nonetheless provided sufficient information for

Respondent to approve Rule 13 requests. On May 31, 2013, Complainant received an alternate surface request from a consultant to an operator. Complainant determined that the application lacked a sufficient number of centralizers and directed the consultant to fill out the old form and indicate the appropriate number of centralizers although the correct number could be determined from the new application. (RX-25, Tr. 155-156, 347-348, 350-353, 369-372, 383-384, 441-442, 520, 597-598).

The e-mail sent to Teague by Complainant on June 5, 2013 constitutes a dispute with Teague over the manner in which Complainant preferred to process an alternate surface casing request. This dispute showed Respondent that Complainant was not heeding his instructions from Teague and Fernandez to cooperate and work with operators. Had Complainant been compliant, he would have told Ms. Jaroszewicz the correct number of centralizers to be used, modify or correct the application in the designated place(s), and sign and approve the form as modified. Instead, he instructed the consultant to fill out another form which was not necessary, which left the consultant guessing the correct number for compliance. Thus, as Teague and others with Respondent observed, Complainant was making compliance with the regulations much more complex than needed and thereby wasting Teague's and Fernandez's time in dealing with such issues.

Complainant's conduct was not protected activity. If anything, it constitutes anti-compliance, insubordination, and anti-protected activity. Teague's decision to impose additional discipline and Fernandez's decision to terminate Complainant were based solely on Complainant's misconduct and had nothing to do with any alleged protected activity (which is not limited to 30 day filing limitation as was his termination came within 30 days of Complainant's filing of his complaint).

In discharging Complainant, Respondent treated Complainant in the same manner it would any other employee who refused to follow directions. (Tr. 763-764). As such, I am convinced because of the severity of Complainant's misconduct which hampered and impeded his supervisors in dealing with an overload of problems associated with the proper enforcement of a booming regulatory business, Respondent has proven by clear and convincing evidence it would have terminated Complainant in the absence of any protected activity. (Tr. 127-136).

Accordingly, I find Complainant's complaint lacks merit and dismiss it for the failure to prove any act in violation of the employee protection provisions of the Federal Water Pollution Control Act or the Safe Drinking Water Act.

ORDERED this 19th day of May, 2016, at Covington, Louisiana.

Digitally signed by Clement Kennington
DN: CN=Clement Kennington, OU=Administrative Law Judge, O=US DOL Office of Administrative Law Judges, L=Covington, S=LA, C=US
Location: Covington LA

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. The Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Avenue, NW, Washington DC 20210, for traditional paper filing. Alternatively, the Board offers an Electronic File and Service Request (EFSR) system. The EFSR for electronic filing (eFile) permits the submission of forms and documents to the Board through the Internet instead of using postal mail and fax. The EFSR portal allows parties to file new appeals electronically, receive electronic service of Board issuances, file briefs and motions electronically, and check the status of existing appeals via a web-based interface accessible 24 hours every day. No paper copies need be filed.

An e-Filer must register as a user, by filing an online registration form. To register, the e-Filer must have a valid e-mail address. The Board must validate the e-Filer before he or she may file any e-Filed document. After the Board has accepted an e-Filing, it is handled just as it would be had it been filed in a more traditional manner. e-Filers will also have access to electronic service (eService), which is simply a way to receive documents, issued by the Board, through the Internet instead of mailing paper notices/documents.

Information regarding registration for access to the EFSR system, as well as a step by step user guide and FAQs can be found at: https://dol-appeals.entellitrak.com. If you have any questions or comments, please contact: Boards-EFSR-Help@dol.gov

The date of the postmark, facsimile transmittal, or e-filing will be considered to be the date of filing. If the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

If filing paper copies, you must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and you may file an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review. If you e-File your petition and opening brief, only one copy need be uploaded.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and may include an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies. If you e-File your responsive brief, only one copy need be uploaded.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board. If you e-File your reply brief, only one copy need be uploaded.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.