



Issue Date: 15 September 2017 **CASE NO.: 2015-SWD-00001**

In the Matter of:

ERICA SCHELL,
Complainant,

vs.

MARTIN MARIETTA MATERIALS, INC.,
Respondent,

Appearances: Thomas J. Crane, Esquire
For the Complainant

Mike Birrer, Esquire
Sara Romine, Esquire
For the Respondents

Before: Jennifer Gee
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

This matter arises out of a whistleblower complaint filed by Erica Schell (“Complainant”) against her former employer, Martin Marietta Materials, Inc. (“Martin Marietta” or “Respondent” or “Employer”). Complainant alleges that Respondent violated the employee protection provisions of the Solid Waste Disposal Act, 42 U.S.C. § 6971 (“SWDA”), the Safe Drinking Water Act, 42 U.S.C. § 300j-9(i) (“SDWA”), and the Federal Water Pollution Control Act, 33 U.S.C. § 1367 (“WPCA”) (collectively “the Environmental Acts”) by retaliating against her after she raised issues regarding how a third party vendor was profiling waste spills. This claim was initiated with the Office of Administrative Law Judges (“OALJ”) on March 17, 2015, when OALJ received Complainant’s objections to the determination made by the Occupational Safety & Health Administration (“OSHA”) and request for a hearing.

For the reasons set forth below, the Complainant’s complaint for unlawful retaliation under the Environmental Acts is DISMISSED.

I. Procedural History

On November 8, 2014, Complainant filed a complaint with OSHA alleging that Respondent had unlawfully retaliated against her under the SWDA. On February 10, 2015, the Regional Supervisory Investigator for OSHA issued Secretary's Findings dismissing the complaint. Complainant filed a timely appeal of this determination on March 12, 2015, and the case was docketed on March 17, 2015. On March 24, 2015, this case was assigned to me and on March 25, 2015, I issued a notice of hearing setting this case for hearing on July 30, 2015, in San Antonio, Texas. On May 6, 2015, however, I vacated this hearing to give Complainant more time to find an attorney. While this case was proceeding at OALJ, on March 31, 2015, OSHA issued a second determination letter related to additional complaints filed by Complainant on November 8, 2014, and amended on January 28, 2015, dismissing the same complaints as the first, but with an additional adverse action and under the SWDA, SDWA, and WCPA. On May 12, 2015, OALJ received Complainant's objections to this dismissal and request for a hearing.

Tom Caldwell, Esq., appeared as counsel on behalf of Complainant on May 21, 2015. After a June 23, 2015, conference call with the parties, I set this case for hearing in San Antonio on November 17-18, 2015. Complainant filed a motion for a continuance on October 16, 2015, asking for additional time to complete discovery. Respondent filed an opposition to this motion on October 19, 2015. The motion was discussed during an October 27, 2015, conference call and on October 28, 2015, I issued an order granting the motion for a continuance and setting the hearing for April 25-28, 2016. As discovery continued, various disputes arose concerning the production of documents. These were discussed at and resolved in a conference call on November 23, 2015, as summarized in an order of the same date.

On December 3, 2015, Mr. Caldwell filed a motion to withdraw as counsel with Complainant's consent. On December 4, 2015, Respondent filed a letter indicating that Complainant had not produced documents in conformance with the November 23, 2015, order. I issued two orders on December 9, 2015, granting Mr. Caldwell's motion to withdraw as counsel and ordering Complainant to produce the documents subject to my November 23, 2015, order. On December 16, 2015, Complainant filed a request for in-camera inspection of the subject documents as well as what I treated as a motion to extend the discovery deadlines. Respondent filed a signed confidentiality agreement on December 17, 2016. After reviewing the agreement and the motion, on December 17, 2016, I denied Complainant's motion for an in-camera inspection but adjusted the discovery deadlines to allow more time to comply. On December 29, 2015, Complainant requested a stay while she searched for new counsel. Respondent filed a letter on January 5, 2016, asking for mediation of ongoing discovery disputes. A status conference was held on January 7, 2016, and I issued an order requiring Complainant to produce additional responsive documents and vacating the April 2016 hearing.

Thomas Crane, Esq. filed a notice of appearance on behalf of Complainant on March 15, 2016. On April 28, 2016, I conducted a status conference to discuss scheduling and then issued a notice of hearing for October 31, 2016, through November 4, 2016, again in San Antonio. On June 1, 2016, the hearing was re-scheduled for November 14-17, 2016. Discovery disputes continued. On July 19, 2016, Respondent filed a request for two subpoenas duces tecum. Complainant's motion to quash and motion for a protective order had arrived on July 18, 2016. Respondent filed a response to these motions on July 20, 2016. On July 22, 2016, I issued an

order acknowledging the validity of some of the arguments made by Complainant, but denying the motion to quash since those points went to credibility, not relevance.

Respondent filed a motion for summary decision on September 12, 2016. Complainant filed a response on September 26, 2016. On October 5, 2016, Respondent filed a motion for leave to file a reply brief along with a reply brief. I granted the motion for leave to reply on October 11, 2016. Complainant filed a motion to submit a sur-reply along with a sur-reply on October 11, 2016, but I denied the motion to file a sur-reply on October 12, 2016. On October 12, 2016, I also issued an order denying Respondent's motion for summary decision. On October 27, 2016, I rescheduled the hearing for November 15-18, 2016, due to courtroom availability in San Antonio. Respondent filed a motion to exclude and strike untimely disclosed and designated trial witness and exhibits on October 28, 2016. Claimant filed a response on October 31, 2016. The pre-hearing conference was held on November 4, 2016, and summarized in an order of November 7, 2016. At the pre-hearing conference, the parties agreed to stipulations and the issues to be decided in this case. After hearing argument, I denied Respondent's motion to exclude two exhibits and one of the witnesses, Marc Schell, but granted the motion to exclude another witness, Henry Flores.

Hearing was held on November 15-17, 2016, in San Antonio. Complainant, Complainant's counsel, and Respondent's counsel all appeared and were given a full and fair opportunity to present evidence and argument. At the hearing, I marked Complainant's Exhibits ("CX") 1-37, but Complainant then indicated that she was withdrawing CX 4, CX 15, CX 18, and CX 22. (Hearing Transcript ("HT"), pp. 6-7.) After hearing argument, I admitted CX 1-3, CX 5-14, CX 16-17, CX 19-21, CX 23-25, and CX 27-36. I deferred ruling on CX 26. Complainant clarified that CX 37 was being withdrawn but CX 38 was being added. I then marked and admitted CX 38. (HT, pp. 20-22.) Next, I marked Respondent's Exhibits ("RX") 1-112. (HT, p. 22.) After hearing argument and clarification, I admitted RX 1-112.¹ (HT, p. 26.) Later in the hearing, I excluded CX 26. (HT, pp. 278-79.) On the third day of the hearing, I marked and admitted CX 39 and CX 40.² (HT, pp. 552, 729.) On November 15, 2016, I heard testimony from Jason Reed and Complainant. Complainant's testimony continued through the second day of the hearing. On November 17, 2016, Anna Waller, Marc Schell, and Jill Raab testified. I also heard rebuttal testimony from Complainant.

On November 28, 2016, I issued an order memorializing the agreement of the parties on the last day of the hearing that closing briefs would be postmarked by February 6, 2017. (*See also* HT, p. 738.) Respondent filed a joint request for an extension of this deadline on January 23, 2017. This motion was granted telephonically on January 24, 2017, with post-hearing briefs now due to be postmarked by February 20, 2017. Complainant's Post-Trial Brief ("CPB") and Respondent's Closing Brief ("RPB") were both post-marked on February 20, 2017, and received on February 21, 2017. On March 13, 2017, Respondent filed a motion for leave to file a reply brief along with the reply brief ("RRB"). I granted this motion on March 16, 2017. Complainant

¹ Respondent's exhibits are generally stamped with pagination that begins anew in each exhibit. I refer to these numbers, rather than any numbering internal to the exhibit. RX 111 and RX 112 are depositions. I refer to the depositions with the pagination internal to the depositions.

² Complainant's exhibits are generally stamped with sequential pagination that carries across exhibits. I refer to that pagination when present. When it is not present, I use internal pagination (e.g. CX 38, CX 40). CX 39 is excerpts of a deposition. I refer to the internal pagination of this deposition.

filed a response to Respondent's motion for leave to file a reply brief on March 17, 2016. Complainant asked that the motion be denied or, in the alternative, that she be granted leave to submit a response brief ("CRB"), which was attached to the motion. On March 20, 2017, I granted Complainant's motion for leave to file a response brief. Thus, the post-hearing briefs and reply briefs of both Complainant and Respondent have been considered in reaching this decision. No further filings have been received.³

II. Stipulations

During the pre-hearing conference, the parties agreed to the following stipulations:

1. Erica Schell was hired by Martin Marietta on February 3, 2014, as a Senior Environmental Engineer for Martin Marietta's Southwest Division.
2. The enviroLIS deadline was set by Martin Marietta's corporate headquarters in Raleigh, North Carolina.
3. On the morning of October 14, 2014, Reed asked Schell for an update on her progress with the enviroLIS assignment and specifically requested the percentage of locations she had completed for the Southwest Region.
4. Reed asked Steve Whitt, Martin Marietta's Director of Environmental and Natural Services in Raleigh, North Carolina, to review Schell's work to ensure the San Antonio District and SW Region were complete.
5. Whitt reported that Schell's work in enviroLIS contained errors.
6. On November 6, 2014, Schell was placed on a Needs Improvement Plan ("PIP"). The PIP was developed by Reed, Waller, and Rudy Sanchez in Martin Marietta's Human Resources Department.
7. On January 5, 2015, Reed, Whitt, and Jill Raab, the Vice Presidents of Human Resources for Martin Marietta's Southwest and Cement Divisions, discussed Schell's performance and progress on the Needs Improvement Plan, including the enviroLIS assignment. Because of the lack of progress made by Schell, the decision was made to terminate Schell's employment.

III. Issues

During the pre-hearing conference and at the hearing, the parties agreed that the issues to be decided in this case are:

1. Did the Complainant engage in an activity protected by the Safe Drinking Water Act, the Solid Waste Disposal Act, or the Federal Water Pollution Control Act?
2. Did the Employer have knowledge of the protected activity?
3. Was the Complainant terminated in retaliation for her protected activity?

³ In the course of discovery disputes arose regarding the disclosure of Complainant's VA records. Respondent signed a confidentiality agreement and the records were ordered produced. Some of those records have been submitted into evidence in this case, though not all contain sensitive material (i.e. the basic ratings letters in RX 27 and RX 109). Given the sensitive nature of some of these documents, it is hereby ORDERED that CX 34, CX 35, RX 91, RX 93, RX 105, and RX 110 be SEALED. They will be placed in a separate sealed envelope as part of the case record.

4. Would the Employer have terminated the Complainant even if she had not engaged in the alleged protected activity?
5. If the Employer did retaliate against the Complainant for engaging in a protected activity, what relief is she entitled to?

(See also HT, p. 5.)

IV. Factual Background

A. Respondent's Background

“[Martin Marietta] is a supplier of aggregates (e.g., crushed stone, sand, and gravel) and heavy building materials for the construction industry. . . .Martin Marietta’s operations span 32 states, Canada, and the Caribbean. The Southwest Division contains a large number of quarries, rail distribution facilities, asphalt operations, and ready-mix concrete operations.” (CX 5, p. 18.) Total revenues were \$2,957,951,000.00 in 2014. (CX 38, p. 7.)

Martin Marietta’s corporate headquarters is in Raleigh, North Carolina. Steve Whitt is, and was at the time period relevant to this case, the Director of Environmental Services in the corporate office. In that capacity he coordinates environmental issues for the company, including compliance, data collection, and policy. (RX 111, pp. 4-5.) Martin Marietta is organized into geographic divisions. Texas is part of the Southwest Division. (*Id.* at 19.) Larry Roberts is the President of the Southwest Division. He supervises Jason Reed, who is the Director of Natural Resources for the Southwest Division. He has held that position since 2014 and supervises around 20 employees, including the environmental employees. (HT, pp. 32-34.) Anna Waller manages HR in the Southwest Division, working out of the San Antonio office. She has been with the company for 15 years and known Mr. Reed for 9 years. (*Id.* at 554-55.)

In January 2014, Martin Marietta publically announced plans to acquire Texas Industries, Inc. (“TXI”). TXI was the largest cement maker in Texas and the merger represented a very large expansion of the operations in the Southwest Division—as well as potential layoffs as staffing was integrated. (CX 5, p. 18.) The acquisition officially occurred on July 1, 2014. (CX 38, p. 7.) It involved adding 130-150 ready mix concrete plants, 3 cement plants, and 12-24 other facilities (rock mines, sand gravel plants, limestone quarries). (HT, p. 120.) Mr. Reed’s promotion to Director of Natural Resources was contemporaneous with the process of acquiring TXI, which also required that he move from San Antonio to Dallas, Texas. (HT, pp. 32-34.) The TXI acquisition involved adding 2,000 employees, all in the Southwest division. Prior to the acquisition, the Southwest Division only had about 500 employees. (*Id.* at 121; RX 111, pp. 20-21.) Mr. Reed’s responsibilities expanded. He was focused on “high-level” issues and the integration of the new employees/facilities into Martin Marietta’s culture and operations. He travelled frequently and was working 15 hour days, plus weekends. (HT, pp. 121-23, 431-33.)

B. Complainant's Background

Complainant has a degree and background in environmental engineering. She was active duty in the Air Force, then in the National Guard, then a contractor for the Air Force, and then worked in the private sector. In all of these positions, she was doing some sort of environmental work. (HT, pp. 245-46.) She has a number of professional environmental certifications. (*E.g.*

id. at 341-42.) Complainant is married to Marc Shell, who is a firefighter for the City of San Antonio and a member of the Air Force Reserves. At the time of the hearing, they had been married 13 years and had three children together. (*Id.* at 602.) Complainant has been diagnosed with PTSD from her time in the military. (*Id.* at 331, 602-03.) From March 16, 2006, onwards, the VA assessed Complainant's combined disability rating as 80%. (RX 110, p. 7.)

Prior to working for Martin Marietta, Complainant worked for Caterpillar, Inc. as an "EHS Professional II." (RX 102, p. 1.) In an interim performance review for the first half of 2013, she was rated as "Did Not Meet Performance Expectations" overall and in the "marginal" to "intermediate" skill levels in the various sub-categories. Though the sub-categories contain descriptors of the various levels, the only commentary is in the overall rating. (*Id.* at 1-7.) There, Complainant's supervisor, James D. Eddy, critiques Complainant's communication and relationship building skills, stating that "in many cases she creates more problems than solutions" and elevates them unnecessarily. (*Id.* at 1.) Someone, likely Complainant, handwrote rebuttals to each of the points and ratings made in the document. (*Id.* at 1-7.) On July 29, 2013, Caterpillar put Complainant on an "Employee Action Plan" to improve her performance. (RX 103, pp. 1-2.) At some point prior to this, Complainant had accused Mr. Eddy of sexual harassment. (HT, pp. 463-64.)

C. Complainant's Hire by Respondent

In December 2013 and/or January 2014, Complainant interviewed with Martin Marietta for a Senior Environmental Engineer position. Mr. Reed was one of the interviewers and decision-makers. At the time of the interview and hire, they knew that the TXI merger was going to occur and Mr. Reed knew that his role would be expanding and he would not have much time to oversee the new hire, so he was looking for someone who could work independently. He recommended that Martin Marietta hire Complainant. (HT, pp. 118-20.) Ryan Carlson, an Environmental Manager, also interviewed Complainant, though he was never supervised her. He recalled that they were looking for another Senior Environmental Engineer who would focus on the air realm/permitting and would be able to work alone and know what he or she was doing from the start. (RX 112, pp. 130, 141.) Anna Waller, an HR and safety manager at Martin Marietta, interviewed Complainant as well. She also explained that they were looking for "[a] senior level environmental engineer that [sic] could pick up all the environmental functions, basic knowledge...of environmental and Martin Marietta training when needed." Given how busy the division was, they needed someone who could work with minimal supervision. Complainant interviewed well and had a good disposition. (HT, pp. 557-58.)

Complainant was hired by Respondent in January 2014 to work as a Senior Environmental Engineer out of Respondent's San Antonio office. (CX 5, p. 18; HT, p. 245.) Mr. Reed hired her and was her supervisor. (CX 5, p. 18.) Her first day at Martin Marietta was February 3, 2014. (HT, pp. 119, 246-47.) When she started, her duties included air permitting involving the Texas Commission on Environmental Quality ("TCEQ"), the state regulatory agency, and waste profiling. Her "primary responsibility" was "air permitting and [dispersion] and just all the permits and documents lined up because they weren't organized." (*Id.* at 247.) She also dealt with issues relating to compliance with Texas specific standards. (*Id.* at 249-51.) Her salary was \$77,000.00 plus benefits. She thought her health insurance was about \$500.00

per month. She also had the use of a company car for her commute and for her own recreation, including insurance. She valued that benefit at \$1,000.00 per month. (*Id.* at 395-96.)

D. The enviroLIS Project⁴

EnviroLIS is a software program developed by “Enkon” that was purchased by Martin Marietta. It functions as a data warehouse that centralized various land leases and permits for the entire company and created task reminders so that when renewals needed to be completed, whoever was currently working in the relevant position at Martin Marietta would be notified. (HT, pp. 123-24; RX 3, pp. 1, 3.) Mr. Whitt described it as “a land information system” that can manage all of the real estate documents the company has. One of the tabs for each site (i.e. facility, operation) in the system is for environmental permits that can function as a compliance management tool. To make it work, all of the permits for a site need to be uploaded into EnviroLIS electronically, information about the permit needs to be coded, and then various reminders need to be set up. (RX 111, pp. 5-7.) The number of permits varies widely by site, but there are probably on average of 5-6 permits per site. (*Id.* at 77.) The purpose of the system on the environmental side is to ensure compliance and make sure that tasks don’t get missed, even if someone new takes over a particular function at the company. (*Id.* at 9-10.)

Martin Marietta’s last step of populating EnviroLIS was uploading and coding the environmental permits. Corporate headquarters set a December 31, 2014, deadline for completing this project. In the Southwest Division, there were about 140 sites to populate during 2014. (HT, pp. 125-26; *see also* RX 112, pp. 150-51.) This was exclusive of the TXI sites that were being acquired that year, which would require more work at a later date to integrate into the system. (RX 112, p. 96.) Mr. Reed described the enviroLIS project deadline as “an important mandate” from headquarters. (HT, pp. 42-43.) Mr. Carlson recalled that it was a big project that had taken a “backseat” for a while but that corporate headquarters decided that they wanted it to get finished and so set the deadline. (RX 112, pp. 93-94.) Complainant acknowledged that she learned about the enviroLIS and the deadline within her first two weeks of employment and that she knew it was important to both Mr. Reed and corporate headquarters.⁵ (*Id.* at 402.)

On February 3, 2014, Mr. Reed sent an email regarding “EnviroLIS Training/Refresher” to Complainant, Mr. Carlson, Randy Wilkinson, and Robin Simmons, informing them that “Karen J.” would be available to do enviroLIS training later that month. (RX 1, p. 1.) They all attended the training together. (HT, p. 127.) Complainant remembered that this training was a few hours long, but that was the only training she received. (*Id.* at 282-83.) Mr. Whitt conducted a number of different group and individual trainings in 2014, including the group training he participated in via a webinar in the Southwest Division. (RX 111, pp. 13-14, 66-67.) Mr. Reed also sent an email to Complainant, Mr. Wilkinson, and Mr. Carlson passing along a corporate goal of spreading the environmental audits to be done in a year throughout the year, rather than waiting until the end. They set a goal of completing the audits by August. (RX 2, pp. 1-2.) On February 11, 2014, Mr. Reed followed-up on the email chain, writing to Mr. Wilkinson, Mr. Carlson, and Complainant that Mr. Whitt “has confirmed that all permits are to be in enviroLIS this year. This

⁴ The software program is referred to in a variety of formats in the record. I use “enviroLIS,” except when quoting emails or other documents that use a variant.

⁵ The deadline came from the corporate structure, and was communicated by Jay Moroe, the Vice President of Operations, who is the boss of Mr. Whitt’s boss. (RX 111, pp. 14-15.)

should be in our goals as well.” (RX 2, p. 1.) Mr. Reed set the earlier goal because he doesn’t like leaving projects to the end of the year. (HT, pp. 128-29.)

Mr. Reed also sent Complainant an email containing the “Environmental Data Entry Guide – EnviroLIS” on February 11, 2014. (RX 3, p. 1.) According to the explanation given by Mr. Whitt in the original email distributing the guide, it was “your reference for what needs to be uploaded to EnviroLIS, how to name scanned files, where to place the information, and how to enter tasks and emails into the system.” (*Id.*; *see also id.* at 3.) The email also contained a “Task Spreadsheet Guidance” that contained instructions for using a tool which would allow “copying tasks and conditions across multiple permits.” (*Id.* at 1.) The Data Guide is 33 pages long and describes what needs to be uploaded, how to name the documents, information about the system, how the system displays information and documents, how to enter information and upload documents, the tasks that need to be added, and how to add tasks and email notifications for each facility. (*See id.* at 2-34.)⁶ The Task Spreadsheet Guidance gave detailed information for “advanced users” on how to create and use a spreadsheet to quickly populate and edit the enviroLIS system. (*See id.* at 38-58.) Mr. Whitt was the primary author of the Data Guide. He developed it based on what the company decided it wanted in the system and how things were to be entered so that users would know what to do. (HT, p. 131; RX 111, pp. 7-8.) He was in charge of the enviroLIS project on the environmental side and he often offered to help Complainant. (HT, pp. 422, 469-71.) The function of the Data Guide was to ensure proper entry and consistency throughout the company. (*Id.* at 132.) Complainant agreed that it was the first resource and instruction manual for enviroLIS. (*Id.* at 424.)

E. Employment through Summer 2014

In Complainant’s view, initially Martin Marietta had a great atmosphere and she got along well with Mr. Reed. (HT, p. 251.) Mr. Schell recalled that at first Complainant was very happy at work. When later another opportunity came up that Complainant had considered her dream job, he encouraged her to take it, but Complainant was hesitant and decided to stay. She enjoyed the work and was excited to be working on and resolving environmental issues and questions. (*Id.* at 503-04.) Complainant’s work included the enviroLIS project. Mr. Reed emailed Melissa Israel on February 28, 2014, asking that Complainant and Mr. Carlson be added to the distribution list of the enviroLIS summary reports since “Corporate has mandated all permits to be in the system this year as well.” (RX 25, p. 1; *see also* HT, pp. 132-33.) Based either on her resume or something she had mentioned, Mr. Reed believed that Complainant had some prior experience with enviroLIS from the Air Force.⁷ After the various trainings, he believed that she had the ability to enter data into enviroLIS in accordance with the Data Guide. (HT, pp. 133-35.) At this point, the relevant files and permits in the Southwest Division were mostly electronic and “in pretty good shape,” though a few of the permits would have been hard copy only, located in filing cabinets in the San Antonio office. (*Id.* at 135-36.) State permits could also be procured from the state and almost all of the permits would be available at the local facilities as a last resort. (*Id.* at 136-37.) Mr. Whitt added that it would always be possible to procure the permits from the sites themselves and that phone numbers/emails for the local environmental employees would have been available. (RX 111, pp. 154-56.)

⁶ The Environmental Data Entry Guide is also included as RX 81.

⁷ Complainant denied having any prior experience with enviroLIS. (HT, p. 732.)

Complainant, generally, believed that the files were not as accessible, but she agreed that she could find the permits on the group drive, in the filing cabinets, from TCEQ, or as a last resort from the actual sites. The process was to locate the permit, scan it if it was in hard copy, upload the PDF to enviroLIS, name and code the permit per the Data Guide, and set up various task alerts in the program. (*Id.* at 424-28.) The amount of time needed to locate hard copy documents varied, but the most she spent searching for a permit was 2-3 days. (HT, pp. 530-31.) She encountered some technical difficulties with the program. On March 26, 2014, she emailed “Support Services,” copying Mr. Reed, indicating that her enviroLIS access wasn’t allowing her to upload permits and asking that full access be restored. (CX 11, p. 33.) She sent a follow-up request on April 1, 2014. (*Id.* at 34-35.) In addition, Complainant sent an email to some colleagues on May 21, 2014, informing them that she had created a folder on the shared drive so that they could share enviroLIS shortcuts and solutions to problems. (CX 11, p. 36.)

Ms. Waller recounted an informal conversation she had with Mr. Reed around April about Complainant’s performance. He replied that Complainant was picking up the job a little slower than expected, but he did not have any performance issues that he wished to address. (HT, pp. 558-59.) Ms. Waller later wrote a letter of recommendation for Complainant when she was applying to law school over the summer, but she relied on samples she found in a Google search for some of the content. (*Id.* at 559.) In it she described Complainant as a person of great integrity, though at the hearing Ms. Waller indicated that she no longer believed that because of various misrepresentations she believed Complainant had subsequently made of conversations and events, though she was not sure if Complainant was deliberately stating falsehoods. (*Id.* at 675-78.)

Originally the enviroLIS project was the responsibility of multiple employees, but this changed in June 2014 when Complainant was given responsibility. Mr. Reed recalled that

She began being the lead person on that project I think in the middle of June leading up to the TXI merger...We got two companies coming together and we knew that duplicated positions get eliminated. Her being the most junior person within both groups in terms of experience in the industry and the newest of either company, my goal with all this was to make sure everybody’s employment was maintained within the natural resources group. She had previous experience with [enviroLIS] with the Air Force and she was expressing concern, Is my job safe and I said, How about this? You have previous experience with [enviroLIS]. Would you like to take this on and she jumped at that chance.

(*Id.* at 82.) He denied this was a demotion—it was a project that Complainant voluntarily took on in an effort to maintain her employment. (*Id.* at 137-38.) He would subsequently inquire about the project whenever he saw her and was told that they were on track. (*Id.* at 83.) Mr. Carlson also remembered that enviroLIS transitioned from being a group project to a project that Complainant was responsible for in the Southwest Division. (RX 112, pp. 94-95.)

Mr. Whitt emailed the entire “Environmental Staff” on June 30, 2014, reminding them that the year was halfway over and many appeared to be not making progress on the enviroLIS population project. He noted that “it has been stressed to each of you that a goal for the company is to have all of the environmental documents populated into EnviroLIS by the end of this year.”

Mr. Whitt recommended that those tasked with the project devote time each week to it. He added that “[b]ased on the training sessions that we have conducted it appears that it takes a little over an hour to create the permit records, upload the documents, and add in task reminders for one location. This does not include the time required to scan the permits and documents that will be uploaded.” (RX 4, pp. 1-2; RX 68, pp. 1-2; RX 88, pp. 1-2; *see also* RX 111, pp. 15-17.)

Mr. Reed emailed Complainant regarding “Friday – enviroLIS” on July 17, 2014, requesting that they talk the next day about Complainant’s “proposed District/facility priorities, time schedule, coordination with Randy in obtaining his docs, etc. for getting all heritage MLM [sic] regulatory permits into the enviroLIS system by the end of the year.” (RX 90, p. 1.) He was interested in getting a roadmap from Complainant on how the project would be completed by December 31, 2014. (HT, p. 147.) Given that Complainant was focused on the project, Mr. Reed believed they would complete it well before the corporate deadline. (*Id.* at 147-48.)

On the evening of July 22, 2014, Mr. Reed sent an email to Don Bell, Rick Williams, Stephen England, John Hopper, Kevin Stone, Jennifer Adams, and Julia Andoe, with a copy to Mr. Carlson, indicating that they would need to develop performance goals in the coming weeks. Shortly thereafter he forwarded the message to Complainant, Robin Simmons, Mr. Carlson, and Randy Wilkinson, adding, “Let’s all take a moment individually to identify where we all stand with our respective goals as well, being that we are over halfway through the year!” A few minutes later, he sent an email solely to Complainant stating, “Yours will obviously need some modification given the changing capacity of your activities for the remainder of the year. We’ll need to score yours retroactively to-date when the time comes, and again for the new goals for August through December.” (CX 13, p. 51; RX 5, p. 1; RX 98, p. 1.) A chart listing Complainant’s objectives links 30% of the “point value” for purposes of a bonus to work involving enviroLIS. (CX 13, p. 52; RX 5, p. 1; RX 98, p. 2.)

Complainant agreed that in the summer of 2014 her duties shifted and enviroLIS became her primary duty, though it was not her sole project and when other matters came up her time would be diverted. (HT, pp. 254-55, 371-72.) She also did work relating to compliance with the Emergency Planning Community Right to Know Act. (*Id.* at 240, 255-57.) This project took a higher priority than enviroLIS because the stakes were higher. (*Id.* at 257-58, 372-74.) She agreed that the shift in responsibilities was in response to the merger and that she volunteered to take responsibility for the enviroLIS project. (*Id.* at 433-34.)

But Complainant testified that she had technical problems with enviroLIS from “day one.” Some of these were due to her user profile not having the right role, which could be fixed, but it happened more than 10 times. She had problems with logging in. She asked for help from a co-worker and from IT. (*Id.* at 254-67.) There were also compatibility problems with her internet browser and settings. (*Id.* at 267-68.) She testified that “[i]t ran and released [slow]. There were duplication of locations...adding permits sometimes, all the permits I added would transfer to another site or be rewarded somehow where everything just reflected the same name even though it should reflect something different.” (*Id.* at 268.) She lost data: “I would enter the information that I needed for the data guide and if I found out I had the incorrect role later after IT helped us, that’s why the data was lost, allegedly. I don’t know exactly what caused the loss. That’s just one of the explanations I received from the IT Department.” (*Id.*) Sometimes she would request help over email, but she also verbally sought help from IT over 50 times. (*Id.* at

269-70.) Sometimes they would point her to the Data Guide, which sometimes helped with her issues. (*Id.* at 270-71.) She believed that she found multiple errors in enviroLIS, including a conflict in the instructions between the Data Guide and an online video tutorial. (*Id.* at 280-81.)

Complainant sent Mr. Whitt an email on August 8, 2014, asking about the possibility of running a report in the enviroLIS system to check if the entries were correct and what percentage had been completed. (RX 4, p. 1; RX 68, p. 1; RX 88, p. 1.) He replied that it was not something anyone had a great deal of experience with and required playing with the features to get the output desired, but that he would look into it with another division. (RX 4, p. 1; RX 68, p. 1.) A few minutes later Mr. Whitt replied again, stating that he would be happy to look at some of the sites Complaint had completed to see if everything looked right and asking her to send him some names of sites she wanted him to review. (RX 88, p. 1; *see also* RX 111, pp. 21-22.) There is no response in the record. Complainant also emailed Mr. Reed on August 8, 2014, stating that her title no longer seemed to fit her roles and responsibilities and asking if she could change it to “Natural Resource & Environmental Program Administrator.” (RX 6, p. 1.)

On August 11, 2014, Complainant emailed Mr. Reed asking about her future at Martin Marietta and whether she would be staying in the department doing environmental work once the enviroLIS project was completed. (RX 7, pp. 1-2.) Mr. Reed replied that she would be asked to help with permitting over the next couple of years and would remain in the environmental group after enviroLIS was in “maintenance mode.” (*Id.* at 1.) Complainant responded indicating that she was interested in applying to a Master’s program at a local school, stating if she was allowed to pursue the degree and there were classes during the day, she could commit herself to completing the work after-hours and/or at home. (*Id.*) She agreed that based on these exchanges it was fair to infer that she would finish the enviroLIS project on time. (HT, pp. 404-05.)

In response to an email chain about timelines in another project, Mr. Reed sent Complainant an email on August 20, 2014, stating that he would be in San Antonio and would like to “discuss milestone dates for each district to ensure the corporate deadline of 12/31 for EnviroLIS permits implementation is met.” (RX 8, p. 1.) She claimed that at some point she had provided Mr. Reed with a plan with milestones, though there was no record because it occurred when they spoke verbally. (HT, pp. 406.) At this point in time, Mr. Reed believed that it would take roughly an hour to do the enviroLIS tasks for each site. There were 140 sites in the Southwest division to complete, and Mr. Reed believed that the enviroLIS project was where Complainant was spending the bulk of her time. (*Id.* at 141-43.)

F. Continued Work on enviroLIS and Possibility of Work at Hunter

Complainant continued to make periodic technical complaints about enviroLIS. She reported a flaw that she believed she had found on August 25, 2014, in response to distribution of a report of upcoming critical dates and overdue tasks generated by the program. (RX 9, pp. 2-4.) Mr. Reed responded that afternoon, referring to instructions in the Data Guide that explained the flaw and how to change the default to get around it. (*Id.* at 1-2.) On September 3, 2014, Matthew Rock, a “Support Specialist” for Respondent working in Raleigh, sent an email to Mr. Whitt, copying Mr. Reed and Complainant, reporting that he had been working with Complainant on problems with enviroLIS not saving her changes. He indicated that they had not received other calls on the issue and had assumed that it was a browser problem. He asked

whether others were having problems. (CX 11, pp. 37-38.) Mr. Whitt responded that “I have not experienced anything like that and have not heard of anyone else reporting a similar situation,” but allowed that he was not in the system as much as those doing the actual populating and added that there had been problems with fixing who needed permission to make changes. (*Id.* at 37.)

Complainant emailed “Support Services” with copies to Mr. Reed and Mr. Whitt on September 8, 2014, complaining that she was having difficulties with her password and login. She indicated that her username and password had not changed recently but she was receiving error messages on a weekly basis and four times that day. Mr. Whitt responded stating that he hadn’t had any problems logging in and offering a tip about capitalization conventions for the user name/email fields in the program. (RX 10, pp. 1-2; RX 69, pp. 1-2; RX 82, pp. 1-2; *see also* RX 111, pp. 24-26.) On September 24, 2014, Complainant emailed Support Services, copying Julie Schmidt, Mr. Whitt, and Mr. Reed, asking about an error message she was receiving when navigating the tree view display on enviroLIS. (CX 11, pp. 39-40.) Ms. Schmidt replied stating that she was not having the problem. (*Id.* at 39.)

On September 9-10, 2014, Mr. Reed and Complainant corresponded about the potential of Complainant relocating to the Hunter cement facility. (RX 11, pp. 1-2; *see also* HT, pp. 252-53, 258-60.) On September 12, 2014, Mr. Reed notified Complainant and Randy Waclawczyk, the Environmental Manager at the Hunger Cement Plant, that he wasn’t going to be able to make their planned meeting that day to discuss Complainant’s work at Hunter, but encouraging them to meet and discuss what Complainant could do to help out at the facility. He added that Complainant would “remain heavily engaged in enviroLIS at least through the end of the year; however, it would be a good fit if she can provide assistance to you 1-2 days per week there at Hunter.” (RX 12, p. 1.) Mr. Reed explained at the hearing that he wanted to ensure that Complainant was focused on the enviroLIS project, but believed that she could devote some time to Hunter and still complete the project without difficulty. (HT, pp. 150-51.) Complainant agreed that based on this exchange, Mr. Reed would have been justified in believing that she was on track to finish the enviroLIS project by the end of the year. (*Id.* at 408-09.) She knew that he was trusting her to finish the project. (*Id.* at 414.)

That evening Mr. Reed sent Complainant an email with the subject “Get Well!” in apparent response to a telephone conversation they had earlier in the day. He expressed sympathy with illnesses that Complainant and her children were suffering and encouraged her to reach out to co-workers locally if she needed anything, adding that he and his wife “would be there for y’all if we were not 300 miles away!” (RX 13, p. 1.) In response to concerns Complainant had expressed to him he wrote:

As we discussed this evening, I am appalled to hear about the rumors you are hearing concerning your performance. Whomever is telling you that you are not performing to standards in aggregates and ready mix clearly does not realize that you are not currently involved in the environmental management of the area operations since the TXI merger, and clearly does not realize that you have been focused on managing the enviroLIS system since the commencement of the merger with TXI. The individual disseminating this information to you has ill intent and does not have access to divisions [sic] leadership conversations; therefore, it is simply someone that I recommend severing ties with. Larry, his VP/GMs and I

do not condone such behavior. I understand your reluctance to divulge the identity of the individual; however, I do not appreciate, nor do we condone, someone that [sic] we work with acting in such a manner.

(Id.)

The next Monday, September 15, 2014, Complainant sent Mr. Reed a report about the September 12, 2014, meeting with Mr. Waclawczyk and another individual about her work at the Hunter facility, indicating that they had agreed that it would work best for her to work there 2 days each week. (RX 14, p. 1.) Mr. Reed responded the next morning, writing, “[I]et’s hold this to one day per week for now. I’m concerned about the enviroLIS deadline...” *(Id.)* Later that afternoon, Mr. Waclawczyk emailed Mr. Reed reporting that the meeting with Complainant had gone well and he believed she should be “a big asset” at the facility. He proposed that she work at the facility 2-3 days per week. (RX 15, p. 1; RX 97, p. 2.)

Mr. Reed responded early the next morning, September 17, 2014, copying Complainant and David Perkins: “[t]o meet Raleigh’s deadline for populating the enviroLIS system with heritage MLM [sic] permits by the end of this year I’m not sure [Complainant] is going to be available more than one day per week most weeks and two days max (occasionally) for the remainder of this year.” But expansion of her work at the facility and in the Cement Division generally might be appropriate “as we move into the [sic] 2015 & 2016” and the continuing work on enviroLIS could be done by “more of an administrative person” while Complainant’s “talents and experience” could be put to better use at Hunter. (RX 15, p. 1; RX 97, p. 2.) David Perkins replied stating that going forward he liked the idea of having Complainant on the “cement end” but that he recognized it would be more intermittent for the rest of the year. (RX 97, p. 1.) Complainant sent an email to the group the next morning, stating that she felt “humbled with the opportunity” and anticipated “working closely with each one of you moving forward.” *(Id.)*

G. Beckmann and Carthage Spills

Martin Marietta had a diesel fuel spill occur at its Beckmann Quarry facility on September 24, 2014. At around 2:30 in the morning a piece of heavy equipment drove away from the fuel dispenser without properly disconnecting, causing about 150 gallons of diesel fuel to spill onto the surface soil. Absorbent materials were applied and then disposed of in a 55 gallon drum. The “impacted materials were excavated and removed for disposal.” A contractor, Alamo1, was eventually hired to assist in the disposal of the contaminated material. (RX 36, p. 3.) The site superintendent, Brian Long, emailed Jim Densberger and Mr. Carlson, with copies to Mr. Reed and Barton Chevreux, on the morning of September 25, 2014, reporting the events surrounding the spill and local cleanup. *(Id. at 10.)* Part of the Beckmann site is over the Edwards Aquifer, so it is in an environmentally sensitive area. (HT, pp. 66-67, 301-02.) Mr. Carlson was the point person per the protocols and he notified TCEQ and the other relevant authorities. *(Id. at 168-69.)* Diesel fuel is extremely common in their industry as a fuel for machinery and diesel fuel spills and cleanup are a common issue. *(Id. at 169-70.)*

TCEQ conducted an unannounced inspection at Martin Marietta’s Carthage facility, which had been acquired in the merger with TXI, on October 3, 2014, after an anonymous complaint was received about discharge of a brown liquid waste. The area manager confirmed

that the waste had been discharged and explained that it had been discharged into a concrete heel pit. The investigators procured the Material Safety Data Sheet for the chemical involved, did a walkthrough of the site, and took a sample. They informed the managers that there were alleged violations based on their not knowing the proper industrial solid waste classification as well as the discharge into an unlined cement heel pit. (RX 37, pp. 6-7.) Martin Marietta's environmental group thereafter became involved and Julie Andoe contacted TCEQ on October 6, 2014, to inform them that Martin Marietta had hired a contractor to clean up the waste and that the profile was almost ready. The disposal was completed by November 17, 2014. (*Id.* at 7-8.)

Complainant became involved with the Beckmann Quarry spill on Friday, October 10, 2014, at the suggestion of Mr. Carlson, since he had a number of other projects and she heard about the spill and offered to help him out. (HT, pp. 170, 294.) Per Mr. Carlson's testimony, Complainant would periodically reach out and ask if she could help him, but he was at least sometimes confused because it seemed to him that she was having difficulty keeping up with her air permitting responsibilities. (RX 112, pp. 87-88.) Though he was not her supervisor, his observations of Complainant from working with her made him believe that she wasn't able "to complete her tasks in the manner that was expected" and was in over her head. He didn't feel comfortable delegating work to her in general. (*Id.* at 142-44.) He did on this occasion because he needed help and she was employed as an environmental engineer. (*Id.* at 186.) She became involved in the Carthage spill in the same way. (HT, p. 304.)

At the hearing, Complainant recalled that after she reviewed the paperwork and profiles on Friday the 10th, she developed a number of concerns about the proper completion of the forms and the way the waste was being profiled, which she continued to explore into the next week. (HT, pp. 295-99.) She believed Mr. Carlson was not qualified to sign off on the waste profiles and that it was improperly being coded as residential waste. (*Id.* at 299-301.) She also had concerns about the transportation of the waste. (*Id.* at 302-03.) Though she recognized it might not have been a big deal to Mr. Reed, she thought it was a very important project because it could affect drinking water and multiple regulatory agencies were involved. (*Id.*)

Debbie Kenna of Alamo1 emailed Mr. Carlson on October 9, 2014, attaching the "profile for the soil/diesel generated from a spill at Beckman Quarry" for his review and signature. He forwarded the message to Complainant on October 10, 2014. Complainant then emailed Ms. Kenna asking for a copy of the analytical report for the Beckman Quarry profile. Ms. Kenna replied shortly thereafter, attaching the profile. (CX 16, pp. 55-56; RX 38, pp. 1-2.) On October 10, 2014, Complainant corresponded with Ms. Kenna about the Carthage waste profile, seeking and receiving permit numbers needed to complete a form. (RX 42, pp. 2-3.)

Also on October 10, 2014, Complainant emailed Mr. Reed asking if he had received "any additional feedback from David regarding Hunter" because she was hoping to be able to "relocate to New Braunfels soon." (RX 16, pp. 1-2.) Mr. Reed responded the next Monday, October 13, 2014, informing Complainant that he had learned that a new full-time environmental position was going to be created at Hunter. (*Id.* at 1.) Complainant asked whether she would be able to apply and, "[i]f not, what position do you anticipate I will be in after I have completed enviroLIS data entry in December?" (*Id.*) Mr. Reed responded that he believed that could apply unless they had a particular candidate in mind already. (*Id.*) Complainant then asked again what Mr. Reed anticipated that she would be doing after December, adding "[w]ould I be able to serve

as ‘reach back’ to assist all Texas teams? Thoughts?” (*Id.*) Based on this exchange, Mr. Reed understood that Complainant was on target to finish the enviroLIS project by December 31, 2014. (HT, pp. 153-54.) She agreed that this would have been a fair conclusion. (*Id.* at 416-18.)

At 8:20 a.m. on October 13, 2014, Mr. Carlson, who was working from home, sent Complainant an email asking that she “[l]et me know where you are with the projects at Beckmann and Carthage so we can keep that moving.” (RX 39, p. 1.) That afternoon, Complainant emailed Mr. Carlson, copying Ms. Kenna, about “Beckmann’s Lab Analysis,” stating that she was having difficulty locating the NELAP certification for the lab used to profile the Beckmann waste. (RX 40, pp. 1-2.) Later on October 13, 2014, Complainant sent an email to herself and Mr. Carlson documenting a text or instant message conversation she had with Mr. Carlson earlier. She had asked what type of diesel fuel spilled at Beckmann, adding that “[t]he lab did not run all the correct analysis.” He replied that it was “off road diesel” and that he thought it was #2, though Complaint should verify that with “Brian.” (CX 14, p. 53; RX 59, p. 1.) Regarding the Carthage spill, emails show that Complainant was corresponding with Ms. Kenna at Alamo1 and Barbara Attaway at Republic Services, as well as Mr. Carlson, to arrange for the disposal of the material. (RX 41, pp. 1-2; RX 42, pp. 1-2; RX 56, pp. 1-4.)

At 7:14 a.m. on Tuesday, October 14, 2014, Complainant emailed “Labprgms” at TCEQ asking for a current copy of the NELAP certification for Xenco Laboratories in Houston, reporting that the version she accessed online had expired. (RX 17, pp. 1-2.) Frank Jamison at TCEQ replied at 7:38 a.m. the same day, attaching the current accreditation for Xenco and speculating that Complainant “may have a cache issue” because her link was producing the old form, but the current form was available online. (*Id.* at 1.) Complainant acknowledged receipt of this email at 7:42 a.m. (*Id.*) The certification in question is basically the lab’s authorization to operate, so it would be a big deal if it was expired. (HT, pp. 180-81, 301.) Complainant explained that she wanted to do due diligence to verify the lab before they signed off on the profile of the waste. (*Id.* at 301-02.)

H. EnviroLIS Query and Alleged Protected Activity

Mr. Reed emailed Complainant on October 14, 2014, at 8:05 a.m. asking “Can I get an update that I can provide to Raleigh on where we are exactly with enviroLIS? – i.e. which locations are 100% complete, 50%, etc.” (CX 11, p. 41; RX 18, p. 1.) Complainant replied a few minutes later, “Yes sir, as soon as IT finishes their scans on my computer. My internet keeps crashing and my computer in general is running extremely slow.” (CX 11, p. 41.) She recalled that Mr. Reed had asked for updates on at least one prior occasion, but didn’t recall whether he was asking about it whenever he was in San Antonio. (HT, p. 280, 304.) She wasn’t “extremely surprised” by the request since it was her “primary duty at the time.” (*Id.* at 304.)

A short time later, Complainant initiated an instant message conversation with Mr. Reed stating that she was working on the waste profiles and “trying to find an exemption for the Beckmann spill.” She asked if she should stop and put together the enviroLIS data. She then added that “it looks like the spill material & debris will be deemed RCRA hazwaste, place us in a LQG status.” Mr. Reed responded by asking that they have a call including Mr. Carlson. (CX 17, p. 57; RX 43, p. 1.) He explained that from past experience he knew it wasn’t hazardous waste, but wanted to have a call so they could discuss it. (HT, pp. 172-73.) Later that morning,

Complainant forwarded Mr. Carlson and Mr. Reed the analytical report on the Beckman Quarry spill that Ms. Kenna had provided her on October 10, 2014. (CX 16, p. 55.)

Mr. Reed, Mr. Carlson, and Complainant had a call on the morning of October 14, 2014, in which Complainant was able to express her concerns about the lab not being certified, the waste being hazardous waste, and Alamo1 incorrectly profiling/handling the waste. Mr. Reed recalled telling her to contact TCEQ to ensure that Alamo1 was handling the waste properly. (HT, pp. 67-70, 78-79, 173.) He denied that he told Complainant to keep contact with TCEQ in general terms, explaining that they had already reported the spill to TCEQ so there was no reason to speak generally. (*Id.* at 80.) Complainant claimed that she tried to justify her concerns in the call, but then Mr. Reed hung up on her before she finished. She was confident in her concerns and her belief that the waste from the spill was hazardous waste. (*Id.* at 306-09, 313-14.)

At 10:41 a.m. on October 14, 2014, Complainant emailed Mr. Reed, stating, “I don’t understand why you hung up on me during our discussion about the Beckmann spill. I understand that you disagreed with me, but you didn’t even provide me with an opportunity to finish the conversation. I am the first to admit I may not be correct, but that is why I reached out to you.” (RX 45, p. 1; RX 89, p. 1.) Mr. Reed forwarded this email to Ms. Waller on the evening of October 15, 2014. (RX 89, p. 1; *see also* HT, p. 617.) Mr. Reed denied hanging up on Complainant. Rather, he listened to her and Mr. Carlson and then said he was going to call Mr. Whitt and hung up. (HT, p. 68-70.) He was frustrated because he knew it wasn’t hazardous waste and he was questioning why an Environmental Manager and a Senior Environmental Engineer were having difficulties handling something this routine. From the call, he believed that all of the issues had been raised and no other issues were broached until a few days later. He called Mr. Whitt just to make sure that he was correct. Mr. Whitt has been with Martin Marietta doing environmental work for roughly 30 years, so has the most institutional knowledge. He told Mr. Reed that he’d never seen a diesel spill classified as hazardous waste. Mr. Reed tried to call Complainant that afternoon to pass on the information, but Complainant never answered her phone. (*Id.* at 173-76.)

Around noon on October 14, 2014, Complainant was contacting Ms. Attaway at Republic Services, a landfill, about the Carthage spill and whether the disposal site had a compliant Waste Acceptance Plan. (RX 61, p. 1.) At 1:31 p.m. on October 14, 2014, Mr. Reed emailed Mr. Carlson and Complainant regarding “Beckmann” stating “[l]et’s get this figured out today. It should not take multiple days to figure out how to get rid of diesel contaminated soil. Let me know when it is resolved and what the action plan is going to be.” (RX 50, p. 1.) During the hearing Mr. Reed explained that “[t]his is not exactly non-routine for us. We operate hundreds of pieces, thousands of pieces of mobile equipment and a lot of those [use] petroleum products...We’re not unaccustomed to cleaning these up. It should have been done within a couple of days. I believe in this instance, the material was excavated and staged at an area on site for pickup within the first 24 hours.” (HT, p. 51; *see also id.* at 176.) Complainant did not give him an action plan. (*Id.* at 176.) Complainant stated that she was surprised by the email and felt pressured because she had run into so many difficulties doing due diligence. (*Id.* at 310.)

Mr. Reed and Complainant did speak on the evening of October 14, 2014. Mr. Reed recalled that the conclusion of the call was that he instructed Complainant to contact TCEQ about her concerns that Alamo1 was not handling the waste appropriately. Martin Marietta had

been transparent with the spill from the start, so TCEQ already knew about what had happened. At this point, Mr. Reed testified that he was frustrated because it should have been left to him to figure out the next steps on a routine matter. But he denied yelling on the phone or telling Complainant that she was incompetent. (*Id.* at 176-78.)

Complainant had a different recollection. She was at her son's martial arts practice and Mr. Reed called and yelled at her about wasting his time. She recalled that "he was yelling at me so much and speaking to me so condescendingly that I started to cry." (*Id.* at 314.) Her husband took the kids while Mr. Reed was still yelling at her, calling her incompetent. It was so loud that her husband and kids heard it on the phone. "I was embarrassed. I was shocked. I had never had a supervisor speak to me like that before. It was very demeaning. I was shocked. I was numb." (*Id.* at 314-15.) She agreed that at the end of the call Mr. Reed told her to contact TCEQ to confirm or deny whether Alamo1 was properly profiling and disposing of the waste but told her to only discuss the waste profiles. (*Id.* at 316.) After the call she was distraught and crying and went home instead of attending the practice with her son. (*Id.*) She testified that after this point she felt like she was being excluded from environmental projects and work. (*Id.* at 533.)

Mr. Schell remembered that they were at their son's Jiu-Jitsu practice and promotion when Mr. Reed called. When he returned to the car, he heard Mr. Reed yelling at Complainant over the phone. She closed the door and he kept the kids to the side. When it was over, Complainant had tears in her eyes and the night was ruined. They don't yell at their house, and from there everything spiraled downhill—she was overstressed, not sleeping right, not eating right, worried all the time, and the stress and problems just didn't end. (HT, pp. 605-08.)

Complainant wrote two responses to Mr. Reed's October 14, 2014, email about getting the Beckmann spill figured out. In one, sent on the afternoon of October 15, 2014, she told Mr. Carlson that she had talked to Mr. Reed and she had been instructed to call TCEQ. She stated that "[a]s soon as they provide me with their feedback, I will pass along to you and Jason to decide how you wish to proceed, and terminate my involvement at that point. Moving forward, Jason requested that I only work on enviroLIS data entry." (RX 54, p. 1.) A few minutes earlier Complainant had sent a long response to Mr. Reed. She conveyed that she had contacted TCEQ as directed and was awaiting a response. She indicated that she would pass the information along and then "discontinue my involvement with waste profiling, and all other environmental media at that point (with the exception of enviroLIS data entry)." (RX 53, p. 1.)

The rest of the email is worth quoting at length:

I am disappointed that you feel I was wasting your time, and as a result hung up on me yesterday. You did not give me the opportunity to finish explaining why this process has taken so long. I was only given minimal information and as part of the due diligence process I identified that the lab's NELAP certification had expired, the incorrect sampling analysis was performed, and key pieces in the Chain of Custody and waste profile were excluded/missing. When I discussed this with Ryan, he did not understand this very well. I wanted to ensure I did my best to protect Martin Marietta's liability, assets, and of course the environment. I understand that you and Ryan have historically relied on the waste transporter/broker to complete this process in the past, but I have experienced

firsthand that they are not always right; and ultimately the waste is the generator's responsibility from cradle to grave.

I declined a once in a lifetime position with the Air Force as a GS-12 to manage all of Joint Base SA's hazardous waste and hazardous material to stay at Martin Marietta, and you assured me that it was a great decision. I had high aspirations of working closely with the different plants at MMM to assist with multi-media guidance, permitting, and reporting. I was excited about the new, inclusive, motivated, and comical team I was blessed enough to join, but am now silo'ed with enviroLIS data entry. I have been excluded from several environmental meetings and luncheons in which everyone on your team (who was in the SA office those days) was invited to participate except me. This has become even more difficult when others (Liz in HR, Alice, Kerry, Karen, and more) have noticed and brought it to my attention. I love working for Martin Marietta, but do not feel I am being offered the same position that I was hired to do. I appreciate your transparency in verbally communicating that I take too long to complete tasks and wasted your time yesterday, and now understand why the only position you have for me on your team is in enviroLIS for the next three years.

I humbly request your permission to apply for other internal Martin Marietta positions as they become available. May I please have your concurrence to such?

(*Id.*; see also HT, pp. 528-29 (discussion of other job opportunity Complainant turned down).) There is no response from Mr. Reed in the record.

Complainant contacted TCEQ on the morning of October 15, 2014, to ask for assistance with profiling the waste streams at Beckmann and Carthage. (RX 47, p. 1; RX 48, p. 2; RX 66, p. 2.) TCEQ replied with some additional information about profiling the waste and properly disposing of the waste that afternoon. (RX 48, p. 1.; RX 66, p. 1.) Complainant forwarded this information to Mr. Reed and Mr. Carlson. (RX 48, p. 1.; RX 66, p. 1.) Mr. Carlson replied later that afternoon, asking “[s]o are we good to go with the Alamo 1 characterizations and the landfills they have identified?” (RX 66, p. 1.) Mr. Reed replied to this information on the evening of October 15th: “Thanks. Ryan is going to set up a call with Alamo1 so that you can share your concerns with their methodology. If they are handling this inappropriately they need to re-do, as they were hired to properly dispose of the material.” (RX 55, p. 1.) Complainant acknowledged this email and plan the next morning. (*Id.*) Mr. Carlson arranged for a conference call with himself, Complainant, Mr. Reed, and James Dugosh from Alamo1 for 8:30 a.m. on October 16, 2014. (RX 67, p. 1.)

Earlier on October 15th, Complainant had also contacted a Nancy Garnett, whom she described as a “waste guru,” asking about how to profile soil contaminated from a diesel spill. (RX 49, p. 1.) Complainant sent a similar inquiry to Carla Keylich of Republic Services. (RX 51, p. 1; RX 52, p. 2.) Ms. Keylich responded quickly with some suggestions and instructions for moving forward with the profiling and disposal. (RX 52, p. 2.) They then exchanged emails, with Ms. Keylich indicating that if the profile was approved “we will take this as a class 1 waste with no testing if it is diesel contaminated as your msds indicate.” (*Id.* at 1.) On the morning of October 16, 2014, Complainant forwarded the exchange to Mr. Carlson, copying Mr. Reed,

asking for his thoughts. (*Id.*) Complainant contacted Ms. Attaway that afternoon, informing her that Mr. Carlson would be completing the project. (RX 61, p. 1.) Complainant admitted that although TCEQ had sent her to current lab certification for the lab that Alamo1 had used to profile the waste on the morning of October 14, 2014, she continued raising this concern with Mr. Reed and Mr. Carlson. (HT, pp. 494-95.)

In Mr. Reed's recollection of events in the Beckmann spill, Martin Marietta had quickly reported it to the appropriate authorities and hired a contractor to dispose of the waste. Complainant got involved and had concerns, so she was directed to contact TCEQ to make sure things were being done correctly. They verified that the lab was certified and that the waste was being profiled appropriately. He had Mr. Carlson arrange a call with Alamo1 so they could talk about the appropriate profiling and disposal of the waste. He wasn't sure how they could have been more transparent, since they had involved everyone to address any concerns. (HT, pp. 64-65.) He stated that even though Complainant had already contacted TCEQ to determine if it was being handled correctly, they had a conference call with Alamo1 so that Complainant could present her concerns and then he instructed Alamo1 to also contact TCEQ and verify that they were doing things properly. That was done and as Mr. Reed understood things, everyone agreed by the end of Thursday the 16th that the Beckmann spill cleanup had been handled properly. He was still frustrated that he had to become so involved in a task that was routine. (*Id.* at 182-85.)

He believed that Complainant was given an opportunity to convey her concerns to Alamo1 in one call, they had been directed to talk to TCEQ and justify their handling, and it was then discussed later that day, after which Complainant agreed that Alamo1 was proceeding properly. (*Id.* at 237-38.) He had asked Complainant to contact TCEQ before Martin Marietta had done anything in the disposal of the waste, to make sure that it was being done legally and properly. After the 16th, he understood that everyone had agreed with the resolution and it was no longer on his radar and played no role in his subsequent decisions. (*Id.* at 217-18.) Mr. Carlson testified that Martin Marietta and Alamo1 had done exactly what TCEQ suggested they do. (RX 112, pp. 159-60.) He remembered two calls with Alamo1. After the first Mr. Reed told Alamo1 to double-check that they were doing everything correctly, though Mr. Carlson remembered that they had the same difficulties understanding Complainant's concerns that he and Mr. Reed had. After Alamo1 had done their re-checking, they all had a second conference call. Mr. Carlson remembered that Complainant had agreed at the end of that call that things were being done properly. TCEQ also agreed that they handled it properly. (*Id.* at 165-68, 173-74.)

Complainant testified that there was only one call with Alamo1. She agreed that she was given the opportunity to express her concerns and that Alamo1's response addressed those concerns. But she did not agree that the waste had been handled appropriately and didn't agree with Alamo1's responses. (HT, pp. 316-18, 523-24.) She claimed that she had multiple questions that she verbally raised to Mr. Reed and Mr. Carlson. She continued to disagree about profiling the waste, even into 2015. (*Id.* at 318-20.) She also testified that after they got off the phone with Alamo1 Mr. Reed told her that she had embarrassed him with her incompetence and that Alamo1 was more knowledgeable than her. (*Id.* at 320-21.) She disagreed. Though she allowed that Mr. Reed had lots of experience in the industry, she believed that she had more experience and knowledge than he did about how to properly characterize and dispose of waste. (*Id.* at 321-22.) She wasn't involved in the spill after that because Mr. Reed took her off of the project, but she testified that TCEQ wasn't satisfied with the response until the next March. (*Id.*

at 322.) In addition, Complainant remembered that the Carthage spill was also discussed at this point, and that she had many of the same concerns with Alamo1. (*Id.* at 322-23.) She agreed that Mr. Reed had arranged for the call and allowed her to express her concerns. She also agreed that Alamo1, Mr. Reed, Mr. Carlson, and TCEQ had all concluded that the Beckmann spill did not involve hazardous waste. (*Id.* at 491-92.) She claimed that she had been working on an action plan for the spills, but then Mr. Reed took her off of those projects. (*Id.* at 345.) Any action plan she offered would have been verbal and informal, since Mr. Reed operated informally. (*Id.* at 484-85.) She admitted, however, that Mr. Reed developed the action plan for seeking assistance from TCEQ to resolve her worries and had arranged to have a conference call with Alamo1 so she could raise her concerns for Alamo1 to address. (*Id.* at 485-86, 490-91.)

I. EnviroLIS Update and HR Involvement

On Friday October 17, 2014, Mr. Reed emailed Complainant following up on his request for an update on the enviroLIS project from October 14, 2014, asking, “[c]an I please get this update today?” (RX 18, p. 1; *see also* HT, p. 156.) Complainant responded about two hours later, writing “[t]he ‘San Antonio District’ and the ‘SW Region’ are complete which is comprised of 32 locations. Additionally, I have added and updated two lease amendments/agreements on the land side.” (RX 19, p. 1.) Several minutes later she sent a revised update, adding that “[a]t this time, I have 108 remaining.” (RX 20, p. 1.) Prior to this point Mr. Reed did not have performance concerns. But since the update showed they were far behind and hadn’t been making progress on the project, he became very concerned with her performance, since enviroLIS was now her “primary responsibility and function.” (HT, pp. 87-88.) He found the report “very shocking” because by his estimation she had only completed about a week’s worth of work in three and a half months and they were far off pace to meet the deadline. (*Id.* at 157-58.) Mr. Reed felt misled by Complainant’s prior reports and contacted Human Resources to get some advice on how to get Complainant back on track. (*Id.* at 159-60.)

Complainant remembered things differently. She testified that she was worried about her job security because of the way Mr. Reed was treating her and so she contacted some individuals in the office who then told her to get into contact with Ms. Waller in HR. They exchanged emails and met offsite on October 27, 2014, to talk. (HT, pp. 325-27.) In Complainant’s recollection, she hadn’t been given any deadlines for October—the only deadline she had was the December 31, 2014, enviroLIS deadline. (*Id.* at 338.) Ms. Waller testified that she became involved after Mr. Reed contacted her, not that Complainant reached out to her to be a mediator. Mr. Reed had concerns about Complainant’s performance and misrepresentations he believed Complainant was making. He was particularly concerned with the enviroLIS project—that there was an important deadline that Complainant was not going to meet. (HT, pp. 561-62.) He contacted HR for help on how to sit down and talk with Complainant about his performance concerns in a way that would facilitate the completion of the project. (*Id.* at 563-64.) Termination was not under consideration at this point. (*Id.* at 564.)

On October 21, 2014, Deb Collins sent an email to “helpdesk” regarding “Erica Schell’s EnviroLIS issues and screenshot” including a screenshot of the problem she was having in the program. (CX 11, p. 43.) Raluca Paceana at Enkon Information Systems, which was copied on the original email, acknowledged the report later that afternoon. (*Id.*; RX 71, p. 2.) That evening, Complainant sent a message to Mr. Whitt, Mr. Reed, Lana Armstrong, and Ms. Collins

reporting that Enkon was working on her problems with needing multiple attempts to login, tabs not opening properly, hyperlinks not working, and slow functioning. She asked if others were having problems. (CX 11, p. 42; RX 71, p. 1.) Shortly thereafter, Mr. Reed asked Mr. Whitt to reach out to others to see if they were having problems with enviroLIS. He explained, “[w]e are having performance issues with Erica, are having a sit-down with HR next week and I need to know if we are dealing with yet another excuse on why she is not producing expected deliverables.” Mr. Whitt asked Mr. Reed to call him the next day to discuss. (RX 70, p. 1.) A few minutes later, Mr. Whitt forwarded Complainant’s message to Mr. Reed with the comment that he had been in the system that day and had no problems. (RX 71, p. 1.) Mr. Whitt replied to Complainant’s email soon thereafter indicating that he had been in the system that day and not experienced the problems, beyond a slight delay opening large files. He suggested getting Support Services involved. (CX 11, p. 42; RX 83, p. 1.) Complainant replied the next morning stating that she was working with Support Services. (CX 11, p. 42; RX 83, p. 1.)

Mr. Whitt recalled that when they spoke, Mr. Reed explained that he was frustrated with the progress Complainant was making on the enviroLIS project and that she was explaining the status of the project with reference to problems with the system, so he wanted Mr. Whitt to ask around to determine if there were in fact more widespread difficulties. After doing so, Mr. Whitt determined that “[n]o one else ha[d] reported those types of problems and no one else [was] having difficulty getting the system uploaded.” (RX 111, p. 30-31; *see also id.* at 83-84.) Mr. Whitt testified that in his work with enviroLIS, he did not have problems logging in, getting tabs to open properly, or having hyperlinks work. (*Id.* at 27-29.) Mr. Reed thought that it was around this time that he became aware of Complainant’s reported technical problems with enviroLIS. (HT, pp. 34-35.) Before that point he was aware that Complainant had occasional needs from support services, like being given the proper access, but not that she was unable to work in the program. (*Id.* at 38-39.) But based on the reports from Mr. Whitt, Mr. Reed also concluded that the various reported problems Complainant was having with enviroLIS were the result of the user, not the program. (HT, p. 164, 210.) Mr. Reed was concerned about Complainant’s performance and the excuses he believed she was giving, so he asked Mr. Whitt to look at some of her work. (HT, pp. 87-88.) Mr. Whitt sent Mr. Reed a review of the enviroLIS entries in the Southwest Division on October 27, 2014, at 11:30 a.m.: “[a]s an overall impression there has been [sic] many items uploaded and in general, things are pretty good based on the 7 sites that I randomly opened.” He added that he would not be as picky as the “real estate side.” With regard to the 7 sites, Mr. Whitt included notes about items that were missing or entered incorrectly. (CX 19, pp. 59-60; RX 80, pp. 1-2; *see also* CX 39, pp. 54-55; RX 111, pp. 54-55.) Mr. Reed was not pleased with this report because it meant that there were still problems with the sites Complainant deemed complete. (HT, p. 187.)

Ms. Waller and Complainant had lunch together on October 27, 2014, after Complainant asked for some mentoring/guidance regarding how to be poised, calm, and collected. Per Ms. Waller, Complainant did not mention any struggles with or complaints about Mr. Reed at this lunch. (HT, pp. 564-65.) Mr. Reed had a meeting with Complainant to discuss her performance on October 28, 2104. Ms. Waller was also involved. Mr. Reed testified that he asked Ms. Waller to set up the meeting because of what he had determined regarding the status of the enviroLIS project. (HT, p. 70.) The meeting was set up probably a few days prior so that he could travel to San Antonio to be there in person. (*Id.* at 235-26.) Complainant agreed that at this time there was a “high priority” December 31st deadline from corporate on enviroLIS and

that was her primary, but not sole, responsibility. (*Id.* at 333.) Complainant wasn't aware of the meeting until right before it occurred, but believed that it was arranged at her request because she had asked Ms. Waller to mediate. (*Id.* at 327.) She wanted a mediator because Mr. Reed had yelled at her in the past and not given her an opportunity to explain herself. (*Id.* at 342-43.) Ms. Waller denied that she was approached to act as a mediator. (*Id.* at 565.)

Complainant recalled that Ms. Waller explained at the meeting that she was a mediator. Then Mr. Reed talked and brought up the Beckmann and Carthage spills and accused her of incompetence. He also talked about enviroLIS, expressed concern over the lack of progress, went over the mistakes in her work, and accused her of making excuses for not having things done. (*Id.* at 328-29, 447-48.) She claimed that he mentioned her incompetence several times, was yelling, and said it would be more beneficial to have an administrative assistant doing her job. (*Id.* at 329-30.) The interaction with Mr. Reed brought PTSD-related memories back. (*Id.* at 331.) He was sitting, but his face was red and his body language expressed anger. Complainant recalled that Ms. Waller asked Mr. Reed to calm down and that he then calmed down a little. (*Id.* at 332.) He brought up enviroLIS and stated that he wanted her terminated, but Ms. Waller intervened and got Mr. Reed to wait until December 31, 2014, to give Complainant a chance to finish the project. (*Id.* at 333.)

Mr. Reed allowed that he was "frustrated with the situation" and his "voice was likely elevated" and he "was very stern in what we were talking about." He did not recall being asked to calm down by Ms. Waller. (*Id.* at 70-71.) He did not call Complainant incompetent. He did raise the question of how the Southeast division was able to make progress by having a temporary administrative assistant do the work, but they had not been able to make progress with a Senior Environmental Engineer. (*Id.* at 72-73.) Termination was not on the table. A PIP wasn't even an issue yet. The meeting "was to ask, what's going on Erica? It's a six-month project. We were three and a half months into it and only 20 percent of the project is complete." (*Id.* at 74.) He was frustrated because based on the verbal updates, he thought everything was fine. (*Id.* at 77.) The point was to discuss the fact that they were "grossly behind" on the project and get Complainant on the right track. (*Id.* at 187-88.) After the meeting he was still frustrated, but he thought the point had been conveyed because Complainant assured them the project would be complete on schedule. (*Id.* at 188.)

Ms. Waller remembered that Mr. Reed was frustrated with Complainant because the project wasn't being completed and he had discovered that some of the locations Complainant had indicated were complete had errors. He expressed these frustrations and was also frustrated that Complainant didn't have answers to his questions. But Ms. Waller didn't remember Mr. Reed saying anything inappropriate—it was a "[n]ormal conversation between an employee and a supervisor with some frustration." (*Id.* at 566-67.) Mr. Reed was not outraged, he did not abusive or harassing, and she did not ask him to calm down. If he had behaved inappropriately, she would have intervened and the situation would have been escalated to their supervisors. (*Id.* at 567-68.) He did raise his voice and he was upset. (*Id.* at 678-79.) The conclusion of the meeting was that Complainant was expected to complete the enviroLIS project following the Data Guide by December 31, 2017. (*Id.* at 568-69.)

Complainant emailed Ms. Waller at 4:18 p.m. on October 28, 2014, regarding "Follow-Up: Environmental Discussion with Jason." Complainant stated that she appreciated Ms. Waller

“mediating between Jason and I today.” She related that until that day she had believed that Mr. Reed was satisfied with her performance. She added that “I am concerned that we are so far apart in our opinions regarding environmental. Mostly, I am saddened by all of the accusations he stated today: not being a Senior Environmental Engineer, not knowing environmental, not being ‘detailed oriented’, he harped on my resume and felt that I do not possess the skills listed on my resume, how slow I am (taking too long to complete tasks), and mentioning that a temporary administrative individual would be more efficient for enviroLIS than I am.” (RX 21, p. 1.) She expressed a belief that Mr. Reed would not change his mind and that why she was being excluded “from almost all things environmental.” She also defended some of the work she had done organizing files and the difficulties she had encountered locating permits. She expressed that Mr. Reed and Mr. Carlson treated her like an “outcast” and asked for mentoring advice on how to turn things around. She also expressed frustration that Mr. Reed didn’t understand why she was being so diligent/slow and that he had demoted her to “only data entry.” Complainant also inquired about any position available in HR that she could apply for as well as the salary and benefits associated with those positions. (*Id.*) Mr. Reed testified that this account was simply not true. (HT, p. 189.) Ms. Waller agreed with Mr. Reed and found the request to transfer to HR odd because Complainant didn’t have any HR experience and wasn’t focused on improving her performance, which is how the meeting left matters. (*Id.* at 571-72.)

Complainant emailed Mr. Whitt on the morning of October 29, 2014, stating that Mr. Reed had told her that there were concerns regarding the data she had uploaded to enviroLIS. She asked for more information on which sites were missing some of the data and apologized for any convenience, indicating that she was re-checking the entries. (RX 86, p. 1.) At 5:37 p.m. on October 29, 2014, Mr. Reed emailed Complainant with examples of “deficiencies currently in the system for locations that you considered complete.” He asked that she audit the 32 locations to make sure the entries were completed according to the data guide and Mr. Whitt’s training. He noted that she need not remove any of the documents already uploaded that were not necessary, but that going forward she shouldn’t continue to upload such documents. He added that “[a]gain, the complete EnviroLIS project needs to finished [sic] by the end of 2014.” (RX 22, p. 1.) Complainant responded the next afternoon: “I appreciate the opportunity to improve, and anticipate reaching a resolution.” (*Id.*)

J. Needs Improvement Plan/PIP and OSHA Complaint

After the October 28, 2014, meeting, it was decided to put Complainant on a Needs Improvement Plan, or PIP. Rudy Sanchez, the Vice President for Human Resources in the Southwest Division created some sort of original draft and then Mr. Reed made additions/alterations and sent it to Ms. Waller and Mr. Sanchez for comment on the evening of October 30, 2014. He indicated that Complainant’s role had changed immensely since her hire and that the PIP reflected current responsibilities. (RX 96, pp. 1-2.) The only information that Ms. Waller or Mr. Sanchez had about Complainant’s duties and performance came from Mr. Reed. (*Id.* at 681-83.) Mr. Sanchez replied with some proposed additions/changes on October 31, 2014. (*Id.* at 1.) It was Mr. Sanchez decision to put Complainant on a PIP so that the performance concerns and expectations would be properly conveyed and documented. (HT, pp. 198, 580.) Ms. Waller and Mr. Reed remembered that there was no intent to terminate Complainant at this time. The PIP was designed to improve Complainant’s performance and meet the enviroLIS deadline. It was unrelated to any environmental issues. (*Id.* at 198, 580-83.)

At 5:47 p.m. on November 4, 2014, Complainant sent an email to Mr. Reed, copying Ms. Waller, with the subject “RE: EnviroLIS Deficiencies.” She thanked him for meeting with her and Ms. Waller and expressed disappointment “that I infuriate you and that you believe I am incompetent for the role I am currently in.” She stated that prior to that meeting he had not expressed any dissatisfaction. She then complained that she was being “silo’ed from my co-called ‘team’ and harassed about being ‘slow’ and incompetent.” She continued:

Any supervisor who has concerns about performance should address them with the respective employee without insulting and degrading an individual. As Anna is my witness, you have demoted me to a data entry only position because this is the only task you believe I am capable of performing, and I was only given to the end of December to try to change your opinion of me. I don’t appreciate the following comments you made in the meeting, ‘uploading and naming documents isn’t technical, and any administrative individual without a degree or education should be able to perform these responsibilities. Yet, you are still not competent/capable of doing this.’ You requested that I be completely removed from our environmental team, only allowed to upload documents, and perform data entry for enviroLIS. These actions do not foster a healthy/friendly/motivating environment. Why are you treating me like a special needs, disabled individual?

(CX 23, p. 68.) She then linked the anger she perceived in Mr. Reed to her report that Alamo1 had incorrectly profiled the waste, asserting that she was legally, ethically, and morally obligated to ensure I provide the most environmentally sound guidance.” (*Id.*; *see also* HT, pp. 343-44.) Finally, she related that she had kept Mr. Reed informed of all her problems with enviroLIS and responded to alleged deficiencies, adding that locating and reviewing permits was time-consuming and required a technical background. (CX 23, p. 68.)

Mr. Reed was concerned by this email because he didn’t understand why Complainant was connecting the Alamo1 issue and the email as a whole misrepresented what had actually occurred at the meeting. (HT, pp. 63-64.) He found the accusations about the Beckmann spill absurd at this point because they had been in contact with everyone, including TCEQ, about dealing with the spill properly, had conference calls to discuss Complainant’s concerns, and those concerns had been addressed by the contractor and the state agency. (*Id.* at 64-65.) Those comments, however, did not play a part in the decision to put Complainant on a PIP. (*Id.* at 66.) He denied saying the various things he was accused of saying in the email. After he received it he called Mr. Waller immediately just to ensure that none of it matched her recollection either. It didn’t. (*Id.* at 192-94.) Ms. Waller denied the accuracy of the email. Mr. Reed did not call Complainant incompetent or incapable. The events described “did not occur.” (*Id.* at 578-80.)

On the night of November 5, 2014, Complainant prepared an email addressed to “Sir or Ma’am” alleging that disagreements with Mr. Reed and Mr. Carlson about waste profiles had “escalated out of control.” She catalogued her recollection of events, alleging that Mr. Reed had hung up on her on October 14, 2014, and then told her that she was too slow, didn’t know how to do environmental tasks, and was wasting his time. She further alleged that the profiles were not compliant with Texas regulations and that Respondent’s practices hadn’t been compliant for years. She complained that she was being isolated and “reassigned to only performing data entry

in enviroLIS for disagreeing with my manager about waste.” (CX 21, pp. 63-65.) Next, she related that she had talked with Mr. Carlson and then in a conference call including Mr. Reed, Mr. Carlson, and Alamo1, but her complaints had been dismissed and she was taken off of the project. She claimed that she then contacted Ms. Waller at HR, who arranged a meeting with Mr. Reed where she could serve as a mediator. The meeting occurred on October 27, 2014, and Complainant reported that Mr. Reed was “outraged” and degraded her. She claimed Ms. Waller “asked him to calm down because his body language portrayed an outraged individual who wanted to become physical. He was shaking intently and his face was beet red.” (*Id.* at 65.)

Complainant related that Mr. Reed then agreed that he was excluding Complainant from environmental tasks because she was incompetent and that a temporary administrative worker would be better in her position. Regarding enviroLIS, Complainant complained that her technical issues had caused the delays but that Mr. Reed would not listen and looked at her with disgust. Complainant reported that Ms. Waller intervened and convinced Mr. Reed to give her through December before terminating her. She recalled that “[h]e gave me another look of disgust, and continued to treat me like a mentally disabled individual who lied about everything on a resume.” (*Id.*) In her recollection, Mr. Reed complained specifically about her work on the waste stream profile stating that they should not question the broker and that her complaints had been a waste of time and money. She maintained that the profile was incorrect and complained that Mr. Reed still “adamantly” believed that the vendor was correct. (*Id.* at 65-66.)

She complained that she was being subjected to “harassment and retaliation” and had received “degrading, verbally harassing remarks and a demotion to a position of a disabled, incompetent individual.” She concluded by indicating that she was making contact “as a last resort before Jason fires or lays me off” and asked that her situation be used

as an example and not encourage or condone this behavior especially when, speaking up to dispose of waste correctly in the State of Texas. If you agree that Jason’s actions towards me align with Martin Marietta’s corporate culture, ethics, and core values then please disregard this e-mail. If you believe that an employee should not be harassed, demoted, and degraded for bringing up a regulatory requirement under EPA, RCRA, DOT, TCEQ, and other regulatory statues [sic], then can you please consider this request for intervention on behalf of an American Veteran who has the courage to speak up?

(*Id.* at 66.) Though the email was addressed to herself, she testified that she blind copied the corporate ethics committee. (HT, pp. 334-35.) Mr. Reed denied that any of these accusations about his statements and conduct were correct. (HT, pp. 195-98.) He was contacted and interviewed by an attorney in the corporate legal counsel office who was investigating the ethics complaint related to the Beckmann spill. He cooperated. (*Id.* at 226-27.) Complainant was also contacted by internal counsel and addressed her concerns with him, though she limited any discussion of what she was believed was illegal, citing the OSHA investigation. (*Id.* at 377-78, 399.) Ms. Waller testified that other than the fact that they had all met, the various representations in this email she would have known about were not true. (*Id.* at 574-78.)

On November 6, 2014, Respondent put Complainant on a “60 Day Needs Improvement Plan,” which is contained in a memo to Complainant from Mr. Reed. It stated that after review,

her performance was “unsatisfactory” and that she was expected to improve in the next 60 days. (CX 24, p. 69; RX 23, p. 1.) Failure to improve would result in additional action, potentially including termination. (CX 24, p. 71; RX 23, p. 3.) The PIP specified that Complainant was to “[e]xhibit greater ownership in the EnviroLIS assignment,” including auditing the 32 locations she had deemed complete in accordance with proper protocol and uploading missing documents/information, scanning hardcopy documents into EnviroLIS, populate the remaining Southwest Division locations and adding the associated in accordance with proper protocols by December 31, 2014, and providing Ms. Waller and Mr. Reed with “a weekly update on the progress and status of the assignment.” (CX 24, p. 69; RX 23, p. 1.) The PIP also asked that Complainant “[e]nsure proper and professional communication with other Martin Marietta employees.” A number of sub-points followed, including “[c]hampion a positive and comfortable office environment; refrain from gossip while within the office and when communicating to other Martin Marietta employees and/or about Martin Marietta business matters,” “[a]ssume responsibility for a problem rather than blaming others,” “[t]ake constructive criticism in stride and avoid appearing defensive,” “[a]pproach requests with a mindset of being a problem solver, and not with intentions of being a problem finder,” and “[i]nclude your supervisor on all internal and external email correspondence.” (CX 24, p. 70; RX 23, p. 2.)

The PIP states that Complainant’s duty/responsibility was to “[p]opulate the EnviroLIS System with the documents for Martin Marietta’s Southwest Division and create the associated tasks in accordance with the Data Guide and the training that you received from Steve Whitt, Director of Environmental Services, by December 31, 2014.” (CX 24, p. 70; RX 23, p. 2.) It indicated that “we” would be meeting with her regularly during the next 60 days and that she should feel free to ask any questions. It is signed by Mr. Reed and Complainant, who annotated her signature with “under duress.” (CX 24, p. 71; RX 23, p. 3.) Though the PIP indicates that they would review progress, Ms. Waller explained that HR discourages managers from holding an employee’s hand during a PIP, since the problems will just reemerge later. Rather, the PIP is designed to encourage the employee to take the initiative and improve performance by completing the assigned tasks. (HT, pp. 586-87.) Reviewing progress meant that there would be follow-up of some sort, in meetings, emails, or other discussions. (*Id.* at 686-87.)

This was Mr. Reed’s first PIP, so he relied on guidance with HR in managing it. (*Id.* at 60-61.) HR helped formulate the language in the PIP. Mr. Reed thought that he drafted some of the specifics and had input into the point referencing gossip. The concern was that he had received reports that Complainant was talking to other employees, including the secretaries, about information being uploaded into enviroLIS, some of which was proprietary. (*Id.* at 95-97, 100, 103-04.) Complainant recalled that Mr. Reed told her it was just standard language, but that he also told her to stop talking to others unless it was about enviroLIS. (*Id.* at 366-67.)

Mr. Reed believed he also had input in the “problem finder” language. He explained:

With any job at Martin Marietta, about half your job is finding problems. You’re an auditor. You’re the internal police, right? Well, once you identify an issue, we now need an action plan, some kind of road map to the solution to rectify whatever it is you discover. We weren’t seeing that with [Complainant] at that time. She was generating problem after problem where her job was also to show us what [is] the road map, whether it be [enviroLIS]. It doesn’t work. Whether—

we need—you've got to have the ability to also problems. [sic] That's why we hired a senior environmental engineer. We needed somebody that [sic] could work independently, someone that [sic] did not need a bunch of oversight for these routine environmental tasks that we go through. We just never got up there with her which surprised us because she has a lot of environmental experience. It was close to 15 years. We really expected—we had someone who could also solve problems and not just say, "Hey they're not doing it right, but I don't know how to get there."

(HT, pp. 104-05; *see also id.* at 199-200.) He gave the difficulties Complainant reported with enviroLIS as an example—she would report the problem, but didn't develop a solution, which meant going into the Data Guide and determining what she might be doing incorrectly. (*Id.* at 105.) He agreed that the handling of the Beckmann spill was another. They had a spill and Complainant had concerns, but didn't have the next step to address those concerns—he had to tell her to call TCEQ to get guidance and resolution. (*Id.* at 105-06.)

Ms. Waller stated that the "problem-solver" language pertained to a basic expectation of all salaried employees to not just encounter problems but then to figure out a plan for resolving the problem. (*Id.* at 585-86.) She thought it had probably come from Mr. Sanchez, but allowed that it might have come from Mr. Reed as well. (*Id.* at 684-85.) Complainant recognized the problem-finder and problem-solver language from Mr. Reed, since he used it to describe their positions as internal environmental professionals tasked both with identifying problems with what the company was doing but also working tactfully and kindly to encourage other employees to go along with a solution. (*Id.* at 348-49.) She recalled that Mr. Reed related it to both Beckmann and enviroLIS. But she believed that she was a problem-solver as well. (367-68.)

Mr. Reed testified that the lack of progress on the enviroLIS project was the reason for the PIP. He had found the update he received "very alarming." Complainant's performance around the Beckmann and Carthage spills were not a reason for instituting the PIP. In his mind, he wasn't even sure how involved Complainant was with the Carthage matter and the Beckmann issue was "a blip in the radar of everything going on. That came up. There was [sic] a couple activities left to do. She questioned some things on [Alamo1]. We answered those questions. She agreed it was addressed appropriately and we moved on down the road." (*Id.* at 100-01, 200.) He allowed that given Complainant's short tenure, her entire performance was relevant to the PIP, but added that the spills weren't even mentioned to HR. (*Id.* at 101-02.) Ms. Waller testified that in her experience, Mr. Reed doesn't get upset when an employee raises an issue and that in this case Mr. Reed never expressed any frustration about environmental concerns Complainant had raised. (*Id.* at 616.) She was unaware of any allegations Complainant raised regarding illegal activities. The PIP focused on enviroLIS because that was Complainant's main responsibility and to succeed under the PIP, she needed to meet that deadline. (*Id.* at 618-19.)

Complainant was given the PIP during a short meeting with Mr. Reed and Ms. Waller. Mr. Reed recalled that Ms. Waller stepped out to take a call at one point. He denied saying anything to Complainant about being upset that she was digging up problems. (HT, pp. 93-95.) Complainant testified that she was surprised to be put on a PIP and the meeting didn't go as expected. Ms. Waller started off by telling her not to bring up the past. Ms. Waller left shortly into the meeting for a phone call and then missed most of the meeting. Mr. Reed went through

the PIP, but would stop after the bullet points and tell her “none of this would have happened if you didn’t bring anything up and had to go above and beyond outside...our department.” (*Id.* at 345-47.) She tried to explain all of her technical issues with enviroLIS, but Mr. Reed told her not to bring up the past. (*Id.* at 347-48.) She testified that Mr. Reed told her that she was put on the PIP both because of the enviroLIS issues and “because he was upset about me not agreeing about the Carthage and Beckmann spills.” (*Id.* at 347) He was also upset that she had gone to human resources. (*Id.* at 347-48.) The meeting lasted 30-45 minutes and Ms. Waller missed most of it. Complainant was told that if she didn’t comply she might be terminated. (*Id.* at 368-69.) At the meeting, she agreed to meet the deadline. (*Id.* at 459.) Ms. Waller remembered matters differently—she left for only five minutes to take a call and so was present for almost the whole meeting. Mr. Reed behaved appropriately. (*Id.* at 588.)

At 5:14 p.m. on November 6, 2014, Complainant forwarded the email she had prepared the night before to Hilary Rivera, an investigator at OSHA, indicating that she had sent it to the Corporate Ethics Committee but had just learned that it would simply be returned to the local HR office, which was not helping her. (CX 21, p. 63.) In another email at 7:47 a.m. on November 7, 2014, Complainant asked that Ms. Rivera “re-open my case as I have now provided you with prima facie evidence needed to initiate the anti-retaliatory claim” under the SWDA. (CX 20, p. 61.) She claimed that on November 6, 2014, she had met with Mr. Reed and Ms. Waller, though Ms. Waller stepped out for most of the meeting for a phone call. She alleged that Mr. Reed didn’t respond to emails, spoke to her in a condescending manner, hung up on her, told her she was incompetent, and was “very angry at me for ‘documenting’ a potential violation.” (*Id.*) She reported that he was angry that she had gone to HR and was making him look bad. She also reported that she had been placed on a PIP related to the enviroLIS entries, but indicated that they had disagreed about her technical problems. (*Id.*) She further complained that the PIP added a lot of additional tasks that she had to complete to avoid termination. (*Id.*)

Ms. Waller testified that this email was not an accurate account of events. Mr. Reed involved HR in the situation and Complainant never brought any environmental issues to her. (HT, pp. 588-94.) OSHA logged a complaint and sent a letter to Respondent, addressed to “HR/Legal” in San Antonio.⁸ (CX 1, pp. 1-2; CX 2, pp. 7-8.) Ms. Waller had no memory of receiving this letter and didn’t know if anyone at Martin Marietta received it. She learned that Complainant had filed a complaint at some point in December, but did not tell Mr. Reed. (HT, pp. 621-22.) On December 2, 2014, OSHA sent Respondent a copy of Complainant’s November 7, 2014, complaint and requested that Respondent submit a response within 10 days. (CX 3, pp. 9-10; RX 92, pp. 1-2.) Respondents thereafter submitted a position statement.⁹ (*See* CX 5.)

⁸ Subsequently, Complainant emailed OSHA investigator Hillary Rivera on November 14, 2014, stating that she believed that her whistleblower complaint fell under the SWDA, SDWA, FWPCA, the Clean Air Act, the Occupational Safety and Health Act, and the Comprehensive Environmental Response, Compensation and Liability Act. She asked for additional information about filing complaints and about what to do about “additional EEOC retaliations/actions” she had experienced. (CX 12, pp. 49-50.) Ms. Rivera replied the same day stating that the procedure and timeline for filing complaints was the same under all of the environmental statutes but that she would have to deal with EEOC on the other complaints. (*Id.* at 48.)

⁹ Respondent’s position statement indicates that the merger with TXI created the potential for layoffs and Mr. Reed, starting in June 2014, was looking into the “headcount.” He concluded that Complainant was “potentially subject to layoff” because she was a new hire, lacked experience, and Mr. Reed was questioning Complainant’s ability to perform in the job, specifically in reference to an application for an air permit at Hondo Quarry in March 2014. (CX

K. November 2014: Work Under the Needs Improvement Plan

In Complainant's view, at this point her relationship with Mr. Reed was not good. She started to think that he was keeping an eye on her. Sometimes she would close her door and on one occasion he instant messaged her from Dallas asking who had just been in her office. This made her paranoid. She thought the PTSD was stable but with all the events, "it exacerbated and I regressed immensely." (HT, pp. 350-52.) Other employers avoided her and she even had the lights turned out on her while she was in the bathroom. (*Id.* at 352.) She believed that Mr. Reed had told her not to speak to anyone else, so she started closing her door so that she wouldn't be perceived to be doing anything except enviroLIS. (*Id.* at 352-53.) Her sleep habits were adversely affected, but she was not sleeping in her office, except during her lunch break. (*Id.* at 353-54.) Ms. Waller denied that anyone in San Antonio was spying on Complainant or giving her a cold shoulder. Someone may have turned out the lights while Complainant was in the bathroom, but only because the company has an energy conservation initiative and asks employees to turn out the lights if no one else is using the restroom. Ms. Waller had the lights turned out on her when someone didn't realize she was using the restroom. (*Id.* at 624-26.) The only people in San Antonio who even knew Complainant was on a PIP were in HR. (*Id.* at 626.)

At 1:48 p.m. on November 6, 2014, Complainant asked Mr. Reed to send her a copy of the "APO permits" so that she could "close out these deficiencies." (RX 24, p. 1.) He responded the next afternoon giving her instructions about where she could find the current permits in the group folder. (*Id.*) To facilitate Complainant's task, Mr. Reed had pulled the documents from the TCEQ website and then uploaded them to a shared drive folder so that Complainant would have easy access. But he expected that someone in Complainant's position would have been able to determine how to get the documents in question and do these tasks independently. (HT, p. 202.) Complainant found Mr. Reed's response to her query helpful. (*Id.* at 465.)

During the early evening of November 7, 2014, Complainant sent an email to Mr. Reed, Mr. Whitt, and Mr. Carlson, copying Ms. Waller and some support services employees, about "enviroLIS Anomalies." She reported a number of additional issues and indicated that Mr. Carlson had come to her office and was "shocked," after which he had experienced "additional issues" with enviroLIS on his computer. She then described some problems, including screenshots, and reporting that she was experiencing them on a daily basis. (RX 62, pp. 2-6.) Mr. Carlson responded only to Mr. Reed about half an hour later, stating that he hadn't experienced any of the reported issues with enviroLIS on his computer and that he had been

5, pp. 18-19.) Respondent related that Complainant was assigned the enviroLIS after she volunteered and given a due date of December 31, 2014. (*Id.* at 19.) In relation to the Beckmann Quarry and Carthage Ready Mix Facility cleanups, Respondent averred that Complainant was assigned to coordinate with an outside vendor to remove the waste but there were then delays in completing the project because of Complainant's concerns about the vendor's qualifications and methodology. Mr. Reed conducted two conference calls and after the second Complainant agreed that the vendor was handled the waste properly. The delay led TCEQ to issue Respondent a Notice of Violation. (*Id.*) Mr. Reed became aware of other delays and deficiencies in completing the enviroLIS project. This led to a meeting between Complainant, Mr. Reed, and Ms. Waller, but Complainant subsequently sent an email misrepresenting the meeting and backing off her commitment to finish the project on time. Continued concerns about Complainant's competence and ability to complete the project led to the PIP. (*Id.* at 20-21.) Respondent argued that the PIP was not retaliatory, but was instituted "because she was not accomplishing her assigned task in a timely fashion, did not appear to exhibit the knowledge or skill customarily held by a Senior Environmental Engineer, and failed to meet expectations regarding her behavior and performance." (*Id.* at 21.)

“confused” rather than “shocked” when Complainant showed him the problems she was having. (*Id.* at 1-2.) He testified that this made the work situation awkward because he had only pulled up a screenshot she sent on his computer when Complainant told him enviroLIS wasn’t working—he hadn’t gone into her office and he wasn’t shocked. (RX 112, pp. 103-04.) Mr. Reed concluded that Complainant was misrepresenting events, which he found very troubling. (HT, pp. 208-09.) Mr. Reed forwarded this note to Ms. Waller, adding only “FYI.”¹⁰ (RX 62, p. 1.) On November 10, 2014, Ms. Waller forwarded the chain to Mr. Sanchez, adding that she wanted to keep him in the loop and that she would find it interesting and confirmatory of their impression that there were “different interpretation of reactions.” (*Id.*) Ms. Waller, however, did not discuss the email or the problems with enviroLIS with Mr. Carlson. (HT, pp. 662-63.)

On November 10, 2014, Complainant emailed Raluca Mitchell at Enkon and “helpdesk,” copying Mr. Reed, Smiley Yruegas, Support Services, Ms. Schmid, and Mr. Whitt, an “enviroLIS Assistance Request,” reporting that the browser was not working properly in enviroLIS and she was experiencing difficulties uploading and deleting documents on an “almost daily” basis. (CX 11, pp. 46-47.) Raluca Mitchell replied that evening with instructions on how to fix the browser issues. (*Id.* at 45-46.) The next morning Mr. Yruegas replied stating that there were still problems uploading documents. (*Id.* at 45.) On the morning of November 12, 2014, Complainant sent an email to Mr. Reed, Ms. Waller, copying Souleymane Diallo, Mr. Yruegas, and Mr. Whitt, reporting that there had been no changes in the issues she had been experiencing with enviroLIS since July. She indicated that she and Mr. Yruegas had both contacted Enkon and were awaiting a response. (RX 100, p. 1.) Mr. Yruegas then sent a response stating that Enkon’s help desk didn’t open for a few more hours. (*Id.*) Mr. Reed replied to Mr. Yruegas, copying Mr. Diallo, asking him to “[p]lease keep on them until this is resolved.” (*Id.*) Mr. Reed explained at the hearing that he gave that instruction because Mr. Yruegas is a field tech without any experience or training with enviroLIS, so if there was a problem, it was going to have to be dealt with by Enkon. (HT, pp. 110-11, 165-66.)

On November 12, 2014, Complainant sent Mr. Reed an interoffice memorandum re: “Rebuttal of 60 Day Needs Improvement Plan.” She relates “feeling degraded, numb, and shocked” by the way Mr. Reed responded to her concerns about waste profiling and then her queries about why he had hung up on her. As to the October 28, 2014, meeting, she accuses him of talking to her “condescendingly and having “condemned me with outbursts of rage and criticism. Unfortunately you did not stop there, but proceeded to vocalize that you wanted me completely removed from anything environmentally related. You explained that the reason for removing all of the tasks I was hired to perform is because I disgust you with lack of intellect, understanding of simple environmental principles, and am too slow.” (RX 26, p. 1.) Regarding enviroLIS, Complainant states that she is being isolated and humiliated and takes umbrage at Mr. Reed’s preference for a “temporary admin.” Complainant recalls that Ms. Waller asked Mr. Reed to calm down and then directed him to guide Complainant through the enviroLIS project, which Mr. Reed refused to do. Complainant adds, “I wanted to communicate to you that treating humans like they are physically/mentally disabled and incompetent is a horrific act.” (*Id.*)

In the rebuttal memo, Complainant states that the problem is the enviroLIS program and she had proven this with evidence, but Mr. Reed refused to look at it “and continued on your rant

¹⁰ The same chain of emails to this point is included as RX 65.

that I was the problem.” She relates that she told Mr. Reed that if he wouldn’t listen to new facts and data then she wouldn’t ever be able to convince him, to which he responded, “You are right, there is NOTHING you can do or show me that will allow me to change my mind and perception about you, nothing!” (*Id.* at 2 (emphasis in original).) Complainant’s recollection of the resolution is that Mr. Reed was intent on dismissing her but Ms. Waller intervened and convinced him to give her until the end of the year to finish the enviroLIS project. (*Id.*) But then he would not send her examples of deficiencies, so in the next week she couldn’t make progress. She relates that she requested the November 6, 2014, meeting at which she was surprisingly put on the PIP. Complainant accuses Mr. Reed of refusing to listen to her concerns about the problems with enviroLIS and forcing her to sign the PIP against her will. She related that she had been slow to return Mr. Reed’s calls because “I do not anticipate speaking with individuals who create an austere environment, retaliate against me for going to HR to intervene...and consistently speak to me condescendingly to ensure superiority.” (*Id.*)

Complainant next states that Mr. Reed had spoken to her in a disrespectful tone and created an uncomfortable office environment, as well as humiliating her in a way that created a hostile work environment. Further, she relates that she had since talked with Mr. Carlson about the enviroLIS problems and he was “shocked” and discovered the same problems on his computer. She complains that only now was Mr. Reed looking into the concerns, whereas she had been raising them since July. She concludes “To date, enviroLIS is still not fully operable, and as a result of the ongoing issues with enviroLIS losing data, meeting the December 31st deadline will be a long stretch. I am going to have to review all the facility locations again, and correct them when enviroLIS does begin to function properly. Unfortunately, meeting the December 31st deadline now seems very unrealistic.” (*Id.* at 3.) Mr. Reed denied that the quotes attributed to him were accurate. (HT, pp. 204-07.) Ms. Waller testified that this rebuttal was an inaccurate rendition of what had occurred. The message of the meeting was that Complainant was expected to improve her performance, not that she couldn’t do so. (*Id.* at 595-98.) She did not tell Complainant that they couldn’t talk about events—rather she indicated that the purpose of the meeting was just to discuss the PIP. This is a normal message to convey at meetings where an employee is put on a PIP. (*Id.* at 598.) She also found the reference to inaccessible databases unreasonable—if an employee is inhibited for months from doing their job because of lack of access, it is expected that they raise the issue and continue to do so. (*Id.* at 599-600.)

Also on November 12, 2014, Complainant had corresponded with Chance Allen, the VP GM in the district including San Antonio, sending her regrets for being unable to attend a charity event the next weekend. (RX 95, p. 3.) Mr. Allen expressed his disappointment but thanked her for the support. (*Id.*) Complainant then replied stating that

In case anything happens, I wanted to tell you how thankful I am for the opportunity to work alongside you...Unfortunately I will likely not be with Martin Marietta much longer. I recently voiced my concerns regarding some ethical concerns I had, and am being punished for it. I now stay in my office, with the door closed, and Jason has removed me from all environmental tasks which he hired me to do. He has completely isolated me from the team. I have never been so humiliated in my life.

(*Id.* at 2.) Complainant then expressed a belief that she was being retaliated against for raising her concerns in accordance with the Ethics Policy, which she then excerpted. (*Id.* at 1-2.)

Early on November 17, 2014, Complainant sent Mr. Allen an email thanking him for talking to her about the concerns she raised in her earlier email to him. She stated she missed the old Martin Marietta atmosphere and had once hoped to retire from the company, but that Mr. Reed had other plans and she hoped that he never treated someone else like he was treating her. She added that Mr. Reed had told her that he was going to make sure everyone in the San Antonio environmental community “knew how slow and incompetent I was.” She continued

As a result I continue to barricade myself in the office because I worry that others now perceive me the same way he does. He has completely demoted me professionally, stripped me of all environmental responsibilities, and assigned me to enviroLIS to perform data entry only...It's amazing how one person can shred one's dreams and aspirations, tear down over 13 years of confidence gained from my environmental experience, and threaten my future career in environmental as a result of his perception. My work environment has made me so sick, I can't even eat. I am so sick to my stomach about the threat of being terminated every day I come in. As a veteran, I am saddened that I was actually deployed to fight for our freedom to work in a blessed, ethical country where you would not be terminated (or threatened) by your manager over a database that is experiencing technical issues. It is surreal to me that he is able to treat me more inhumane than the third country nationals we supervised in Pakistan.

(RX 95, pp. 1-2.) Complainant then explained that the reason she had missed the charity event was that her children disliked Mr. Reed. (*Id.* at 2.)

Mr. Allen forwarded this message to Ms. Waller later that morning, adding, “[a] majority of the conversation related in this email either did not take place or is false. I am concerned that this employee has an ulterior [sic] motive and is creating context that is make believe and inaccurate. I provided her guidance to meet with you and Rudy. That is all. Most everything else is fabricated. Do we need to offer her assistance through the EAP?” (RX 95, p. 1.) Ms. Waller testified that the events referred to between Complainant and Mr. Reed did not occur. The email from Mr. Allen was disconcerting because it was an instance of another employee reporting that Complainant was portraying events that did not occur. (HT, pp. 652-55.)

Complainant sent Mr. Reed and Ms. Waller a “Weekly enviroLIS Update” on November 17, 2014, copying Mr. Whitt and several others. She indicated that there were “no changes on enviroLIS to report” and that she was “still experiencing the same issues I have been for months.” She also attached a document with information about one of the locations she needed to review and correct. (RX 28, pp. 3-4; RX 29, p. 10; RX 72, pp. 1-9.) After reviewing the update, Mr. Whitt forwarded the message to Mr. Reed, adding that “I see some things that are definitely something that I can comment on. Give me a call when you can as I do not want to spend time on this if it is not what you want.” (RX 71, p. 1.) Mr. Whitt responded to Complainant the next morning, offering specific comments about the issues raised in the document Complainant had attached and trying to explain why some of the problems may be occurring. (RX 28, pp. 1-3; RX 73, pp. 1-4.)

Complainant replied on the evening of November 19, 2014, copying Mr. Reed, Ms. Waller, Mr. Whitt, two HR employees, and Mr. Allen. In her email, Complainant adds comments/rebuttals to each of Mr. Whitt's suggestions and attaches various screenshots. (RX 29, pp. 1-9.) She concludes by relating that she is in an "extremely difficult" position because she is accused of not following protocols when Mr. Whitt's and Mr. Reed's protocols are different. She complains that she is being disciplined for something that she did not cause. She is trying her best and states that she has been "humiliated, demoted, called incompetent (among other hurtful names which I will never forget and I hope no human will ever have to endure), and working under the pressure of being terminated if not done correctly by December 31st or sooner." She then complains about Mr. Reed hanging up on her, calling her various hurtful names, and not speaking to her first in private. She claims that he said that she was "not an asset to this team and I want you GONE!" (*Id.* at 8-9 (emphasis in original).)

In addition, Complainant wrote that

There are so many great people who work here that I have been fortunate enough to cross paths with and to call friend, and for that....I am thankful. I miss going to company meetings and feeling respected, but I no longer do (as many have been told I don't know how to do environmental & am no longer wanted). I miss reaching out to my colleagues to work on improving areas in environmental, but I am no longer permitted to. For some reason I had this idea that working in the United States would not be as difficult as my deployment to Pakistan (where the Taliban were shooting at us), but I was wrong.

(*Id.* at 9.) Mr. Reed denied that this was an accurate portrayal of the situation. He found it "extremely hurtful" to be likened to a terrorist. (HT, pp. 213-15.) He emailed the other recipients about an hour later, stating "[p]lease do not respond to her email. Address any concerns with Anna or Rudy. (RX 84, p. 1.) The next morning Mr. Whitt responded to Mr. Reed, reporting that he had been planning on contacting Complainant to schedule time so that two of them could be on enviroLIS together and do training. He asked if he should still pursue that plan. (*Id.*) Ms. Waller agreed that Complainant's email was not accurate. (HT, pp. 643-45.)

Complainant sent an email to Lana Armstrong on November 20, 2014, asking that she be given access to a "2013 ENVIRONMENTAL ISSUES – Reports" folder on the shared drive. Complainant stated that she "was hoping the folder may contain similar issues to what I have been experiencing, and aid in our quest to find a solution." Complainant was responding to a group email sent by Ms. Armstrong on January 24, 2014, which made reference to the folder. (CX 27, pp. 122-23.) Ms. Armstrong forwarded the message to Mr. Whitt and Mr. Reed the next morning without comment. Mr. Reed replied, copying Ms. Waller, instructing Ms. Armstrong that he, Mr. Whitt, and Ms. Waller had talked that Complainant should be told that none of the items associated with enviroLIS would be in the folder. He added that Mr. Whitt might consider limiting access to himself alone. (*Id.* at 122.) Mr. Whitt replied, "[c]ome to think of it, you know there is a world on [sic] information in our Environmental Files folder, not just this quarterly report. If we are really concerned about her getting in here, then it would seem to me that access to the entire U:Drive should be the issue." (*Id.*) Mr. Reed then forwarded the message to Ms. Waller. (*Id.*) Later on November 21, 2014, Ms. Armstrong sent Mr. Reed a pdf chart containing information on all of Complainant's logins to enviroLIS to date. (*See* CX 25.)

Mr. Reed maintained that he hadn't requested this information and wasn't sure why it was sent. He didn't ask for it, didn't review it, and didn't understand its relevance. (HT, pp. 46, 242.)

Complainant testified that she was told to seek access to the folder by another employee, who told her it had information about enviroLIS and problems it had from the beginning. She thought it might have some solutions to the problems she was having. (HT, pp. 358-61.) Mr. Reed explained that the folder that Complainant was seeking access to contains reports and information that are given to the Board of Directors and would include things beyond environmental reports. The request got people at headquarters in Raleigh talking enough that they contacted him about it—"access to that [folder] is meant to be pretty tight." (HT, pp. 46-47.) There was nothing in that folder that would have been appropriate to upload to enviroLIS. (*Id.* at 47-48, 226.) He wasn't sure who did and did not have access to the folder. (*Id.* at 56-57.) At this point, since Complainant was on a PIP, it was standard practice to copy HR on all of the email correspondence. (*Id.* at 58-59.) The concern for Mr. Whitt was that items in the folder could have a material impact on the company and it didn't make sense for Complainant, given that her job was to complete the enviroLIS project, to be using or trying to get into that folder. The report is restricted to senior level employees only. (CX 39, pp. 141-43, 149-51.)

Jodi Patterson of TCEQ contacted Mr. Carlson on November 18, 2014, requesting the 30-day spill report on the Beckmann Quarry spill. (RX 36, p. 9.) He replied shortly thereafter, attaching the report and explaining that they had contracted Alamo1, which had analyzed and profiled the waste for disposal. He indicated that the disposal was underway and would likely be completed the next morning. (*Id.*) TCEQ issued the Investigation Report for the Carthage spill on November 25, 2014. The alleged violations were that Martin Marietta had failed to complete the proper characterization of the waste and that it had failed to prevent the discharge of the waste into the unlined cement heel pit. Both had been resolved, the first by providing the profile to TCEQ on October 27, 2014, and the second by completing the clean-up and proper disposal of the waste. (RX 37, pp. 1, 3, 8-9.; RX 60, pp. 1-2.)

At 5:00 p.m. on November 26, 2014, Complainant sent Mr. Reed an update:

This e-mail is difficult for me to compose, because I do both love and need my job. As I mentioned previously, I do respectfully believe that the [PIP] I have been put on is in retaliation for my not going along with what I believe to be illegal. Now, I am extremely worried because I believe that I am being prevented from doing my job, and thus complying with this plan, by not being providing [sic] the information that I need to comply. I am being shut out in retaliation to address [sic] what I believe is right and legal. If you could please make sure that this does not happen anymore, I would appreciate it. All I am seeking is the ability to do my job as well as possible.

(CX 28, p. 125.) Complainant's signature now listed her title as "enviroLIS Administrative Assistant." (*Id.*) Previously her signature listed her title as "Senior Environmental Engineer." (*See, e.g.* CX 16, p. 55.) She claimed that at this point she believed that she had been demoted because of the concerns she had raised about the waste profiles. (HT, pp. 376-77.)

At 7:14 p.m., Mr. Reed forwarded the email to Ms. Waller, stating, “[p]lease contact Rudy and corporate Monday. I’m done with these weekly emails.” (CX 28, p. 125.) Ms. Waller replied the next morning stating that she would discuss it but that they would need to continue meeting with Complainant as planned. (*Id.*) Mr. Reed was “very concerned” at this point because Complainant was not providing the sort of weekly progress updates that were specified in the PIP. (HT, pp. 59-60.) He was fed up at this point with misleading communications from Complainant. (*Id.* at 61.) Complainant was never told to cease the updates so she kept sending them, describing them as updates about the current status of the project as well as the continuing issues she was having with enviroLIS. (HT, pp. 379-80.) Ms. Waller remembered receiving a great deal of emails from Complainant, but not any that contained the sort of progress update that was expected under the PIP. (*Id.* at 583-84.) The reference to meeting as planned meant that they needed to continue to follow the PIP and meet with Complainant at the end. (*Id.* at 621.)

L. Events of December 2014

On December 1, 2014, Complainant emailed Ms. Attaway at Republic Services asking that any documents she signed related to the Carthage spill be voided and re-submitted to Mr. Carlson for signature, since she had been removed from the project. (RX 112, ex. 104.) Complainant’s next update to Mr. Reed and Ms. Waller also came on December 1, 2014. She indicated that she was populating enviroLIS with the documents she had access to, but was having difficulty locating some. She asked who she should speak to about some of the permits. (RX 30, p. 1.) Mr. Reed replied the next morning indicating where the scanned permits might be and instructing Complainant that the other permits might be in some filing cabinets or in Mr. Carlson’s office. He also directed her to other employees who might have the permits. Finally, he asked that Complainant let him “know specifically where we are with populating the enviroLIS system.” (*Id.*; *see also* HT, pp. 203-04.) The record does not contain a response.

Complainant testified that she sought the documents from Mr. Reed because she needed them and was hoping to expedite the process. There were 3-4 sets of 5-drawer filing cabinets in the hallway plus the material in Mr. Carlson’s office, which she didn’t always have access to. They weren’t all organized so it would take her a long time to find some of the documents. (HT, pp. 272-74.) Sometimes doing the research to find the documents for a location would take her “hours or days.” Many of the permits weren’t in the shared drive. (*Id.* at 283-84.) It wasn’t always clear to her what documents she had to upload into enviroLIS and she testified that she never got proper clarification from Mr. Reed and Mr. Whitt. (*Id.* at 284-85.) She believed that there were conflicts between instructions she did receive and the Data Guide she was referred to. (*Id.* at 285-86.) In this time frame, she also sent a spreadsheet of enviroLIS problems to Mr. Whitt in order to convince him that there were widespread problems with the program. (*Id.* at 274-77.)

In the early morning hours of December 5, 2014, Complainant submitted an online report to TCEQ targeting Martin Marietta.¹¹ The problem was that “[m]any locations are missing the following: industrial & hazardous waste training, profiling, labeling, spill sampling and reporting EPA and TCEQ specific regulations. They are also missing: PWS permits, OSSF permits, updated WPAPs to reflect septic plan, PSTs, and all respective sampling, testing, and reporting

¹¹ The printout does not indicate who is being reported, but in context it is Martin Marietta. (RX 35, p. 1.)

requirements.” This was occurring in the “San Antonio area and possibly abroad; too many to list” and was caused by “[s]enior leadership.” (RX 35, p. 1.) TCEQ talked to her on the phone and narrowed her complaint to the Beckmann spill. (HT, pp. 495-96.) TCEQ eventually determined that there were no violations. (*Id.* at 498-501.) Complainant, however, disagreed with their conclusions and believed that there were a number of problems with the way Martin Marietta and Alamo1 responded. (*Id.* at 518-19.)

In the context of another text conversation, on December 15, 2014, Complainant asked Ms. Andoe about what happened with the Carthage spill. Ms. Andoe informed her that it had gone to a landfill but that TECQ was going to issue “a NOV” because it had taken so long and they hadn’t been able to immediately classify the waste. She asked Complainant if she wanted any of the files. Complaint stated that she would like the files and asked if Martin Marietta could contest the violation. Ms. Andoe sent the files and indicated that the decision about contesting the technical violation was up to Mr. Reed. (RX 63, pp. 1-2.)

Complainant emailed Ms. Waller on the afternoon of December 15, 2014, asking for a copy of her personnel file. (RX 31, p. 3.) Ms. Waller replied about 25 minutes later stating that company policy had not changed since her last request and that Martin Marietta did not release full personnel files to employees. (*Id.* at 2.) Complaint responded shortly thereafter, asking whether an HR policy on oral warnings was still current and whether her PIP had been her oral warning under that policy. (*Id.* at 1-2.) Later that afternoon Ms. Waller replied that the PIP was a written warning that could lead to more serious action, including termination. She enclosed a copy of the PIP. (*Id.* at 1; *see also* HT, pp. 629-31.) Ms. Waller was concerned that Complainant was becoming distracted and not focusing on actually improving her performance. (HT, p. 631.) She explained that the written policies Complainant referred to pertain to hourly employees but that there are no written policies for discipline of salaried employees. PIPs are generally used only for salaried employees, like Complainant. (*Id.* at 674.)

The next morning, December 16, 2014, Ms. Waller emailed Complainant stating, “I understand that you recently requested some documents related to Carthage waste disposal from earlier in the year. I am not sure how this relates to your EnviroLIS project. I wanted to emphasize the importance for you to focus your efforts on this project and the deadline that is upcoming per your PIP.” (RX 32, p. 1; RX 94, p. 1.) Ms. Waller wasn’t sure where the report that Complainant was seeking these documents came from, but thought it might have been Mr. Reed. (HT, pp. 664-65.) Complainant replied almost immediately, stating that she had requested the copy just for her records. (RX 94, p. 1.) Also on December 16th, Ms. Andoe forwarded her emails with Complainant to Mr. Carlson, adding that she had also sent the Carthage files to Complainant. Mr. Carlson forwarded the messages to Ms. Waller. (RX 63, p. 1.) She didn’t remember talking to Mr. Carlson about the email and wasn’t sure why he sent it to her. She does, however, receive emails of this sort, reporting conversations between employees, on an occasional basis simply as part of working in HR. (*Id.* at 666-68.)

The record also contains an email from Mr. Whitt to Ms. Waller on December 16, 2014. Mr. Whitt reports that he had asked the Southeast division how much time their temporary worker spent on the enviroLIS population project, but that they could not quantify it since the temp had a variety of duties and was no longer working for Martin Marietta. (RX 75, p. 1.) Mr. Reed emailed Complainant on the afternoon of December 17, 2014, copying Ms. Waller,

responding to a query he had received about what he wanted in her weekly updates. He stated that he wanted “which sites are complete, how many you have remaining and if you are experiencing any issue [sic].” (RX 33, p. 1.) Complainant replied a few minutes later, thanking him and simply referencing another email she had sent about the weekly updates. (*Id.*)

On December 17, 2014, Mr. Carlson sent Ms. Waller a copy of an instant message conversation between Complainant and Ms. Andoe between December 15, 2014, and December 17, 2014. In the conversation, Complainant indicated that Mr. Reed was terminating her and that he had limited her to data entry, calling her “incompetent, dumb, useless, and worthless,” in front of the HR director, who did nothing. Ms. Andoe indicated that no one had told her anything. Complainant stated that she had told HR that “women don’t have equal opportunities in our dept. and it led to a disciplinary action for bring it up. The EEO contact I spoke to said I just need one more female to come forward with me to make a case and remain protected from retaliation. Would you be willing to discuss it with EEOC?” Ms. Andoe did not reply immediately. Complainant then wrote, “Do it for my kids!” and attached a picture of her family. Ms. Andoe said that she needed “to think on this,” and then asked whether “Sonya” would be willing to talk with them. Complainant indicated that she would not, and neither would “Lea” but that “[i]t would be best stand united by going to EEOC...before you are the only one left.” On December 16, 2014, Complainant indicated that she had gotten into trouble for emailing Ms. Andoe about the Carthage Spill. The evening she asked whether HR had contacted Ms. Andoe. On December 17, 2014, Complainant sent a message asking if Ms. Andoe had received the prior messages. (CX 29, pp. 126-27; *see also* RX 64, p. 1.)

Mr. Carlson explained that Ms. Andoe had come to him because she was uncomfortable and he contacted Mr. Reed and Ms. Waller. He was told to forward correspondence to Ms. Waller, so he did. (RX 112, pp. 122-24, 175-76.) Mr. Reed told Mr. Carlson to send the concerns to HR and leave him (Mr. Reed) out of the chain. (HT, pp. 53-56.) Complainant recalled the conversation and that this was the only time she asked Ms. Andoe to go to EEOC with her, but she also thought that the conversation wasn’t reproduced in full. (*Id.* at 357-58.) Mr. Carlson testified that at some point in this period, he was instructed to forward correspondence from Complainant to Ms. Waller in HR. He also met with Ms. Waller at some point. (RX 112, pp. 121-22.) Ms. Waller related that no prior issues had been raised to HR and that the events described concerning Mr. Reed and the HR director did not occur. (HT, pp. 655-58.) Ms. Waller remembered talking to Mr. Carlson about this email. He reported that Ms. Andoe had come to him with the information, and she told him to send it to her. It was brought to her attention because it concerned potential discrimination and thus was pertinent to HR. She would have discussed it with Mr. Sanchez. Ms. Waller averred that there was nothing improper with Complainant discussing gender issues or her employment with a co-worker. (*Id.* at 669-70.)

Complainant sent Ms. Waller a message on the afternoon of December 17, 2014, copying Mr. Reed, thanking her for the “impromptu meeting” that morning about the PIP. Complainant stated that Ms. Waller had informed her that due to hectic schedules, Ms. Waller and Mr. Reed had been unable to meet regularly with Complainant as specified in the PIP. Complainant then provided a bullet point summary list of points she believed they had discussed, including that her functionality challenges with enviroLIS would be considered in evaluating her performance. She also included a point stating, “[y]ou were informed that I have been making copies of proprietary documents, and inquired if I was using them for my personal purposes. My response to this

remains the same. I also mentioned how my role with enviroLIS requires me to data mine through file cabinets, make copies (for those items unscannable), and scan the copies to upload into enviroLIS.” (CX 30, pp. 128-29.) At this point, Complainant felt like she was being watched. (HT, p. 363.) She remembered that the meeting wasn’t scheduled but that Ms. Waller had just come by her office and asked if they could talk. (*Id.* at 364.) At that point, she hadn’t had any update meetings with Mr. Reed or Mr. Whitt regarding the PIP, as she believed was required of them by the PIP. (*Id.* at 365-66.) She believed there were contradictions between what the Data Guide specified and what Mr. Reed had asked for. (*Id.* at 380-81.) She claimed that Mr. Reed and Mr. Whitt did not respond to her questions and problems. (*Id.* at 383-84.)

Ms. Waller responded on December 18, 2014, again copying Mr. Reed, adding comments on three of the bullet points listed. She disputed that they discussed Complainant’s difficulty locating any particular documents, any vacation or holiday plans, or the fact that Complainant’s employment was at-will and could be terminated even if she met the PIP requirements. (CX 40, pp. 1-2.) Ms. Waller believed that Complainant’s summary was not accurate and she had come to the conclusion that Complainant’s recaps and summaries were generally inaccurate. (HT, pp. 646-48.) She acknowledged asking Complainant if she was copying documents, but testified that Complainant’s report about that request was inaccurate. (HT, pp. 671-74.) Ms. Waller initiated the meeting to check-in with Complainant about the PIP, since the end of the year was approaching. She was going to be going out on maternity leave and wanted to remind Complainant of the end date for the PIP and let her know that someone else would be taking over going forward. (*Id.* at 689-90.) But the meeting was in part initiated because Ms. Waller needed to ask Complainant about taking proprietary documents. (*Id.* at 690.)

By this point, Complainant did not want to be at work and felt like she was being watched and heavily scrutinized. She was afraid of going to the restroom because someone would turn out the lights on her. She wasn’t eating and had lost weight. She was sick and alternatively couldn’t sleep or couldn’t sleep too much. She was “very depressed” and would cry a lot at home. (HT, p. 369.) The relationships with her husband and children deteriorated and they were upset about what was going on at her job. She was afraid for their future and how they could provide for the family. (*Id.* at 369-71.) Her PTSD was worsening. In November she had started seeing a work stress therapist through Martin Marietta’s EAP. (*Id.* at 396-97.)

On December 18, 2014, Mr. Whitt sent an email to Ms. Waller asking for clarification about what she wanted him to do with Complainant on the enviroLIS project. He indicated that he would send an email later that day to Complainant, Mr. Reed, and her providing more instructions on the tasks. But he asked whether she also wanted him to set up some computer time with Complainant so he could watch her work in enviroLIS and observe/help with any problems. He added that he would be willing to come in on one of his days off to do so. (RX 85, pp. 1-2.) Ms. Waller replied later that afternoon stating that it would be “beneficial” to set up time with Complainant. (*Id.* at 1.) Mr. Whitt then sent Complainant an email on the afternoon of December 18, 2014, copying Ms. Waller and Mr. Reed, reflecting that he had been told that he needed to give her more information about what needed to be uploaded into enviroLIS. He stated that the Date Guide addressed this but then added some guidance about the sort of documents they were interested in, roughly “permits that we currently hold that give us the licenses and approvals to operate our facilities” and historical environmental information that is relevant to a specific site.” He expanded on each category. He indicated that he was on vacation

but that they could discuss it in more detail after he returned to the office. (CX 31, pp. 134-35; RX 34, pp. 4-5; RX 58, pp. 5-6; RX 74, pp. 5-6; RX 101, pp. 4-5.) He testified that the same information was available in the Data Guide. (RX 111, pp. 39-40.)

Complainant responded the next afternoon, copying Ms. Waller and Mr. Reed, stating that Mr. Reed had not replied to 2 of her requests for clarification in early November. She also argued that there were some conflicting instructions regarding what was supposed to be uploaded into enviroLIS, referenced her difficulties with the program, and asked for further clarification from Mr. Whitt. (CX 31, pp. 131-33; RX 34, pp. 1-4; RX 58, pp. 2-5; RX 74, pp. 2-5; RX 101, pp. 2-4) Mr. Reed replied on December 19, 2014, stating that he did not recall her request for guidance but that it appeared to have been a month old. He indicated that she should “show initiative” and follow-up if an email is overlooked. (CX 32, p. 136; RX 34, p. 1; RX 191, p. 1.) Mr. Whitt replied later on December 19, 2014, offering some responses but indicating that they would likely have to discuss the matter on the phone with enviroLIS open so that they could talk through everything. He stated that he had planned not to be working during the holidays, but that he could adjust and schedule time to meet with her before the end of the year or the week of New Year’s. (CX 31, p. 131; RX 58, p. 2; RX 74, p. 2.) Complainant replied that she would be out on vacation, but returning on December 29, 2014. (CX 31, p. 130; RX 58, p. 1; RX 74, p. 1.)

M. Respondent’s Termination of Complainant

On January 5, 2015, Mr. Reed, Mr. Whitt, and Ms. Raab had a conference call to review Complainant’s performance under the PIP. In a memorandum summarizing the discussion, they reviewed each of the bullet points regarding EnviroLIS finding that she had audited the 32 locations but had not made all of the corrections or additions to those sites, that she had not scanned and inputted hard copy documents, and that “virtually no progress had been made” on completing the project for the other locations. They noted that Mr. Reed and Mr. Whitt had recently received questions about locations in one of the five districts, and so Complainant may have started with that, but that per Mr. Whitt, “it should not take this long to complete these entries based on what other employees have been able to accomplish.” They further noted that Complainant had “previously agreed with the timetable and reasonableness of the project when she asked for and was given the project.” (CX 33, p. 141; RX 87, p. 1; *see also* RX 111, pp. 60-62 (Mr. Whitt’s testimony regarding progress and termination decision).) Mr. Whitt had re-checked the locations he had audited and determined that some of the corrections had been made, but that some had not. (CX 39, pp. 55-57, 104-05; RX 111, pp. 55-59.)

Regarding the requested weekly updates, they reported that these mostly were complaints about technical issues with enviroLIS. Other users had not had similar problems and she had been provided with technical support, including new equipment. They added that these concerns “were primarily raised” after Complainant was placed on the PIP. (CX 33, pp. 141-42; RX 87, pp. 1-2.) Mr. Reed and Mr. Whitt came to the conclusion that whatever technical issues Complainant was experiencing were the result of incorrectly following the training and the Data Guide. (HT, pp. 89-91.) Next, they determined that Complainant had not provided timely responses to requests for information because Mr. Reed had asked for updates on the number and names of locations completed but had not received them. The review also concluded that Complainant was not championing a positive and comfortable office environment because since the PIP she had been telling people she was not permitted to communicate about company

matters and was spending her days in her office with her door closed. (CX 33, p. 142; RX 87, p. 2.) They recommended termination for failure to comply with the PIP. (CX 33, p. 142; RX 87, p. 2; *see also* HT, pp. 705-16, 720-26 (Ms. Raab's discussion of memorandum).)

Ms. Raab became involved only at the end of December 2014 because Ms. Waller went on maternity leave. She saw the PIP for the first time at that point. (HT, pp. 702-04.) The memorandum recounting the decision was written by Ms. Raab, who also handled the termination in San Antonio. Mr. Reed was in Dallas. Mr. Whitt was involved because he was the corporate environmental person and had all of the information on enviroLIS as well as the perspective on the technological problems. (HT, pp. 112-13, 704-05.) They did not credit Complainant's technical complaints because they were not widespread and couldn't be replicated. From their perspective, Complainant hadn't made progress on any aspect of the project and was claiming that the whole enviroLIS system had become non-functional after the PIP was instituted. (*Id.* at 113-14.) Mr. Reed testified that he had thought in late October that the problems Complainant reported about enviroLIS were a function of the user rather than the program and nothing he learned after that point changed that judgment. Based on Mr. Whitt's report, he concluded that technical difficulties had not prevented Complainant from completing the enviroLIS project. (*Id.* at 164, 167-68, 224.) Ms. Waller remembered having discussions with Mr. Reed about potential enviroLIS problems and stated that those had been investigated with instructions to fix whatever problems there were, but that they determined that the issues were not endemic to enviroLIS. Other employees were able to utilize the program and accomplish the same tasks. (*Id.* at 638-40.) Ms. Raab recalled that based on their discussions, she concluded that Complainant had been offered assistance and the problems she was claiming to encounter could not be replicated, which led to the conclusions that the various technical complaints were excuses for not completing the work. (*Id.* at 711-12.)

The decision to terminate Complainant was a collective decision between Ms. Raab, Mr. Reed, and Mr. Whitt. They concluded that the enviroLIS project had not been completed, that the identified deficiencies in the identified sites had not been redressed, and that Complainant had missed the goal "by a long shot." There was "[n]o appreciable difference in the amount of product in the system." (*Id.* at 220-23.) Ms. Raab explained that throughout the PIP the emphasis was on enviroLIS as Complainant's primary responsibility. The decision to terminate was made "[b]ecause essentially none of the EnviroLIS project which was the primary responsibility was completed." (*Id.* at 715-16.)

Complainant believed that there was no way she could have completed the assignment due to all of the technical problems she encountered with enviroLIS. She thought that some of the sites that were not completed because there were no permits and Martin Marietta was out of compliance. She also referenced different instructions from Mr. Reed and Mr. Whitt and lack of responses to her questions and equerries in her ongoing problems with the enviroLIS program. (HT, pp. 383-87.) She had numerous computer problems at Martin Marietta and was provided with six different computers during her time with the company because issues arose with each of the computers she was given. (*Id.* at 526-27.)

An unsigned document apparently written by Ms. Raab contains meeting notes dated January 7, 2015, regarding the discussion of the PIP plan between Ms. Raab, Jorge Medina, and

Complainant.¹² Per the notes, Ms. Raab informed Complainant that after the review of the PIP, the decision had been made to terminate her, effective immediately. Complainant then acknowledged the decision. Ms. Raab provided some information about the review of the enviroLIS work and then gave her information on the termination of her benefits and COBRA. She then told Complainant that Mr. Medina would take her home, or wherever she was most comfortable with being dropped off. (RX 99, p. 1.) Mr. Schell testified that Martin Marietta “dumped” Complainant at the Wounded Warrior project with her belongings all alone instead of calling him to come pick her up. (HT, pp. 611-12.) Ms. Raab disagreed. She testified that this meeting was the first time she had met Complainant. They reviewed the PIP and then Ms. Raab informed Complainant that she was terminated effectively immediately. They then discussed the logistics of getting Complainant home because Complainant had a company car. She indicated to Complainant that Mr. Medina would take her home, but Complainant asked to be dropped off at what Ms. Raab thought was Mr. Schell’s place of work, and she agreed and instructed Mr. Medina to do so. The meeting ended with Ms. Raab thanking Complainant and Complainant departing with Mr. Medina. (*Id.* at 717-18.)

N. Post-Termination Events

During the course of OSHA’s investigation, questions arose regarding whether the waste at the Beckmann and Carthage spills qualified as hazardous waste under the SWDA. (*See, e.g.*, CX 8, pp. 26-27.) On January 23, 2015, Complainant sent OSHA investigator Hilary Rivera an email following up on a conversation about the issue, arguing that the SWDA applied to both spills. (CX 10, p. 32.) On January 28, 2015, Complainant filed an amended OSHA complaint to include the termination as an adverse action and the prior OSHA complaint and complaints to management as additional protected activities that she contended motivated the adverse action. (CX 1, pp. 1-2.) OSHA dismissed Complainant’s complaint under the SWDA on February 10, 2015, on the grounds that the two spills at issue did not involve hazardous waste as defined by 42 U.S.C. § 6903(5). (CX 8, pp. 26-28.) Complainant appealed OSHA’s findings on March 12, 2015. (CX 6, p. 22.) On March 31, 2015, OSHA issued revised findings dismissing the amended complaint under the SWDA, SDWA, and FWCPA, again because the spills did not involve hazardous waste as defined in the SWDA. (CX 9, pp. 29-31.) Complainant appealed this dismissal on May 8, 2015. (CX 7, pp. 23-24.)

TCEQ produced an Investigation Report on the Beckmann Quarry spill on February 17, 2015. After reviewing the history of the spill, the investigations and waste sampling, TCEQ reported that about 18 inches of impacted material was removed from 0.3 acres and then the area was down-sloped rather than backfilled. The analytic samplings had only produced one reportable result, and that result was below the action level, so no further action was needed. TCEQ concluded that “[a]ccording to documentation provided, the facility took the appropriate

¹² At 9:47 a.m. on January 7, 2015, Complainant emailed Mr. Reed and Mr. Carlson, copying Ms. Raab, Mr. Medina, and herself regarding the Beckmann and Carthage waste profiles. She stated that “as a result of not reaching mutual consensus on the waste profiles’ characterization I proposed for both of these spills; Jason requested that Ryan spearhead this effort, and I solely focus on enviroLIS. Can you please confirm that the profiles I had submitted to Alamo1 and the TSDFs [sic] were **not** used? May I please have a copy of the profiles used so I may place in the respective folder of the shared drive? I would like to have the opportunity to review them to learn how I can improve. Moving forward this will serve as a professional growth opportunity.” (RX 112, ex. 103 (emphasis in original).) The termination must have followed shortly thereafter.

actions to remediate the area and properly dispose of the diesel impacted waste. At this time, no further action is required.” There were no violations related to the spill.¹³ (RX 36, pp. 3-4.)

Complainant received unemployment benefits between January 4, 2015, and at least April 25, 2015. (CX 36, p. 171.) During this period she kept a log of her job search activities. She has also produced logs for 2016. (*Id.* at 167-70, 4636-45; *see also* RX 104.) As of August 2016, Complainant was attending school to facilitate a career change. (CX 36, pp. 4637; *see also* HT, pp. 393-94.) She testified that she changed careers because a recruiter told her that she had been blacklisted. (HT, p. 394.)

The Wounded Warrior Project filed a disability claim with the VA on behalf of the Complainant on January 23, 2015. (RX 91, p. 1.) The claim was based on PTSD and she noted that she had recently been discharged after her manager decided she “was too slow and incompetent to work.” She added that her colleagues taunted her. In addition, she noted that she would catch herself falling asleep and her memory was getting worse. She indicated that these problems seemed to follow her wherever she went, but also that she had been seeing doctors due to the increased stress from work and the hostile work environment. (*Id.* at 4.) In a letter accompany the application, Complainant stated that Martin Marietta had refused to recognize or accommodate her PTSD and that she had been unable to maintain stable employment, despite treatment by her doctors. She reported that she had regressed recently. She also indicated that she had trust issues that had adversely affected her career. (*Id.* at 8.)

On April 27, 2015, the VA issued a Rating Decision finding Complainant entitled to individual unemployability as of January 12, 2015. It found that Complainant’s PTSD disability increased from 50% to 70% effective September 2, 2014, and that the prior disability related to migraine headaches continued to be 50% disability. This produced a combined 90% disability rating.¹⁴ (CX 34, pp. 143, 145-47, 152; *see also* CX 35, pp. 154, 156-58, 160; RX 93, pp. 2-17; RX 109, pp. 1-2; RX 110, pp. 1-14; HT, pp. 509-13, 515-16.) As a later addition to the application, Complainant’s father signed a declaration stating, among other things, that Complainant had missed work often in the past and that she had reported to him that she had sometimes had problems with energy and falling asleep at work, which led her to lose data on projects and not make deadlines. He also stated that her condition had worsened because of the termination from and treatment at Martin Marietta. She told him that sometimes at work she would just go in her office and cry all day. (RX 105, pp. 1-2.)

Complainant stated that her PTSD worsened because of what happened at Martin Marietta and her termination. (HT, pp. 391-93.) Mr. Schell explained that the events had an adverse impact on their family because it emptied Complainant out and made her feel worthless. Her sleep became disjointed and sometimes she would need to sleep for two days straight. (*Id.* at 609-11.) Her depression has worsened and she’s not the same person anymore—she now appears to have been crushed. (*Id.* at 612-13.) The situation has been very hard on the family financially and emotionally. (*Id.* at 613-14.) Since January 12, 2015, the VA has considered Complainant to be temporarily totally disabled due to unemployability. (*Id.* at 506-07.)

¹³ The record also contains a March 17, 2015, investigation report based on a January 6, 2015, inspection at Beckmann Quarry. The violation alleged “[f]ailure to submit and acquire approval of as built engineering plans prior to operating a public water supply.” The recommended action was to produce the plans. (RX 106, pp. 1-3.)

¹⁴ As of December 30, 2014, Complainant had been given an 80% disability rating by the VA. (RX 27, p. 1.)

The record contains a July 15, 2015, email from Mr. Whitt to Mr. Reed that refers to enviroLIS and Complainant. Mr. Whitt states that he had been tasked with uploading the permits in several of the divisions and that he had been able to complete the tasks for uploading 28 permits in the space of 4 hours. (RX 76, p. 1.) Mr. Whitt followed up on July 17, 2015, reporting that he had done 29 permits in just over 2 hours. (RX 77, p. 1.) Together, this was calculated to a rate of 9.4 permits per hour. (RX 78, p. 1.) Mr. Whitt explained that he timed these tasks just to get a better idea of the time involved in what they were asking individuals working on enviroLIS to do. (RX 111, pp. 44-47.) Mr. Reed couldn't remember the exact date that the division was able to finish the enviroLIS project. After they missed the original deadline, the project got combined with the next phase that included an additional 150 sites and it was tackled as one big project. (HT, pp. 74-75.) They also missed the 2015 deadline for the expanded project. There were no consequences for missing the 2014 deadline. (*Id.* at 76-77.)

V. Credibility Determinations

The Administrative Review Board (“ARB”) prefers that ALJs “delineate the specific credibility determinations for each witness,” though it is not required. *Malmanger v. Air Evac EMS, Inc.*, ARB No. 08-071, ALJ No. 2007-AIR-008 (ARB July 2, 2009). The finder of fact is entitled to determine the credibility of witnesses, to weigh evidence, to draw her own inferences from evidence, and is not bound to accept the opinion or theory of any particular witness. *Bank v. Chicago Grain Trimmers Assoc., Inc.*, 390 U.S. 459, 467 (1968), *reh'g denied*, 391 U.S. 929 (1968); *Atlantic Marine, Inc. v. Bruce*, 661 F.2d 898, 900 (5th Cir. 1981). In weighing testimony, an ALJ may consider the relationship of the witnesses to the parties, the witnesses' interest in the outcome, demeanor while testifying, and opportunity to observe or acquire knowledge about the subject matter at issue. An ALJ may also consider the extent to which the testimony was supported or contradicted by other credible evidence. *Gary v. Chautauqua Airlines*, ARB No. 04-112, ALJ No. 2003-AIR-038, slip op. at 4 (ARB Jan. 31, 2006).

Having heard the witnesses' testimony, I have been able to observe their behavior, bearing, manner, and appearance. The Ninth Circuit has explained that credibility “involves more than demeanor. It apprehends the over-all evaluation of testimony in the light of its rationality or internal consistency and the manner in which it hangs together with other evidence.” *Carbo v. U.S.*, 314 F.2d 718, 749 (9th Cir. 1963); *see also Indiana Metal Prods. v. Nat'l Labor Relations Bd.*, 442 F.2d 46, 52 (7th Cir. 1971). I have based my credibility findings on a review of the entire record, according due regard to the demeanor of witnesses who testified before me, the logic of probability, and “the test of plausibility,” in light the record as a whole. *Indiana Metal*, 442 F.2d at 52.

A. *Anna Waller*

Anna Waller is a human resources and safety manager in Martin Marietta's Southwest Division. She works out of San Antonio and manages a staff of 7-8. She has worked in the HR function with 15 years and known Mr. Reed for 9 of those years. (HT, pp. 554-55.) I found Ms. Waller generally credible and give her testimony weight. This is limited in two respects. First, often during examination Ms. Waller was limited to simply affirming or denying representations of counsel, rather than testifying in her own words and giving her own explanations of events. In

these instances, I credit Ms. Waller's general response, but I do not give weight to the particular way that counsel wished to characterize, or color, an email or a situation.

Second, Ms. Waller is not an expert on enviroLIS or environmental issues generally and in many ways was reliant on Mr. Reed and others for understanding Complainant's performance problems. Thus, in those areas I give her testimony less weight. What Ms. Waller is able to add is another, more independent perspective on the course of events between Mr. Reed's concerns about Complainant's performance in mid to late October 2014 and the end of December 2014, just before Complainant's termination. Ms. Waller was generally in San Antonio, met with Complainant, and was included on or sent most of the email correspondence. She is thus in a good position to state whether Complainant's rendition of events was reliable. Though I recognize that Ms. Waller is an employee of Respondent and thus has some interest in the outcome of this case, her interest is not personal—there has been no allegation that she acted improperly.¹⁵ In fact, Ms. Waller didn't even appear to fully understand what the protected activity was, let alone act in response to it. Thus, she is the closest thing available to a neutral observer regarding the events at Martin Marietta in the last three months of 2014.

Complainant points to several credibility challenges to Ms. Waller. None are convincing. First, Complainant highlights an apparent inconsistency in Ms. Waller's testimony about other whistleblower complaints—at her deposition Ms. Waller said she did not know of any others while at the hearing Ms. Waller testified that she didn't know one way or the other because it is a big company. (CPB, p. 11.) There is no inconsistency or even tension here—Ms. Waller doesn't know of any whistleblower complaints but can't rule them out, since she isn't aware of everything that happens in the company. These are sensible, plausible responses. Complainant also references Ms. Waller's earlier letter of recommendation and subsequent change of opinion about Complainant's integrity by the time of the hearing. (*Id.* at 13.) This too is a non-issue. Events transpired and reflecting back on them, Ms. Waller changed her opinion.

Next, Complainant raises questions about Ms. Waller's testimony that various emails were incorrect on the grounds that when Ms. Waller sent a contemporary email making clarifications and corrections, she did not reference everything she later said was inaccurate. (*Id.* at 13-14.) I find this unimpressive. Ms. Waller offered a rather stern correction of Complainant's representations, confirming one thing and rejecting others. That she did not go through every single point made by Complainant to dispute the validity does not serve as a concession that what Complainant represented was true—this was not litigation, she was not obliged to respond at all. Finally, Claimant argues that Ms. Waller changed her testimony about whether she talked to Mr. Carlson about a particular email. (CPB, p. 25.) There was no inconsistency here. On the surface it looks like MS. Waller gave two different answers, but in context she believed she was talking about two different emails, something that she clarified at the hearing. (*See* HT 667-69.)

¹⁵ The closest allegation in the record comes in the text conversation between Ms. Andoe and Complainant, where Ms. Waller, described as the HR Director, is alleged to have watched silently as Mr. Reed verbally assaulted Complainant. (*See* CX 29, pp. 126-27.) This allegation is otherwise missing. Usually Ms. Waller is portrayed as the reasonable defender of Complainant or a witness to Mr. Reed's abuse. It is somewhat conspicuous that this allegation comes in the context of trying to convince Ms. Andoe to bypass HR and talk to EEOC.

B. Jill Raab

Jill Raab is Vice-President Human Resources at Martin Marietta, overseeing the Cement Division and the Southwest Division. She started in this position in January 2015. Before then, she was Director of Training and Development. (HT, pp. 700-01.) She became involved in this case in late December 2014 when Ms. Waller went out on maternity leave. (*Id.* at 702.) I found Ms. Raab credible and give her testimony weight on matters that were within her personal knowledge. However, since Ms. Raab only became involved in Complainant's employment at the very end of December 2014, this knowledge is quite limited. In particular, Ms. Raab was reliant almost entirely on Mr. Reed and Mr. Whitt as her basis for evaluating Complainant's performance and compliance with the PIP. Her views are thus dependent on their credibility.

C. Steve Whitt

Steve Whitt is the Director of Environmental Services at Martin Marietta. He worked from corporate headquarters in Raleigh and was the coordinator of the enviroLIS project. (RX 111, pp. 4-6.) He has a BS in Civil Engineering and has worked at Martin Marietta full-time for 30 years. (*Id.* at 62-63.) He never met Complainant in person. (*Id.* at 65.) Mr. Whitt did not testify at the hearing, but extended excerpts of his deposition were submitted by both parties.

Based on his deposition and the email correspondence in the record involving Mr. Whitt, I find him generally credible and give his testimony weight, especially in relation to enviroLIS. Mr. Whitt is the subject-matter expert on the program at Martin Marietta and is best positioned to speak to what the enviroLIS project required and what problems Complainant may, or may not have, encountered. Mr. Whitt had some awareness of the protected activity in that he was aware of at least the Beckmann spill, but he was quite detached from the process of profiling and disposing of the waste. At most, he answered Mr. Reed's question about profiling diesel waste. The correspondence shows that Mr. Whitt was very friendly in his approach to Complainant and was attempting to assist her when he could, including offering to give up vacation time between Christmas and New Year's so that they could work together. (*E.g.* CX 31.)

Mr. Whitt has less knowledge of events in San Antonio or the Southwest Division and thus cannot speak reliably about the course of events under the PIP or the detailed chain of events leading up to and during the PIP. But I do generally credit his testimony about enviroLIS and his statements as to his motivations for making the recommendations that he did.

D. Ryan Carlson

Ryan Carlson is another environmental employee in San Antonio (an Environmental Manager) and had an office next to Complainant. He worked on the Carthage and Beckmann spills and delegated some of the work to Complainant. He did not testify at the hearing, but some portions of his deposition are part of the record. Mr. Carlson's knowledge of the events in this case was limited, but I do credit his testimony in explaining events surrounding the Beckmann and Carthage spills and in regards to the later emails and events in which he was involved. His testimony is limited because he was not in an HR or supervisory role and so was not involved with any of the decisions at issue in this case. He appears to not have known about the course of events at the time, though I conclude that he must have had an idea that matters

were progressing towards termination given both his observations of Complainant's performance and the email correspondence he was a part of. Nonetheless, he cannot speak to the reasons for any particular action. He can report credibly what happened in the course of doing his job.

E. Marc Schell

Marc Shell is Complainant's husband. He is a firefighter with the City of San Antonio and a member of the Air Force Reserves. (HT, p. 602.) He testified on the third day of the hearing. I found his testimony convincing, at least as to the points where he had some personal knowledge independent of Complainant's reports. These involve his understanding of the phone call on October 14, 2014, and the deleterious affects the events at Martin Marietta had on Complainant and their family. I also credit his statements about Complainant's initial period at Martin Marietta, since they are consistent with the record as a whole.

However, I do not give weight to Mr. Schell's general perspective on *why* events unfolded the way they did at Martin Marietta. He was in no position to assess what was going on or why Mr. Reed and the others were doing the things they did. In these matters, he was entirely dependent on Complainant and her perspective on events. Similarly, I do not credit Mr. Schell's testimony about the circumstances of Complainant's final day of work and Martin Marietta's actions. He could credibly testify about where he picked Complainant up, but he cannot provide credible evidence about why Complainant was dropped off where she was or why Martin Marietta was taking various actions. Thus, I give weight to Mr. Schell's testimony, but only in the very limited scope of his personal knowledge.

F. Jason Reed

Jason Reed is the Director of Natural Resources for the Southwest Division of Martin Marietta. He has been with the company since 2002. Mr. Reed supervises about 20 employees and was Complainant's supervisor. He does not hold any environmental certifications. (HT, pp. 32-34.) Ms. Waller testified that Mr. Reed is "an ethical supervisor, somebody who goes by the book, who is going to follow the rules, who is going to just care about his employees." (HT, 554-55; *see also id.* at 701 (similar descriptions from Ms. Raab).) He testified on the first day of the hearing. I found his testimony to be mostly credible and I give his statements some weight, especially when they are confirmed by other witnesses or the documentary record.¹⁶ In two instances, however, I find that Mr. Reed's account is not entirely reliable.

First, I find that Mr. Reed minimized his temper and occasions where he became upset with Complainant. To be clear: I do *not* find that Mr. Reed said all, or even most, of the insulting things that Complainant, at one point or another, attributed to him. These attributions were over the top, grew over time, and are not confirmed by or consistent with the other evidence. But I do find that he lost his temper with Complainant on several occasions, in particular on the night of October 14, 2014, and during the meeting on October 28, 2014. Mr.

¹⁶ At one point Complainant argues that Mr. Reed's "memory problems" related to what Complainant complained about on October 14, 2014, "suggest he was changing his answer based on the needs of the moment." (CPB, p. 20.) It is unclear whether Complainant is alleging dishonesty or simply poor memory. Neither is convincing—Mr. Reed wasn't always able to keep up with what Complainant was alleging when. Given that her allegations have developed and shifted over time, this is not a credibility problem for Mr. Reed.

Schell's testimony about the call on October 14, 2014, was convincing and would indicate that Mr. Reed was upset and yelled. I do not find Complainant's account of *what* he said credible, but neither do I accept Mr. Reed's insinuation that he was not angry and/or was not expressing his anger. As for the October 28, 2014, meeting, Mr. Reed and Ms. Waller have described the tone as expressing "frustration" with a somewhat raised voice. I credit their testimony that Mr. Reed did not say the various things Complainant later attributed to him, but I do find that, to put it in plain English, Mr. Reed was angry at Complainant and yelled at her. This finding has very limited importance. The Environmental Acts do not require that a boss never lose his or her temper or that a workplace be a friendly, positive experience for everyone all of the time. They only require that protected activity not motivate adverse actions. Thus, below it will be important to discern *why* Mr. Reed was upset.

Second, I find that Mr. Reed overly minimized his reaction to the Beckmann spill and disputes over its proper handling. His testimony gave the impression that it simply did not matter to him either at the time or thereafter. I credit that the Beckmann spill was a blip on his radar and soon disappeared from focus. That conclusion is supported by the documentary record, which doesn't ever show him referring to the spill after the short period of time in October when he was required to deal with it. But I also find that Mr. Reed was quite bothered by the way that Complainant handled the spill and his degree of involvement. He admitted as much and the rest of the evidence shows his dissatisfaction. Hence, I reject the contention that the events surrounding the Beckmann spill had no bearing on the subsequent events. Below, I will need to determine what Mr. Reed was responding to and what impact it had.

G. Complainant

I find Complainant for the most part genuine, but in many instances not accurate. In particular, I credit that Complainant's unfolding and developing narrative of her time at Martin Marietta generally reflects her honest perception at a given time. But I also find that her perception, especially as her employment situation became more stressful, did not accurately reflect the reality of what others were doing or why they were doing it.

Respondent contends that Complainant has an "utter lack of credibility," pointing to comments from prior employers as well as 15 occasions on which it claims Complainant was impeached during cross-examination. (RPB, p. 26.) They also take issues with Complainant's corrections to her deposition, which were not submitted into evidence but were described as roughly 100 pages of re-written deposition testimony. Rather than rescuing her credibility by removing inconsistencies, Respondent avers that the corrected deposition is indicative of Complainant's credibility problems and tendency to give multiple, inconsistent versions. (*Id.* at 26-27.) Respondent also point out that multiple other employees—Ms. Waller, Mr. Allen, and Mr. Carlson—all reported that Complainant misrepresented their interactions. (*Id.* at 27.)

Moreover Respondent points out that Complainant's allegations about Xenco's lab certification were a deliberate falsehood—she had been informed that the certification was current by TCEQ *before* she made the certification an issue with Mr. Reed and others. (*Id.* at 19-20, 28.) It further contends that her concerns about the disposal of waste were fabricated because no one else shared them. In addition, it avers that the reports of missing data in enviroLIS were a deliberate fabrication given her father's declaration that she told him she would fall asleep at

work, which caused lost data. (*Id.* at 28.) Complainant responds that the statement in question is from her father, not her, and does not speak with any specificity about which deadlines and lost data are at issue. (CRB, pp. 4-5.)

Some of these challenges are overstated. The other professionals did not agree with Complainant's concerns about the disposal of waste, but that does not imply that those concerns were fabricated. Further, simply because Complainant at some point told her father that she would lose data because she fell asleep does not mean that her reports of losing data were fabricated—assuming that what her father reported is true, Complainant was likely confused about why the data was disappearing and only gained a better perspective later. That evidence does call the reported problems with enviroLIS into question and raises concerns about Complainant's *accuracy* in her reports, but they do not imply deliberate falsehoods on her part when she reported problems. She may well have been stressed and confused.

In their reply brief, Respondent also focuses on the text conversation with Ms. Andoe, arguing that it shows Complainant lying to try to advance another claim against Martin Marietta and then when that failed trying to manipulate Ms. Andoe by referencing her children and attaching a picture. (RRB, pp. 4-5.) I agree that this behavior was deceptive and manipulative. There are other instances of similar behavior. The letter to the ethics committee, and forwarded to OSHA, is an instance where over-the-top rhetoric and appeals to emotion, and her veteran status, are used in an attempt to gain advantage. (*See* CX 21.) The continued reference to Xenco's lab certification after Complainant knew it was valid was also deceptive—Complainant had other concerns and clearly wanted there to be a problem, so she kept referencing a potential deficiency even after she knew that she was incorrect. That is a serious credibility problem.

I find that Complainant's email accounts of various events cannot be credited. They change over time—the same meetings get reported as more and more outrageously insulting, with increasingly inappropriate comments attributed to Mr. Reed. Respondent rightly notes that the Beckmann spill is absent from Complainant's first recap of the October 28, 2014, meeting. (RPB, p. 33; RX 21, p.1.) Over time, the focus shifts and Mr. Reed's insults grow in their severity. Mr. Reed may have a temper, but he is not an ogre or super-villain. Ms. Waller contradicted each of Complainant's various over-the-top accounts of events and those accounts are not consistent with Mr. Reed's behavior as reflected in the statements that come from him, rather than what Complainant attributes to him. At least one email portrays Mr. Reed as a very caring and concerned supervisor, seeking to reassure Complainant after she went to him with anonymous reports that she was underperforming. (*See* RX 13, p. 1.) The *worst* that Mr. Reed's emails get is the October 14, 2014, "let's get this done email," that is at most a mild rebuke and far from inappropriate in context. (RX 50, p. 1.) I countenance that people may be more direct verbally than in email, but Complainant's ever-darkening portrait of Mr. Reed almost portrays him as having a Dr. Jekyll and Mr. Hyde personality. This is highly implausible and inconsistent with Mr. Reed's manner at the hearing and the other evidence. Through the course of this claim, Complainant has attributed a large number of very hurtful statements to Mr. Reed. But most of these descriptions appear to come from Complainant herself, reflecting her perception more than his.

For example, Mr. Reed mentioned that a temporary administrative assistant was able to complete the enviroLIS project in the Southeast Division. The point he appears to have been

making is that Complainant, who was much more qualified, should have been able to do the same in the Southwest Division. (HT, pp. 72-74.) This may not have been a flattering query, but it was a reasonable query to make. Complainant's perception, however, was that Mr. Reed told her she was incompetent and not even capable of administrative work and that he wished he could replace her with a temporary administrative assistant. It grew in the telling, to the point where Mr. Reed was reported to have looked at Complainant with disgust and treated her like a mentally disabled person, to have condemned her and attempted to replace her with a temporary administrative worker. (See RX 21, p. 1; CX 23, p. 68; CX 21, pp. 63-66; RX 26, p. 1.)

It is manifest that when Mr. Reed said something, Complainant often heard another. She tended to take criticism to an extreme, to exaggerate the negative reflections on herself and then act on those perceptions. As another example, the PIP asked that Complainant focus on enviroLIS and included a line about refraining from gossip. (CX 24, p. 70; RX 23, p. 2.) Complainant took this to mean that Mr. Reed had told her not to speak to anyone else on the team. In response, she started closing her door so that she wouldn't be perceived to be doing anything except enviroLIS work. (HT, pp. 352-53.) This behavior was self-defeating, since Complainant was now closeting and isolating herself, which raised some additional concerns cited in the PIP review. (See CX 33, p. 142; RX 87, p. 2.) The actual instructions did not tell Complainant to not talk to anyone—but the actual instructions taken as a personal attack and taken to an extreme could be read that way. That's what Complainant apparently did.

When there is independent evidence about what happened on a particular occasion, it tends to contradict Complainant's account. Mr. Reed and Ms. Waller disagreed with Complainant's renditions of events, and were consistent in their alternative accounts. Mr. Carlson, who was not aware of the PIP or overall situation, immediately disputed her account of his alleged problems with enviroLIS. (RX 62, pp. 1-6.) Mr. Allen, who has no connection with the sequence of events at issue except that Complainant reached out to him, immediately disputed Complainant's account of their interaction, independently forwarding it to Ms. Waller, indicating that it was almost entirely incorrect, and expressing concern for Complainant. (RX 91, p. 1.) This evidence convinces me that Complainant's accounts of events cannot be credited as accurate without independent support.

While I conclude that Complainant's reports cannot be credited as accurate, I also find that she was not inventing events from whole cloth. While there are many instances where Complainant's description of what happened at a meeting or interaction are contested, the record contains no instance in which Complainant is alleged to have simply invented a meeting or interaction. Her inaccuracies are grounded in the facts, suggesting that she has for the most provided her honest perspective on events, rather than a crafted deception.¹⁷ She was also willing to make admissions, such as that the enviroLIS deadline was important and that the Beckmann spill would not have been hugely important to Mr. Reed. Her behavior is also largely consistent with the perception reflected in the statements. It shows someone under great stress and coming undone, behaving in often self-defeating ways. As a result I find that her statements

¹⁷ There were instances of deceptive statements, both in the emails and in the testimony. For instance, in addition to those discussed above, at one point Complainant attempted to bolster her concerns about the Beckman spill on the grounds that TCEQ wasn't satisfied until March 2015. (HT, p. 322.) This is deceptive; the only reason it stretched into the next March was that Complainant filed a complaint in December that required the administrative process to resolve itself. As far as I can tell, TCEQ was *never* concerned with Martin Marietta's handling of its own accord.

cannot be credited as accurate unless confirmed by other evidence, but not that Complainant was or is essentially dishonest.

VI. Legal Analysis and Findings

A. Legal Framework

The SWDA “is a comprehensive environmental enactment designed to promote the reduction of hazardous waste and the treatment, storage, or disposal of such waste so as to minimize threats to human health and the environment.” *R.I. Dep’t of Env’tl. Mgmt. United States*, 304 F.3d 31, 37 (1st Cir. 2002) (citing 42 U.S.C. § 6902(b)); *see also Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Beaumont v. Sam’s East, Inc.*, ARB No. 15-025, ALJ No. 2014-SWD-001, slip op. at 4 (ARB Jan. 12, 2017); *Hall v. U.S. Army*, ARB No. 02-128, ALJ No. 1997-SWD-005, slip op. at 4 (ARB Dec. 30, 2004); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-009, 2001-CAA-011; slip op. at 9-10 (ARB June 30, 2004). The SWDA relates to solid waste that alone or in combination creates public health and environmental dangers. *See* 42 U.S.C. § 6903(5). Congress enacted the SDWA “to assure safe drinking water supplies, protect especially valuable aquifers, and protect drinking water from contamination by the underground injection of waste.” *Natural Res. Def. Council, Inc. v. EPA*, 824 F.2d 1258, 1268 (1st Cir. 1987); *see also* H.R. Rep. No. 93-1185, at 6454 (1974). The WPCA was enacted to further the “[r]estoration and maintenance of chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

The whistleblower protection provision of the SWDA provides that “[n]o person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee...by reason of the fact that such employee...has filed, instituted any proceeding under this Act or under any applicable implementation plan or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provision of this Act or of any applicable implementation plan.” 42 U.S.C. § 6971(a). If a violation is found, the Secretary of Labor shall require “the party committing such violation to take such affirmative action to abate the violation as the Secretary of Labor deems appropriate, including, but not limited to, the rehiring or reinstatement of the employee...to his former position with compensation.” 42 U.S.C. § 6971(b). Attorney’s fees and costs are also recoverable by a prevailing complainant. 42 U.S.C. § 6971(c). The whistleblower protection provisions of the SDWA parallel those of the SDWA, except that exemplary damages may be awarded where appropriate. 42 U.S.C. § 300j-9(i)(2)(B)(ii). The whistleblower protection provisions in the WPCA mirror those in the SWDA. *See* 33 U.S.C. § 1367; *see also Redweik v. Shell Exploration and Prod. Co.*, ARB No. 05-052, ALJ No. 2004-SWD-002, slip op. at 8 (ARB Dec. 21, 2007).

The implementing regulations for the Environmental Acts are set out in 29 C.F.R. § 24 and are identical in terms of the analysis of a complaint. Employers subject to the Environmental Acts may not “discharge or otherwise retaliate against any employee with respect to the employee’s compensation, terms, conditions, or privileges of employment because the employee, or any person acting pursuant to the employee’s request, engaged in [protected activity].” 29 C.F.R. § 24.102(a). In particular, an employer may not “intimidate, threaten, restrain, coerce, discharge, discipline, or in any other manner retaliate against any employee because the employee [engaged in protected activity].” 29 C.F.R. § 24.102(b). Protected

activity includes commencing, assisting in, testifying in, or participating in a proceeding under one of the Environmental Acts. 29 C.F.R. §§ 24.102(b)(1)-(3).

“To prevail on a whistleblower complaint under the Environmental Acts, ‘a complainant must establish by a preponderance of the evidence that the respondent took adverse action against him because he engaged in protected activity.’” *Wolslagel v. City of Kingman, Arizona*, ARB no. 11-079, ALJ No. 2009-SDW-007, slip op. at 2 (ARB, Apr. 10, 2013) (quoting *Powell v. City of Ardmore, Oklahoma*, ARB No. 09-071, ALJ No. 2007-SDW-001, slip op. at 5 (ARB Jan. 5, 2011)). This means that a complainant must show “by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.109(b); *see also Wolslagel*, ARB No. 11-079 at 2-3. The complainant must persuade the finder of fact “that [her] version of events is more likely true than the employer’s version.” *Hall*, ARB Nos. 02-108, 03-013 at 28 (citing *Masek v. The Cadle Co.*, ARB No. 97-069, ALJ No. 1995-WPC-001, slip op. at 7 (ARB Apr. 28, 2000)).

The regulations governing the showing before OSHA provide that a complainant must make “a *prima facie* showing that protected activity was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.104(e)(1). More specifically, a complainant must show “(i) [she] engaged in protected activity; (ii) [t]he respondent knew or suspected that the employee engaged in protected activity; (iii) [she] suffered an adverse action; and (iv) [t]he circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.” 29 C.F.R. § 24.104(e)(2). This can be done by a showing of employer knowledge of the protected activity coupled with temporally proximate adverse action. 29 C.F.R. § 24.104(e)(3); *see also Thompson v. Houston Lighting & Power Co.*, ARB No. 98-101, ALJ No. 1996-ERA-034, -036; slip op. at 6 (ARB Mar. 30, 2001). The ARB has cautioned against using the language of a *prima facie* case in the context of a proceeding before OALJ. *See, e.g., Wolslagel*, ARB No. 11-079, slip op. at 3 n.11. But the basic elements remain the same: to prevail, a complainant must show protected activity that the respondent was aware of, adverse action, and causation. *Id.*; *Redweik*, ARB No. 05-052, slip op. at 8; *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 01-SWD-3, slip op. at 11 (ARB Mar. 31, 2005) (citing *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 17-18 (ARB Feb. 28, 2003)); *Moder v. Village of Jackson, Wisconsin*, ARB Nos. 01-095, 02-039; ALJ No. 2000-WPC-5, slip op at 8 (ARB June 30, 2003); *Timmons v. Franklin Elec. Coop.*, ARB No. 97-141, ALJ No. 97-SWD-2, slip op. at 4 (ARB Dec. 1, 1998). The ARB’s most recent statement eliminates the “knowledge” element, specifying that “a complainant must establish that he or she: engaged in protected activity; suffered adverse employment action; and the protected activity caused or was a motivating factor for the adverse action, i.e. that a nexus existed between the protected activity and the adverse action.” *Beaumont*, ABR No. 15-025 at 4. Regardless, in this analysis, which I will follow below, the knowledge or awareness component gets folded into the causal showing—if a complainant cannot show the relevant awareness of the protected activity, he or she will be unable to make the required causal showing.

The causal showing requires demonstration that the protected activity was a motivating factor in the decision to take the adverse action. This is a higher causal showing than “contributing factor” causation that is used in other whistleblower statutes. *See, e.g., Araujo v. N.J. Transit Rail Operations, Inc.*, 708 F.3d 152, 157-59 (3^d Cir. 2013); *see also Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 2004-CAA-005, slip op. at 3 n.6 (ARB Nov. 29, 2006).

“A ‘motivating factor’ is ‘conduct [that is]...a ‘substantial factor’ in causing an adverse action.” *Onysko v. State of Utah, Dep’t Env’t Quality*, ARB No. 11-023, ALJ No. 2009-SDW-004, slip op. at 10 (ARB Jan. 23, 2013) (quoting *Mt. Healthy City Sch. Dist. Bd. Of Educ. v. Doyle*, 429 U.S. 274, 286 (1977)). The required showing, however, only requires that the protected activity be *a* motivating factor, not *the* motivating factor, in the decision to take the adverse action. *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-001, slip op. at 14 (ARB Apr. 25, 2014) (citing *Abdur-Rahman v. DeKalb County*, ARB Nos. 08-003, 10-074; ALJ Nos. 2006-WPC-002, -003, slip op. at 10, n.48 (ARB May 18, 2010)).

Even if a complainant makes the required showing, “relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.” 29 C.R.F. § 24.109(b)(2); *see also* 29 C.F.R. § 24.104(e)(4) (same standard before OSHA); *Beaumont*, ARB 15-025 at 4-5; *Wolslagel*, ARB No. 11-079, slip op. at 3; *Tomlinson v. EG&G Defense Materials*, ARB Nos. 11-024, 11-027; ALJ No. 2009-CAA-008, slip op. at 8 (ARB Jan. 31, 2013). This “affirmative defense” permits a respondent to escape liability in “mixed motive” cases where the protected activity was *a* motivating factor by showing that the permissible factor(s) alone would have produced the same adverse action. *See Moder*, ARB Nos. 01-095, 02-039; slip op at 8; *Timmons*, ARB No. 97-141, slip op. at 4; *Combs v. Lambda Link*, ARB No. 96-066, ALJ No. 95-CAA-18, slip op. at 4 (ARB Oct. 17, 1997) (citing *Doyle*, 429 U.S. at 287).

Complainant’s theory of the case is succinctly stated in her conclusion:

Jason Reed over-reacted to Complainant’s questions about the two waste profiles. He mis-trusted Mrs. Schell and believed she was trying to undermine him in some way. From that point forward, the Director of Natural Resources lead [sic] others within Martin Marietta to also distrust Mrs. Schell. Her insistence that the company follow pertinent rules and regulations caused the Director of Natural Resources and others to believe she was a whistleblower. She was a whistleblower and that is what got her fired.

(CPB, p. 32.)

Respondent has a different take:

Erica Schell was terminated for failing to complete her primary job responsibility by the assigned deadline, even after being counseled and provided with a detailed [PIP]. She repeatedly assured [Mr. Reed] that she was on track to complete the project before the deadline. Only after it became clear to Reed that Schell was woefully behind schedule did Schell start focusing on excuses, including lack of assistance and “technical problems” that no one else was experiencing. Her termination was unrelated to her alleged protected activity regarding the Beckmann Quarry spill...Notably, the conduct Schell allegedly “blew the whistle” on was completely appropriate and was blessed by the applicable regulatory agency, the TCEQ. Schell’s general lack of credibility and ever-evolving versions of the facts further cement the point that her claims are without merit.

(RPB, pp. 1-2.)

I must decide, within the analytical framework of the Environmental Acts, which narrative more accurately reflects the events in Complainant's employment with Respondent.

B. Did Complainant Engage in Protected Activity?

Under the SWDA protected activity involves filing or instituting a “proceeding” under relevant provision of the Act. 42 U.S.C. § 6971(a). This has been expansively interpreted: “[t]he term ‘proceeding’ set out in 42 U.S.C.A. § 6971(a) encompasses ‘all phases of a proceeding that relate to public health or the environment, including an internal or external complaint that may precipitate a proceeding.’” *Joyner v. Georgia-Pacific Gypsum, LLC*, ARB No. 12-028, ALJ No. 2010-SWD-001, slip op. at 12 (ARB Apr. 25, 2014) (quoting *Lee v. Parker-Hannifin Corp.*, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 7 (ARB Feb. 29, 2012)). The SDWA and WPCA employ similar language. See 42 U.S.C. § 300j-9(i)(1); 33 U.S.C. § 1367(a); see also 29 C.F.R. 24.102(b) (regulations for all three). Under the Environmental Acts a broad range of activities is protected, but the activity must relate to the requirements of the act in question or the implementing regulations or the administration or enforcement of those acts and regulations. *Devers*, ARB No. 03-113 at 11 (citing *Knox v. United States Dep’t of the Interior*, ARB No. 03-040, ALJ No. 01-CAA-3, slip op. at 4 (ARB Sept. 30, 2004); *Culligan*, ARB No. 03-46 at 9.)

For an activity to be protected, the employee must have both a subjective and objectively reasonable belief that it furthers the purposes of the relevant statute. The employee must both actually believe that the complained of conduct violated the relevant statute and that belief must be reasonable, “evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as the complainant.” *Joyner*, ARB No. 12-028 at 13 (citing *Johnson v. The Wellpoint Co., Inc.*, ARB No. 11-035, ALJ No. 2010-SOX-038, slip op. at 9 (ARB Feb. 25, 2013); *Lee*, ARB No 10-021 at 9-10; *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 27-28 (ARB July 14, 2000)). In addition, the complaint must relate to public safety or health or the environment, not just occupational safety and health. *Devers*, ARB No. 03-113 at 10-11. A complaint is protected even if it is informal and internal. There is no requirement that the employer actually engage in the conduct that is objected to—even if the employer adopts the complainant's recommended actions, the complaint itself is protected. See *Timmons*, ARB No. 97-141 at 5.

Complainant points to the various concerns she raised about the Beckmann spill as protected activities, contending that it was reasonable for her to worry about the profiling of the waste, the plans for its transportation, the way the forms had been completed. She points in particular to concerns raised in the October 14, 2014, phone call and in subsequent conversations and emails. She also references violations surrounding the Carthage spills, though she does not specify what her exact protected activities were. (CPB, pp. 18-20.) Respondent contends that Complainant has not established any protected activity. Though it allows that she made complaints, it argues that those complaints were not objectively reasonable. The reports about Xenco's certification were known to be false. The concerns about Alamo1's waste profiling may have been genuine, but there is insufficient evidence that they were reasonable given that all of the others involved did not share those concerns. (RPB, pp. 28-30.) Martin Marietta further

contends that no protected activity has been identified related to the Carthage spill—Complainant participated in the response but signed off on the profile on October 13, 2014, before the various complaints relevant to this case were made. (RRB, p. 5.)

I find no protected activity related to the Carthage spill. Complainant was involved in the profiling and disposal process as of October 10, 2014. (*E.g.* RX 41, pp. 1-2; RX 42, pp. 1-3.) She was still working on it on October 14, 2014. (RX 61, p. 1.) On October 15, 2014, she asked TCEQ *questions* about profiling the Carthage waste. (*See* RX 47, pp. 1-2; RX 66, pp. 1-2.) But through this documented involvement, there are no *complaints* or other activities that contested or raised concerns about Martin Marietta and/or Alamo1. The concerns, contemporary in time, all concerned Beckmann, not Carthage. I do not credit Complainant's bare assertion that Carthage was at issue as well in these discussions. (*See* HT, pp. 322-23.) Though in the litigation of this case the Carthage spill has at times been folded in as part of the complaints about Beckmann, Complainant has not pointed me to evidence reflecting protected activity related specifically to Carthage that is contemporaneous with her work. In my review, I find none. I conclude that any Carthage complaints are retrospective and not protected activities.¹⁸

Complainant has established that she engaged in protected activity related to the Beckmann Quarry spill. Respondent has not contested that she made complaints between October 14 and 16, 2014, on the grounds that she believed that there were various improprieties in the way that Martin Marietta and/or Alamo1 were handling the spill. Rather, it contests the reasonableness of the complaints. I agree that Complainant's complaints related to Xenco's laboratory certification are not protected activity. Complainant had a concern and she investigated it. At 7:38 a.m. on October 14, 2014, TCEQ sent Complainant an email confirming that the lab certification was current and attaching the document. Complainant acknowledged this email a few minutes later. (*See* RX 17, pp. 1-2.) Though Complainant was involved in the Beckmann spill from October 10, 2014, onwards, all of the internal and external complaints about Beckmann are subsequent to this exchange with TCEQ. Hence, no matter what Complainant actually believed, any complaints about Xenco's lab certification were objectively unreasonable and so were not protected activities under the Environmental Acts.

The other complaints related to how Alamo1 and Martin Marietta were profiling and disposing of the waste are another matter. I credit that Complainant had a sincere belief that errors were being made. The record reflects that she was perhaps overzealous in seeking out potential problems, but this reinforces, rather than undermines, the sincerity of her belief. Moreover, though Complainant was quite inexperienced in the industry, she possessed sufficient education and experience to form an expert opinion on the proper profiling and disposal of waste. While Complainant's beliefs may have been incorrect all along, that does not mean that they were unreasonable. The fact that she—an environmental expert experienced enough to be hired by Martin Marietta into a Senior Environmental Engineer position—*did* form those beliefs after doing due diligence is good evidence that they were at least reasonable.

¹⁸ Complainant testified that she discerned that Beckmann Quarry was missing a required "PWS" permit at some point, though she allowed that in the last several years one had been procured. (HT, pp. 260-61, 264.) From the record as a whole, I conclude that this was also a "retroactive complaint," not one she raised or even realized at the time. The record demonstrates that the spill and its aftermath were the relevant events in her employment.

Martin Marietta has stressed that all of the others involved—Mr. Reed, Mr. Carlson, Mr. Whitt, the experts at Alamo1, and TCEQ—all came to a different conclusion. This is compelling evidence that Complainant's concerns were ultimately incorrect. But it does not establish that they were unreasonable at the time they were raised. When Complainant first raised her concerns in the call with Mr. Reed and Mr. Carlson on October 14, 2014, none of these other people/entities had weighed in or responded to her concerns. It wasn't until the end of October 16, 2014, that *all* of these other entities had some input.

I find that there were two calls with Alamo1 on October 16, 2014, and that by the end of the day Complainant had at least acceded to following the views of everyone else, even if she still harbored private misgivings. By that point Mr. Reed and Mr. Carlson had both expressed their disagreements with Complainant's concerns, Mr. Whitt had provided input based on his 30 years of experience in the field, TCEQ had been consulted twice, both by Complainant and Alamo1, and everyone had listened to Complainant's concerns. Alamo1 responded to those concerns. Complainant is an environmental expert, but she was also new to the industry. After being told by other employees with extensive experience, a contractor with extensive experience, and the state regulatory agency that her concerns were invalid, it was no longer reasonable for her to continue to make those complaints. Thus, I find that complaints about the Beckmann spill profiling and disposal were reasonable through October 16, 2014, but unreasonable thereafter. Thus, the complaints made during between October 14 and 16, 2014, are protected activities.

Based on the documentary evidence, Complainant appears to have come to a similar conclusion. The record doesn't contain subsequent complaints about the Beckmann spill for some time. When they re-emerge, they do so in the context of complaints about *retaliation* for making complaints related to the Beckmann spill—a different issue altogether. The next time Complainant raises concerns about the Beckmann spill (or any environmental matter) that is disconnected with her complaint that she is being retaliated against for making the earlier complaints, is in the December 5, 2014, online complaint to TCEQ. (*See* RX 35, p. 1; HT, pp. 495-501, 518-19.) Regardless of whether Complainant sincerely believed what she was reporting at this point, I find that the reports were unreasonable from Complainant's position and so they were not protected activities. Mr. Reed and Mr. Carlson both testified that Complainant's concerns had been allayed by October 16, 2014. I credit this as consistent with the record. Those concerns are no longer raised until they are put into the context of complaints about retaliation. When they return as primary complaints, it is much later and after a great deal has changed both in the workplace and in Complainant's mental condition—by her own account. It was not reasonable to resurrect concerns that had been fully discussed and allayed a month and a half earlier on December 5, 2014, especially when Complainant knew that TCEQ had already been involved in the process and given guidance that was followed. Moreover, the manner of this complaint is not reasonable. It was narrowed to the Beckmann spill only after TCEQ spoke with her on the phone to narrow the complaint. Originally it was a complaint related to locations worldwide, "too many to list," and premised on a slew of environmental deficiencies. This wasn't a legitimate complaint about an environmental problem. It was hostility to Martin Marietta and a desire to cause her employer problems. TCEQ didn't treat it as a legitimate, reasonable complaint, it made her narrow it. That's when the complaint returned to Beckmann, but at this point, that was not a reasonable complaint to make from Complainant's position.

So I find that post-October 16, 2014, complaints about the profiling and disposal of waste in the Beckmann spill were not objectively reasonable by Complainant's position and are thus not protected activity. Most of Complainant's subsequent complaints, however, are based on allegations that she was being retaliated against for raising prior environmental concerns. In late October and then again on November 6-7, 2014, Complainant contacted OSHA with allegations of retaliation. (See CX 20 p. 61; CX 21, p. 63.) On November 5, 2014, she sent a complaint about retaliation to the corporate ethics committee. (See CX 21, pp. 63-66; HT, pp. 334-35.) In addition, she complained about retaliation in a variety of emails involving Mr. Reed, Ms. Waller, and others. I do not find that Complainant's allegations were correct—that is what is at issue in this case—or that the manner and accompanying statements in the various complaints of retaliation were reasonable. But I do find that complaining of retaliation was a subjectively sincere belief and objectively reasonable. Although the Beckmann spill may have been a blip on Mr. Reed's radar, it was an important project for Complainant. And regardless of whether her complaints played any role whatsoever in the adverse actions that followed, it was at least reasonable for her to draw that inference based on temporal proximity alone. Thus, I make the limited finding that Complainant's complaints of retaliation to her supervisor and HR staff, to OSHA, and to the corporate ethics committee were at least reasonable enough for those complaints to be protected activities in their own right.

In sum, I conclude that Complainant has established that she engaged in two varieties of protected activity. First, her complaints about the Beckmann spill from October 14-16, 2014, are protected by the Environmental Acts. Second, the Environmental Acts also protect her subsequent complaints that she was being retaliated against for making the complaints related to the Beckmann spill. However, I find that Complainant did not engage in any protected activity related to the Carthage spill and that any complaints about the Beckmann spill after October 16, 2014, were not reasonable from her position and so are not protected by the Environmental Acts.

C. What Adverse Actions Did Respondent Take Against Complainant?

The Environmental Acts broadly define adverse actions. They include “discharge or [retaliation] with respect to the employee's compensation, terms, conditions, or privileges of employment.” 29 C.F.R. § 24.102(a); *see also* 29 C.F.R. § 24.102(b) (“...intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate...”). There is no dispute in this case that Respondent took adverse actions against Complainant. Martin Marietta terminated Complainant on January 7, 2015. Respondent also placed Complainant on a Needs Improvement Plan on November 6, 2014. Though I credit that this was not simply a formality along the way to a termination decision that was already made, placement on a Needs Improvement Plan is an adverse action for the purposes of the Environmental Acts.

D. Was Complainant's Protected Activity a Motivating Factor in Respondent's Adverse Actions?

To make out a case for retaliation under the Environmental Acts, a complainant must show that the protected activity was a motivating factor, but a respondent can defeat the complaint by showing that it would have taken the same action despite the protected activity. *Beaumont*, ARB 15-025 at 4; *Joyner*, ARB No. 12-028 at 14. There may be other, non-retaliatory motivating factors the complainant must “merely prove that ‘the protected activity

caused or was a motivated factor in the adverse action,’ even if it was only one of several motivating factors.” *Kanj v. Viejas Band of Kumeyaay Indians*, ARB No. 12-002, ALJ No. 2006-WPC-001, slip op. at 6 n.4 (ARB Aug 29, 2012) (quoting 29 C.F.R. § 24.109(b)(2)). A motivating factor is a causally “substantial factor.” *See Doyle*, 429 U.S. at 287.

Complainant has established two varieties of protected activity and there are two adverse actions at issue. She engaged in protected activity in making complaints related to the Beckmann spill between October 14-16, 2014, and in making subsequent complaints about retaliation. Martin Marietta took adverse action against Complainant by placing her on a PIP on November 6, 2014, and by terminating her on January 7, 2015. The question now is whether either variety of protected activity was a motivating factor in the decision to take either adverse action. For exegetical reasons, I begin with the termination in January 2015 and then consider the decision to put Complainant on a PIP.

1. Was the Termination Motivated by the Protected Activity?

Martin Marietta contends that in the termination decision the Beckmann spill played no role, while the enviroLIS project was the major concern. For Martin Marietta and Mr. Reed, the spill was a routine matter that was long over and done with. EnviroLIS was an ongoing company-wide project with a corporate deadline and had been Complainant’s major responsibility. (RPB, pp. 38-39.) Moreover, it points out that both Caterpillar and the VA reached similar conclusions about Complainant’s ability to work productively. (*Id.* at 39-40.) Complainant alleges that the enviroLIS project was a pretext for termination, arguing that it was not nearly important as alleged by Respondent in that the task changed over time and there were no consequences for the division’s failure to meet the deadline. (CPB, p. 14.)

An initial question is whether the decision-makers knew about the protected activity and so *could have* been motivated to act. Mr. Reed knew about the complaints related to the Beckmann spill. Mr. Whitt knew about them at least generally. Ms. Waller was not a decision-maker in the termination, but also at least knew that there had been some complaints, though it is doubtful she understood them. There is no evidence Ms. Raab knew of those complaints, or any of the protected activity, but Ms. Raab was not a driving force behind the decision—she could at most provide a third set of eyes to review the facts as presented by Mr. Whitt and Mr. Reed.

Turning to the other protected activity, Ms. Waller clearly had knowledge of the OSHA complaint at some point in December. (HT, pp. 621-22.) Though I credit Ms. Waller’s statement that *she* did not tell Mr. Reed about the OSHA complaint, the response submitted by Martin Marietta, (*see* CX 5), indicates that Mr. Reed must have been aware. Though the response in evidence is not dated, in context it obviously precedes the termination decision. Based on its contents, it could not have been prepared without Mr. Reed’s involvement. Thus, I find that he knew about the OSHA complaint. He, as well as Ms. Waller and Mr. Whitt to some degree, would also have known that Complainant was alleging internally that she was being retaliated against for raising complaints related to the Environmental Acts. Those complaints were directed at them. The corporate ethics complaint resulted in an investigation in which Martin Marietta did due diligence. That involved talking with Mr. Reed, (*see* HT, pp. 226-27), so he would have known the complaint was made.

The record shows that Martin Marietta established a corporate-wide internal deadline to complete the environmental portion of the enviroLIS setup by December 31, 2014. There is no indication that this deadline changed during the period Complainant was with the company. There is also some evidence that the deadline was not a high priority. Mr. Carlson's testimony was informative here—enviroLIS was a project that took a backseat but needed to get done, so the deadline was set as a way to provide impetus for completion. (RX 112, pp. 93-94.) Communications from Mr. Reed show that he was concerned about the deadline, but also indicate that it was not a big priority—it was not something he ever followed closely. That he didn't realize how far behind Complainant was until mid-October shows as much. Indeed, if it had been a very important deadline, Mr. Reed would have taken Complainant off of the project at that point, not made it part of a PIP. Re-staffing would have made it more likely the project actually would get finished, given Complainant's struggles so far. Further, there were no consequences associated with the deadline—it was an internal creation that when missed simply rolled over into a larger project and set of deadlines. (See HT, pp. 74-77.)

So I do not credit Respondent's presentation of the enviroLIS as a big deal for Mr. Reed or the company. Neither do I find, however, that it was unimportant. The project itself was important and the deadline mattered. It just wasn't high on the priority list. This does not mean that it was pretextual. Quite the opposite. Though the enviroLIS project and the December 31, 2014, deadline were not matters of great importance for the company, division, or even Mr. Reed, in reference to Complainant's employment the enviroLIS project and the deadline were of the utmost importance. Since the summer, it had been her *primary* responsibility and the part of operations that she had genuine ownership over. The PIP made this more formal and singular—her job per the PIP was to finish the enviroLIS project. While in the grand scheme of the huge corporation this project may have been small and unimportant, in reference to Complainant's employment—what matters here—it was far and away the most important thing.

There is no dispute that Complainant did not meet the deadline and finish the project. The record establishes that she did not come close. Poor performance is a simple, uncontroversial reason for termination. Complainant was given one primary, almost sole task, and she failed to complete it or come close to completing it. That motivated the decision to terminate her. This is manifest in the internal notes and the emails. The decision-makers were focused on enviroLIS and pointed Complainant back to that project, even when she was wandering into other issues. The PIP made expectations plain, the behavior of all of the Martin Marietta employees, save Complainant, is consistent with those expectations, and those expectations were not met. The termination decision, then, was axiomatic.

Though the performance deficiency motivated the termination, there could be additional motivating factors in play. Much of the evidence and factual disputes in this case have turned on the reality/unreality of Complainant's technical problems with enviroLIS and the degree of support and assistance Martin Marietta provided her. Complainant argues that her IT concerns were ignored by Mr. Reed and Mr. Whitt. (CPB, pp. 21-22.) If this is correct, it might indicate that the failure to complete the enviroLIS project was not the sole motivating factor in the termination—she would have been set up to fail or terminate even though they had come to realize that she could not succeed because of the technical difficulties. Respondents argue at length that Complainant's technical excuses were invalid. (See RPB, pp. 13-17, 38.) They

further contend that any excuses are irrelevant since the issue in this case is not whether termination was fair, it is whether it was motivated by the protected activity. (*Id.* at 38.)

There is compelling evidence that the various technical problems that Complainant experienced were not endemic to the enviroLIS software. Though she had been making reports of difficulties all along, after the PIP those reports increase in frequency and severity. No one else experienced the same problems. Mr. Whitt did not and Mr. Carlson did not—despite Complainant’s attempt to insinuate that he had. Other divisions of the company were able to complete the project on schedule. By Complainant’s account, Martin Marietta provided her with six different computers. (*See* HT, pp. 526-27.) This testimony was presented as an indication of the level of technical difficulties she faced—but to the contrary, it speaks loudly in favor of the conclusion that the problem was not the computer. And it shows that Martin Marietta was expending significant resources to solve the purported problems. This is echoed in the amount of time Support Services devoted to helping her and the instructions from Mr. Reed to Support Services to figure out whatever was not working well. (*See* RX 100, p. 1.)

I also find that the contention that Martin Marietta provided insufficient instruction and support to Complainant in the project meritless. Mr. Reed told Complainant where to find the permits and in one case collected the permits for her and organized them to upload into enviroLIS. (*See* RX 24, p. 1; HT, p. 202.) Mr. Whitt was willing to spend significant time assisting Complainant, even when he was supposed to be on vacation, and offered extensive responses to some of the complaints. (*See, e.g.* CX 31, p. 131.) Unfortunately, Complainant appears to have seen this assistance as an invitation to argue further, (*see* RX 29, pp. 1-9), rather than as a way to improve her performance. This attitude is apparent in Complainant’s behavior and performance under the PIP—she appears to have been much more fixated at finding problems with enviroLIS that might excuse non-performance than actually performing. Allegations have been made about conflicting instructions, (*see, e.g.*, HT pp. 455-56), but insofar as there even was a conflict, the managers were clear that the Data Guide provided the binding guidance. That was put in the PIP. (*See* CX 24, p. 70; RX 23, p. 2.) Even if there was a conflict, Complainant’s response appears to have been to stow it away as an excuse, rather than figuring it out immediately and moving forward with the task at hand.

Additionally, even if Mr. Reed and the others offered Complainant less assistance than she wanted, the expectation that she would be able to handle some things on her own was entirely justified. She was hired as a Senior Environmental Engineer, was being paid well, and had benefits including the use of a company car. If Complainant was unable to complete her assignments without significant and continued assistance from her supervisors, the rational conclusion would be that she couldn’t perform in her position, which expected and required the ability to work independently without the sort of guidance Complainant has sometimes offered as an excuse for non-performance. (*See* HT, pp. 118-20, 557-58; RX 112, p. 141.)

Moreover, I agree with Respondents that the ultimate questions of fact about the technical difficulties and sufficient managerial support and guidance are not essential here. Courts do not sit as a sort of “super-personnel department” evaluating the wisdom of business decisions. *See Scaria v. Rubin*, 117 F.3d 652, 655 (2d Cir. 1997); *see also Kuduk v. BNSF Ry. Co.*, 768 F. 3d 786, 792 (8th Cir. 2014) (citing *Kipp v. Mo. Highway & Transp. Comm’n*, 280 F.3d 893, 898 (8th Cir. 2002)). The whistleblower statutes do not prohibit employers from imposing requirements

on employees, so long as those requirements are not imposed in a way that interferes with or is in retaliation for protected activity. *Timmons*, ARB No. 97-141 at 6-7 (citing *Kahn v. U.S. Sec’y of Labor*, 64 F.3d 271, 279 (7th Cir. 1995); *Smith v. Monsanto Chem. Co.*, 770 F.2d 719, 723 n.3 (8th Cir. 1985); *Assistant Sec’y and Ciotti v. Sysco Foods of Philadelphia*, ARB No. 98-103, ALJ Case No. 97-STA-00030, slip op. at 8 (ARB July 8, 1998)). Whistleblower statutes, like anti-discrimination statutes generally, do not forbid irrational or unfair policies or requirements. *E.g. Smith*, 770 F.2d at 723 n.3. Put otherwise, an adverse action is not actionable because it was unfair or unjustified. A respondent doesn’t need *good* reasons, it just can’t be motivated by *retaliatory* reasons. *See, e.g., Kanj*, ARB No. 12-002, slip op. at 6 n.4.

So the question is why the decision-makers at Martin Marietta decided to terminate Complainant. Martin Marietta does not need to justify its decision—it just needs to rebut Complainant’s arguments that protected activity was among the motivating factors. The record very convincingly demonstrates that the decision-makers in this case did not believe that Complainant’s excuses were genuine. The record strongly suggests that they were right. But even if they were wrong in this conclusion, they genuinely believed it, and it motivated their actions. The various appeals to technical and other problems associated with the enviroLIS project thus do not provide evidence that the termination decision was in any way motivated by the protected activity. Complainant’s own account indicates that Mr. Reed’s criticisms and comments were targeted largely at her enviroLIS performance. So even if Mr. Reed made those over-the-top criticisms, they were not evidence of a retaliatory motivation.

Neither do I find any persuasive circumstantial evidence that the protected activity was motivating the decision to terminate Complainant. The decision makers make no reference to the Beckmann spill or the various external and internal complaints of retaliation. Ms. Raab would likely have known about neither, though she was not a driving force behind the decision. Mr. Whitt had the barest of knowledge of the complaints concerning the Beckmann spill. He received some messages contending there was retaliation, but his knowledge was surface level and his reactions show that he was unconcerned and detached, interested only in what he was expected to do. Mr. Reed certainly knew about the Beckmann spill-related complaints and had some knowledge of the complaints about retaliation, but I do not find evidence that in the period of the PIP these activities mattered at all to Mr. Reed. He doesn’t react to them—even when serious, over-the-top allegations are being levied against him.

This case has involved some question and speculation about the role Complainant’s request for access to the Environmental Issues folder may have played in her termination or what it might evidence about Respondent’s attitude to her. Complainant contends that she requested access after being told there might be information on enviroLIS in the folder. She raises suspicions about Respondent’s response, including concern in Raleigh, having Ms. Waller approach her, and Ms. Armstrong’s dispatch of Complainant’s enviroLIS login history to Mr. Reed and others. (CPB, pp. 10-11, 23-24.) Complainant is not alleging that the request itself was protected, but that the scrutiny that it received evidences retaliatory motives by Respondent. (CRB, pp. 6-7.) More generally, Complainant points to a number of “strange timing incidents” in her last few months that raise suspicions about Respondent’s motivations, including Ms. Armstrong’s sending the user log to Mr. Reed, Ms. Waller’s meeting with her in December asking about proprietary documents, which she links to headquarters keeping tabs on Complainant, Mr. Carlson’s sending the text conversation between Complainant and Ms. Andoe

to Ms. Waller. (CPB, pp. 23-25.) Respondent offers a more innocuous account—Complainant sought access to documents restricted to the senior officers and the general counsel’s office, which raised a number of legitimate concerns about what she was doing and prompted a response from HR. (RRB, pp. 7-8.)

I find this sequence of events tangential to any of the issues in this case. Regardless of why Complainant wanted access to the folder, it is no surprise that it set off alarm bells. There was no reason for her to have access to the folder and it contained sensitive material. Large institutions do not give employees access to things they do not need to do their jobs. When corporate headquarters received an odd request (embodied in a reply to a 10 month old email no less) for access to sensitive material irrelevant to an employee’s job, it was going to raise some questions and get people talking. They were bound to wonder what exactly Complainant *was* doing.¹⁹ Some sort of look at whether Complainant was even working in enviroLIS, and how often, was natural. Even on Complainant’s account, the reason to look in that folder was to bolster her continuing argument that enviroLIS had systemic flaws that prevented her from doing her job. But Respondents weren’t paying her to look for excuses.

Nor do I find the other circumstantial evidence of animus during Complainant’s last two months credible. I do credit that Complainant perceived the environment as hostile, but there is no evidence that this was a result of Martin Marietta’s actions. Mr. Reed was in Dallas and the only people in Houston who even knew that she was on a PIP were in HR. There was no reason for other employees to treat her differently, until she started sending peculiar, inflammatory emails and closeting herself in her office. Some awkwardness may well have developed over time, but it was not the result of hostility to protected activity or animosity at Complainant. Co-workers like Mr. Allen and Ms. Andoe learned of the situation from Complainant and expressed surprise, some support, and concern for her. But it is no wonder that after these exchanges the workplace might have involved more awkwardness.

While Complainant’s perception of her work environment appears to have been quite sincere, it was not an accurate perception. The various indications of animosity or hostility to protected activity during her last few months at Martin Marietta are thus not credible.

Complainant also points to the manner of termination as an indication of animus, averring that Respondent wouldn’t let Complainant drive home or wait for her husband to pick her up but instead “dumped” her and her car seats at the Wounded Warrior Project. (CPB, p. 15, 27; CRB, p. 5.) It is largely based on what Complainant told her husband. Ms. Raab’s account is more persuasive. She may have been “dumped,” but she was “dumped” at a place of her choosing. She had a company car and it was completely sensible for Martin Marietta to both deprive her of the car and to not want her lingering around the premises until such time as her husband was able to pick her up. It was both rational and considerate for Martin Marietta to drive and “dump” her at a place of her choosing. They had no motivation to randomly leave her at the Wounded Warriors office against her will.

¹⁹ Though Mr. Reed denied asking for Complainant’s enviroLIS user logs, even if he had sought this information it would not be evidence of retaliatory motive. Given that Complainant was not making progress on the project, it would have been fair for her supervisor to wonder what she was actually spending her time doing and how often she was actually in the enviroLIS system. It is not spying for a supervisor to want to know how a subordinate is spending his or her workdays.

Finally, the timing of the protected activity and adverse action do not suggest that the protected activity in any way motivated the adverse action. The termination was in January. The “primary” protected activity related to the Beckmann spill was in October. Months passed in which Complainant and her supervisors were focused on enviroLIS with only passing reference, all by Complainant, to Beckmann. The complaints about retaliation, internally, to the corporate ethics committee, and to OSHA come later, but are still long before the adverse action at issue in this question, the termination. On the other hand, the timing of the adverse action perfectly aligns with the enviroLIS deadline and the tasks set out in the PIP, strongly suggesting that they, and they alone, motivating the termination decision.

In conclusion, I find that the sole motivation for Complainant’s termination was that she failed to complete the enviroLIS project, or even come close to doing so, as specified in the PIP. Complainant may be a very talented environmental professional, but she was unable to complete this particular project in a satisfactory manner. Unfortunately, at this point her primary and nearly sole responsibility at Martin Marietta was to complete that project. I find no convincing evidence of any other motivations for the termination decision. Thus, I find that Complainant has not established that her protected activity was a motivating factor in the termination decision.

2. *Was the PIP Motivated by the Protected Activity?*

The termination was motivated solely by Complainant’s failure to meet the expectations specified in the PIP. This is not the end of the analysis. Complainant was terminated for failing to succeed under the PIP, but the PIP itself is another adverse action. If *it* was motivated by the protected activity, then it would be retaliatory, as would the later termination that was based on the PIP. The foremost material dispute in this case concerns the motivations for placing PIP to begin with. Complainant contends it was due to her complaints about the Beckmann spills while Respondent argues it was solely concerns about the enviroLIS project.

Complainant argues that the “timing or the [PIP] suggests the employer was motivated less by the need to populate the EnviroLIS database and more about Mrs. Schell’s concerns about the two waste profiles.” (CPB, p. 21.) She points to the October 14, 2014, after-hours phone call and contends that even at the hearing Mr. Reed was upset by the complaints. (*Id.*) Moreover, Complainant argues that Mr. Reed before this point had been unconcerned with enviroLIS or her technical problems, ignoring her emails asking for assistance with the project, which would evidence that it simply wasn’t very important. (*Id.*) She avers that Mr. Reed’s expressed concern with enviroLIS was contemporary with the Beckmann spill. (*Id.* at 22-23.) As to the PIP itself, Complainant argues that it “remarkable” that it was timed just after her email to the corporate ethics committee, though she also acknowledges that the PIP had been circulating for a number of days.²⁰ (CPB, p. 22.) This acknowledgment defeats any probative

²⁰ Complainant also argues that Respondent’s OSHA position statement represents that performance problems went back to June 2014 or even March 2014, which is inconsistent with the record and suggests some pretext. (CPB, p. 22.) There is no inconsistency in the evidence. Insofar as the OSHA statement misrepresents what later was determined to be the case about the timeline, I do not credit the OSHA statement—it is a litigation document, not independent evidence. If, as in the cases cited by Complainant, the OSHA statement gave a reason for discharge that was different than the reason given at the time of discharge or at trial, that might be evidence of pretext. But there are no shifting explanations here. Respondent has been consistent about why it placed Complainant on a PIP and then subsequently terminated her. The only alleged inconsistency is about when performance problems first

value of the timing. Nor has Complainant introduced any evidence that would show that the relevant decision makers were even aware of the corporate ethics complaint at the time the PIP. But Complainant is correct that the timing of the PIP is proximate to the protected activity. I credit that Martin Marietta decided to put Complainant on a PIP after the October 28, 2014, meeting. That meeting was prompted by concerns that had recently developed about enviroLIS. The protected activity occurred in the same timeframe—October 14-16, 2017. Complainant argues for an inference that the concern with enviroLIS was pretextual because *it* was temporally close to the protected activity. This does not withstand scrutiny.

Respondent makes its own timing argument, averring that there was no protected activity until after Mr. Reed sought a specific update on the enviroLIS project that Complainant knew would reveal how far behind she was. (RPB, pp. 18-19, 36-37.) Respondent is correct that the enviroLIS interest did not develop after the protected activity. I credit that Mr. Reed asked for periodic updates and that based on the communications he would have believed they were on track—Complainant agreed to as much. He emailed seeking an update before the protected activity. So the concern with enviroLIS was genuine, not a pretext to put Complainant on a PIP that was motivated by the protected activity. But Respondent's timing argument is not convincing. Complainant had concerns about the Beckmann spill going back to October 10, 2014. They were not invented on October 14, 2014, in response to a query about the status of the enviroLIS project. The protected activity came on October 14, 2014, because that is when Complainant voiced her preexisting concerns. So neither party makes out a convincing case that the enviroLIS queries and protected activity were causally related at all. Rather, they overlapped and the PIP followed both. There is thus temporal proximity between the PIP and the protected activity, but that proximity doesn't establish that one motivated the other. Temporal proximity alone does not demonstrate that the protected activity motivated the adverse action. *See, e.g., Beaumont*, ARB 15-025 at 5-6. Instead, the determination must be made by examining *what* Mr. Reed (and the others) was responding to when they decided to put Complainant on a PIP.

Martin Marietta contends that there is no evidence that connects the protected activity regarding the Beckmann spill to the PIP. Any inference based on temporal proximity is faulty because it overlaps with the discovery of deficiencies in the enviroLIS project. The October 28, 2014, meeting and then institution of a PIP were focused on enviroLIS and made no reference to anything related to protected activity. When Complainant was terminated, it was not discussed at all by the decision-makers. (RPB, pp. 32-33.) In the context of advocating its affirmative defense, Martin Marietta makes additional arguments that go to motivation. It argues that the adverse actions in this case, both the PIP and termination, were the result of poor performance and motivated by Complainant's failure to make progress on and then complete the enviroLIS project, her major job duty. (RPB, pp. 34-35.) Though this evidence goes primarily to the affirmative defense, it is also relevant here. An adverse action may have multiple motivations, in which case a respondent may need to rely on its affirmative defense. But in determining whether *a* motivating factor was the protected activity, it is important to examine whether there are alternative plausible explanations—employers generally do not take adverse actions on a whim.

emerged, not when or why they became substantive concerns. The record does reflect that Mr. Reed has some concerns early on about Complainant's slow start. Mr. Carlson, who worked next to Complainant, also had concerns about her effectiveness. This explains the statement to OSHA, though the record is very clear that it was in October 2014 that Mr. Reed first developed concerns that would require intervention on his part.

Potential alternative explanations are important as potential evidence against a circumstantial case for causation based on knowledge and timing. In this regard, Respondents stress that until mid-October, Complainant led Mr. Reed to believe she was on-track on the project, but that after she responded with a numerical update on October 17, 2014, he learned that she was far behind, prompting immediate serious performance concerns that motivated the adverse actions. (*Id.*)

There is no question that the lack of progress in the enviroLIS project was *a* motivation for the PIP. The PIP itself focuses on those deficiencies. Though Complainant has contended (at least at times) that the Beckmann spill was also a topic of conversation at the October 28, 2014, and the November 6, 2014, meeting, I do not find these statements credible. The contemporary evidence doesn't support that account, and on their own, I do not find Complainant's reports of exactly what was said or discussed credible. Nor is there evidence that Ms. Waller or Mr. Sanchez were aware of the protected activity. That isn't essential, since Mr. Reed's knowledge is more than enough, but it is notable that there are no indications that Mr. Reed told them anything about the Beckmann spill. This supports a conclusion that in formulating the PIP, the primary factor was the enviroLIS project and the Beckmann spill complaints were a non-issue. In fact, after October 16, 2014, the record doesn't show that Mr. Reed was at all concerned about the Beckmann complaints. Complainant is the only person bringing them up

At times Complainant has alleged that she was assigned the enviroLIS project in the PIP in retaliation for her protected activities, that Mr. Reed was taking her off of environmental tasks and isolating her in punishment for disagreeing with him after the profiling of waste. This allegation does not withstand scrutiny. The record convincingly establishes that enviroLIS was always one of Complainant's responsibilities and that at some point in the summer of 2014, it became her *primary* responsibility. Various contentions that she was being isolated or prevented from doing environmental work are unconvincing. She volunteered for the project before any of the protected activity. Later events only show Mr. Reed and Ms. Waller asking her to focus on it like her job required. It is manifest that Complainant didn't find enviroLIS very fulfilling or worthy or her qualifications—but like it or not it had been her primary job since that summer. Directing her to do it is not in the least bit indicative of retaliation.

Parts of the PIP, however, are suggestive of retaliatory motive. Most suggestive is the language directing Complainant to be a “problem-solver” rather than “problem-finder.” (CX 24, p. 70; RX 23, p. 2.) Whistleblowers are problem-finders, and Complainant at least believed she found some problems in the way the Beckmann spill was handled. Though there is some confusion in the record over whether the language came from Mr. Sanchez or Mr. Reed, I find that it most likely came from Mr. Reed—and that he most certainly endorsed it.

However, I found Mr. Reed's explanation for this language convincing. (*See* HT, pp. 104-05, 199-200.) The stress on being a “problem-solver” rather than “problem-finder” was not meant to discourage any “problem-finding.” Mr. Reed saw that as an important part of the job of his environmental staff, even referring to their department as the “internal police.” The language was meant to encourage independently developing solutions to the problems that are found and getting others in the company to go along with addressing those problems. This fits both into the expectations Mr. Reed had for someone in Complainant's position and the goal of effectively dealing with problems with others in the company as a whole, who might resist someone who simply tells them what is wrong or a violation, but react more positively who approaches with a

suggestion of how to do better or remedy a problem. In fact, Complainant confirmed this understanding of the language in the PIP based on her other interactions with Mr. Reed. (*See* HT, pp. 348-49.)

Still, even if the language itself doesn't indicate that the PIP was motivated by the protected activity, Mr. Reed did see the protected activity as an instance of being a problem-finder rather than problem-solver. Complainant testified that Mr. Reed made this connection, (HT, pp. 267-68), and Mr. Reed agreed that the Beckmann spill work was an example of Complainant being only a problem-finder. (*Id.* at 105-06.) Further, even though the record shows that Mr. Reed wasn't upset about Complainant's work on the Beckmann spill for very long, I find that it did upset him when it was going on. This follows from the above findings about the call on the evening of October 14, 2014. Mr. Reed was upset with Complainant and lost his temper. Since Complainant didn't provide the requested enviroLIS update until October 17, 2014, at this point, the dissatisfaction could not be related to that project. (CX 11, p. 41; RX 18, p. 1; RX 19, p. 1; RX 20, p.1.)

The question, then, is whether Mr. Reed was upset with the fact that Complainant had complained about the way the spill was being handled or was upset with something else—and whether Complainant's handling of the Beckmann spill was an example of the sort of thing the PIP sought to curb because she had complained about the spill or because of something else. I find that based on the record as a whole, Mr. Reed was responding to Complainant's way of resolving the problem she thought she had identified, and not the fact that she was engaging in protected activity. He was upset with, and the PIP was partially motivated by, at least his perception that Complainant was not doing the job she was hired to do. It was poor performance, or at least the perception of poor performance, that motivated his ire. The PIP was motivated mainly by the enviroLIS project and the same perception that Complainant was not performing the job she was hired to do—it was her main responsibility, yet she was far behind. The role that the Beckmann spill complaints played in the PIP, if any, was in concerns they raised about Complainant's performance, not the concerns she raised about Martin Marietta's handling of the spill.

Respondent argues that its behavior in response to the Beckmann spill belies any retaliatory intent—they immediately informed all of the relevant authorities and involved them throughout. There was nothing to hide and Mr. Reed instructed Complainant to reach out to the authorities to ensure that they were doing things correctly. After Complainant raised her concerns, Mr. Reed discussed the matter with her and Mr. Carlson and then phoned Mr. Whitt to double-check his understanding. He told Complainant to contact TCEQ and then had a conference call with Alamo1, giving Complainant an opportunity to voice her concerns and then instructing Alamo1 to verify their approach with TCEQ. This was subject to another conference call to address any concerns Complainant may have had. (RPB, pp. 31-32.)

I find this argument convincing. TCEQ and the other relevant authorities were informed immediately. (HT, pp. 168-69.) The particular course of the response shows that Martin Marietta and Mr. Reed were not bothered by or reacting to Complainant's complaints. Alamo1 was contracted to dispose of the waste. It sent Mr. Carlson the profile on October 9, 2014, which was forwarded to Complainant on October 10, 2014, after she became involved. (CX 16, pp. 5-56; RX 38, pp. 1-2.) On the morning of October 13, 2014, Mr. Carlson asked for an update,

indicating the need to “keep that moving.” (RX 39, p. 1.) Discussions about the spill continued that day between them. (RX 40, pp. 1-2; CX 14, p. 53; RX 59, p. 1.) Early on October 14, 2014, TCEQ resolved the question about Xenco’s certification. (RX 17, pp. 1-2.) Later that morning Complainant had the first interaction with Mr. Reed about the spill, and expressed that she had concerns. Mr. Reed’s response was to immediately convene a conference call with her and Mr. Carlson—even though he believed that he knew that Complainant’s concerns were incorrect from his past experience. (CX 17, p. 57; RX 43, p.1; HT, pp. 172-73.) This is telling. Complainant expressed a concern about the profiling of the diesel waste. Even though Mr. Reed thought he knew it was baseless, he did not order her to desist and move forward. Instead, he gave her a forum to discuss the complaint.

This pattern continued. During the call they disagreed about whether it should be deemed hazardous waste, but the end result was that Mr. Reed told Complainant to go to TCEQ and said that he would talk to Mr. Whitt. (HT, pp. 67-70, 78-80, 173, 206-09, 313-14.) There has been a dispute over whether Mr. Reed hung up on Complainant and Mr. Carlson or whether he believed the conversation was over and then hung up without formally saying goodbye. This dispute isn’t important. The Environmental Acts don’t entitle anyone to a courteous boss. What does matter is the way events vis-à-vis the protected activity unfolded. Mr. Reed had first given Complainant an opportunity to explain, rather than simply suppressing the complaint, and even though he still was certain she was incorrect, he directed her to talk to the state regulatory agency while he reached out to another colleague to double-check his view. This is not behavior that displays any animus or hostility to protected activity—quite the opposite.

Mr. Reed consulted with Mr. Whitt, who confirmed his view of the situation. That afternoon he called Complainant without success, not getting any response. He then sent an email to both Complainant and Mr. Carlson telling them to “get this figured out today,” expressing displeasure at how long it was taking, and directing them to tell him what the plan was going to be and when it would be resolved. (HT, pp. 173-76; RX 50, p.1.) There is frustration in this email, but it is not any frustration at the protected activity. Rather, I credit Mr. Reed’s explanation that for Martin Marietta, this was a fairly routine matter that should not require a great deal of time and effort to resolve.²¹ Complainant testified that this stressed her and made her feel rushed and unable to do due diligence. (HT, p. 310.) But Mr. Reed expected her to be able to do due diligence in just a day or two. He was not reacting to the fact that she was doing due diligence—when she raised a concern he immediately arranged to discuss it and then directed Complainant to look further into it while he verified his own views—he was reacting to the fact that Complainant wasn’t doing what he believed she should be able to do in her position. Whether or not those expectations were reasonable is not a question I reach—I find that they were genuine expectations and so unreasonable or not, *that* is what was motivating Mr. Reed’s frustration.

Next, Mr. Reed called Complainant on the night of October 14, 2014, and expressed his displeasure with a raised voice. There is no credible account of the content of this conversation. Complainant’s accounts generally shifted over time, displaying Mr. Reed as more and more

²¹ Complainant challenges this line of reasoning on the grounds that weeks had passed since the spill. (CPB, p. 6.) But the ball had only been in Martin Marietta’s court since October 9, 2014, the prior Thursday. I credit that Mr. Reed’s expectation was that Complainant and Mr. Carlson should have had this completed by October 14, 2014.

villainous. In context, however, I find that the displeasure was related to Complainant's inability to finish the assignment and non-communicativeness about what she was doing. Mr. Reed was in Dallas. Complainant was in San Antonio. That morning he told her to contact TCEQ and investigate her concerns. He did his own investigation and then at 1:14 p.m. asked for a resolution and action plan. Complainant did not respond that afternoon. She did not answer calls from Mr. Reed or call him. He was likely quite perturbed. Many supervisors would be. He expressed that displeasure. But there is no credible evidence that his displeasure was motivated by the fact that Complainant was raising complaints. It was because Complainant wasn't making the progress he expected from a Senior Environmental Engineer in resolving those complaints and wasn't communicating with him even after a direct order to give him an action plan.

Complainant did respond, twice, to Mr. Reed's email asking for an action plan, but not until the afternoon of October 15, 2014, by this point representing that Mr. Reed had taken her off of the project effective as soon as TCEQ responded to her and relegated her to enviroLIS. She also sought permission to transfer out of the environmental department.²² (RX 53, p. 1; RX 54, p. 1.) Per the email records, Complainant hadn't actually contacted TCEQ until the morning of the 15th, almost a full day after Mr. Reed had asked her to do so. TCEQ responded that afternoon. Based on that response, Mr. Carlson thought they could move ahead with Alamo1's plan. (RX 48, p. 1; RX 66, p. 1.) Complainant apparently still had concerns about the way Alamo1 was proceeding. Mr. Reed's response is telling—he was clearly frustrated over how long this was taking, he strongly believed that everything was being done properly, he had verified it with someone more experienced, and Complainant had verified it with the state regulatory agency, yet because Complainant still had concerns, he had Mr. Carlson set up a call with Alamo1 so that Complainant could express her concerns again. Mr. Reed's language is probative as well: he thanks Complainant for getting the feedback from TCEQ and indicates that if there are any problems, Alamo1 will need to re-do the project because they were hired to dispose of the waste properly. (RX 55, p. 1.) This does not have the feel of a manager who is at all perturbed by the fact that Complainant raised concerns and engaged in protected activity.

After Complainant was given an opportunity to explain, Mr. Reed directed Alamo1 to verify their handling with TCEQ. After Alamo1 did so, they talked again. (HT, pp. 182-85; RX 112, pp. 165-68.) There is dispute over whether Complainant was satisfied with Alamo1's responses to her concerns—but even Complainant acknowledged that she was given an opportunity to express them and that Alamo1 was required to respond. (*See* HT, 316-18, 523-24.) She complained that after October 16, 2014, she was taken off of the project, (*id.* at 322), but it seems that at this point *everyone* at Martin Marietta was off of the project—Alamo1 was given the go ahead to proceed with the disposal plan. Hence the record reflects that Complainant's protected activity was encouraged. Further, neither Mr. Reed nor Martin Marietta had any motivation to suppress complaints—TCEQ already knew about the spill and any costs of re-doing the job would be borne by Alamo1, not Martin Marietta. In the subsequent interactions between the Martin Marietta employees in this case, the only instances where the Beckmann spill

²² It is worth noting that working on the Beckmann spill wasn't Complainant's job to begin with—it was Mr. Carlson's job and he accepted Complainant's help. Complainant's primary job was enviroLIS. So even if Mr. Reed had taken Complainant off of the Beckmann spill at this point, it would not suggest anything untoward. It would just be a boss telling his subordinates to do their duties as assigned.

is mentioned is when Complainant brings it up.²³ On October 17, 2014, Complainant provided Mr. Reed with an update on the progress of her primary assignment, and Mr. Reed determined that she was not on track. That sets in motion the events that lead to the PIP.

The PIP is the adverse action at issue. It, eventually, led to the termination when Complainant did not meet its goals. The PIP was motivated by concerns over Complainant's performance. This was primarily in relation to enviroLIS. Insofar as the PIP and the history of events in mid-October, including Mr. Reed's frustration with Complainant before he learned of the enviroLIS deficiency, indicate that Complainant's work on the Beckmann spill motivated any part of the PIP, it was *not* Complainant's protected activity. Mr. Reed clearly had high expectations of Complainant as a Senior Environmental Engineer, whether fair or not. She wasn't meeting them—she raised concerns without a plan for resolving them, was non-communicative, and was not proceeding as quickly as he wanted. This does not evince a motive to act because of the protected activity. The fact that Mr. Reed encouraged, at several points and over several days, Complainant to engage in protected activity by stating her concerns, contacting the state regulatory agency, and forcing the contractor to explain and justify its profile and plan, demonstrates that he was not motivated to take any adverse action because of her protected activity. Since he was the only person involved in the PIP with any knowledge and understanding of the protected activity, I find that Complainant has not established that the protected activity was a motivating factor in the decision to place her on a PIP.

E. Conclusion

Therefore, I conclude that neither sort of protected activity—the complaints about the Beckmann spill between October 14-16, 2014, and the subsequent complaints that she was being retaliated against for making those earlier complaints—motivated either Complainant's termination or the decision to put her on a PIP. The termination was motivated solely by Complainant's failure to complete or come close to completing the enviroLIS project as specified in the PIP and that PIP, insofar as it reflected more general concerns about Complainant's employment beyond the enviroLIS project, was motivated by Complainant's work on the Beckmann spill with respect to her failure to meet Mr. Reed's expectations for her position in solving the problems, not with the protected activity of having and expressing concerns to begin with—something he encouraged in this instance. Since Complainant did not show that her protected activity motivated either adverse action, her complaints under the Environmental Acts must be dismissed.

In the alternative, for the same reasons articulated at length above, I find that Respondent has shown that even if Complainant did not engage in any protected activity, it would have taken the same adverse actions. Even had Complainant not been involved at all with the Beckmann spill, and derivatively had no occasion to later complain of being retaliated against due to that involvement, Mr. Reed was going to find out how far behind Complainant was on the enviroLIS project. There was a due date that had been mentioned several times, he had sought some updates in the past and before the protected activities sought a more concrete update. As soon as that update was provided, Mr. Reed was going to become aware of the enviroLIS problems.

²³ Ms. Waller did email Complainant about document requests from the Carthage spill, (*see* RX 32, p. 1; RX 94, p. 1), but this was in response to Complainant's prior queries to Ms. Andoe, which found their way to Ms. Waller.

Since the enviroLIS project was Complainant's primary responsibility, a responsibility she volunteered for, that discovery was going to lead to the involvement of HR, the decision to place Complainant on a PIP, and if Complainant was unable to complete the project per the PIP, her termination. In both emails and testimony of the relevant decision makers, enviroLIS, and it alone, was driving the chain of events. Whether fair or not, an employee who is unable to complete his or her primary job function is likely to face adverse actions. Thus, Respondent has made out its affirmative defense, so even if Complainant had shown that the protected activity was *a* motivating factor on top of the predominant enviroLIS project concerns, the complaint would be dismissed because Martin Marietta would have taken the same adverse actions absent the protected activities.

This case presents an unfortunate series of events, but it does not represent retaliation in violation of the Environmental Acts. Mr. Reed became concerned with Complainant's performance during October 2014. He expressed his displeasure and Martin Marietta opted to put Complainant on a PIP, with the expected deliverable being the enviroLIS project. These responses were reasonable and warranted from the perspective of Martin Marietta and Mr. Reed. Unfortunately, given Complainant's history, this chain of events had a deleterious effect on Complainant. Her psychological condition worsened and so did her performance. The record shows that over time she perceived the criticism and treatment as much harsher than it actually was, a narrative that grew over time, again adversely affecting her performance. I have found her perceptions mostly genuine, but not accurate.

Complainant did not complete the enviroLIS project or make substantial progress. She has pointed to a host of technical difficulties, but regardless of the reality of these difficulties, I have found that the decision-makers genuinely and reasonably did not credit them because they were unique to Complainant's experience. They thus made the decision to terminate Complainant, motivated solely by her insufficient performance under the PIP. The PIP itself was closer in time to some protected activity, but the record shows that it was not motivated by that protected activity—it was motivated by genuine, reasonable concerns about Complainant's performance. The facts in this case show a chain of events that was unfortunate for all involved. But I find that this unfortunate chain of events and the adverse actions Martin Marietta took against Complainant were not motivated by Complainant's protected activity. Accordingly, the complaints under the Environmental Acts must be dismissed.

ORDER

For the reasons stated above, it is hereby ORDERED that the Complainant's November 8, 2014, complaint, as amended on January 28, 2015, is DISMISSED.

JENNIFER GEE
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.