DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER ENTITIES WITH A DIRECT FINANCIAL INTEREST IN LITIGATION

ONLY ONE FORM NEED BE COMPLETED FOR A PARTY EVEN IF THE PARTY IS REPRESENTED BY MORE THAN ONE ATTORNEY. DISCLOSURES MUST BE FILED ON BEHALF OF INDIVIDUAL PARTIES AS WELL AS CORPORATE PARTIES. DISCLOSURES ARE REQUIRED FROM AMICUS CURIAE ONLY IF AMICUS IS A CORPORATION. COUNSEL HAS A CONTINUING DUTY TO UPDATE THIS INFORMATION. PLEASE FILE AN ORIGINAL AND THREE COPIES OF THIS FORM.

Pursuant to FRAP 26.1 and Local Rule 26.1,
William T. Knox who is Petitioner,
(name of party/amicus) (appellant/appellee/amicus)
makes the following disclosure:

1. Is party/amicus a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
2. Does party/amicus have any parent corporations?
   ( ) YES (X) NO
   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
   ( ) YES (X) NO
   If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))?
   ( ) YES (X) NO
   If yes, identify entity and nature of interest:

5. Is party a trade association?
   ( ) YES (X) NO
   If yes, identify all members of the association, their parent corporations, and any publicly held companies that own 10% or more of a member's stock:

6. If cases arise out of a bankruptcy proceeding, identify any trustee and members of any creditor's committee.

_____ 1/31/2008
(signature) (date)

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JURISDICTIONAL STATEMENT

Congress directs the U.S. Department of Labor to investigate and adjudicate claims made pursuant to the employee protection provisions of the federal environmental statutes. See, *e.g.*, Clean Air Act, 42 U.S.C. § 7622; Resource Conservation and Recovery Act, 42 U.S.C. § 6971.

This Court's jurisdiction to review the final decision of the Department of Labor is codified in the Clean Air Act. 42 U.S.C. § 7622(c). A final decision in the instant case was issued on August 30, 2007. Mr. Knox's Petition for Review of the final decision of the Department of Labor was timely filed (within sixty days) with this Court on October 30, 2007.

STATEMENT OF ISSUES FOR REVIEW

A. Whether the ARB used improper legal standards and ignored extensive evidence in the record in determining whether Petitioner William Knox had a good faith, reasonable belief that the Department of the Interior (DOI) violated EPA asbestos work practice standards, such that he is protected under the Clean Air Act's employee protection provision, 42 U.S.C. § 7622?

B. Whether DOI was aware of Petitioner Knox's concerns about DOI's work practices?

C. Whether the Record establishes that DOI retaliated against Petitioner Knox because of his protected activities?

STATEMENT OF CASE

The instant case is an action under the employee protection provision of the federal Clean Air Act ("CAA"). 42 U.S.C. § 7622. As noted previously, Congress has charged the Department of Labor with the duty to investigate and adjudicate "whistleblower" claims under the employee protection provisions of the federal environmental statutes. The Department has promulgated regulations outlining its duties under these provisions. 29 C.F.R. Part 24.

Petitioner William Knox, who was employed by the U.S. Department of Interior ("DOI") at the Harper's Ferry Job Corps Center ("Center"), initiated this action almost *eight years ago* by filing a letter of complaint with then-Secretary of the Interior Bruce Babbitt on or about March 7, 2000. Joint Appendix, A606, A11.[1] Knox's complaint letter was provided to the Occupational Safety and Health Administration's ("OSHA") regional investigations office.

In his complaint letter, Knox provided a detailed description of the hazards and problems he was experiencing on the job. He stated that he was being harassed and felt he was a whistleblower. In part, Knox emphasized that he was concerned about "being punished as a whistleblower," the past and present

[1] The Joint Appendix pages are numbered A1 through A611. Subsequent citations to the Joint Appendix will be to those page numbers.

exposure of "students, contractors, and federal workers" to asbestos, and "violations of AHED [sic][2] Public Law, EPA Laws and OSHA Laws." A609.

Following an investigation, OSHA issued a letter on October 18, 2000 indicating it had reached the following determination:

> The complainant engaged in protected activity by voicing his concerns to management regarding exposure to workplace asbestos. The respondent acknowledges receiving these concerns from the complainant. Management told the complainant that he was stirring up employees and not to get people in an uproar over the situation. The complainant maintains that when he advised the respondent as to what needed to be done to properly correct the problem, the respondent discharged him and tried to cover up the problem. The complainant believes that he was harassed and discharged in reprisal for exposing asbestos problems and voicing his concerns regarding workplace asbestos. The Occupational Safety and Health Administration provided to the respondent formal written notification of the complainant's allegations of discriminatory employment practices and the Acts alleged to have been violated. The respondent chose not to provide any relevant information or evidence or any communication detailing its position in this matter as requested by the notification.

A603. In response to OSHA'S determination, the DOI requested a hearing.

The hearing consumed twenty-nine days. A9. On December 30, 2002, Administrative Law Judge ("ALJ") DiNardi issued an eighty-seven page decision, ruling in favor of Knox. A8-104. ALJ DiNardi had nothing but praise for Knox's whistleblowing efforts, concluding that "William T. Knox is a dedicated, conscientious, diligent and highly-motivated public citizen who has manifested these qualities throughout his many years in the military and as a public servant no

[2] AHERA stands for Asbestos Hazard Emergency Response Act. 15 U.S.C. 2624 et seq.

matter the task assigned." A9. The ALJ awarded back pay, compensatory damages, exemplary and punitive damages, injunctive relief, and attorneys' fees and costs. A80-94.

DOI sought review of the ALJ's decision before the Administrative Review Board ("ARB"). On September 30, 2004, the ARB dismissed the complaint, ruling that Knox did not "demonstrate by a preponderance of evidence that he engaged in [Clean Air Act] protected activity[,]" because the ARB believed that the CAA was concerned only with ambient (outside) air pollution and that Knox had not shown that he had a reasonable belief that DOI emitted asbestos into the ambient air. A98, A100, A101.

On January 17, 2006, this Court reversed, holding that because the record showed, and ARB accepted, that Knox observed asbestos escape into the ambient air, he met the standard for protected activity under the CAA. A150. Contrary to what the ARB had found, this Court held that it was not necessary for Knox to show that he actually expressed this concern to DOI management. *Id.* This Court also noted that it might not be necessary for a whistleblower to reasonably believe there had been a release into ambient air, because the CAA could be violated without such releases, *citing*, *inter alia*, the EPA asbestos work practice standards at 40 CFR § 61.150. A149, n. 3. The Court remanded to the ARB, directing it to determine whether DOI retaliated against Knox because of his protected activities.

On remand, the ARB again dismissed the complaint, ruling that DOI was not aware of Knox's protected activity concerning releases into the ambient air, and therefore could not have retaliated against him on that basis. A156. The ARB also ruled, without explanation, that the record did not contain evidence that DOI violated any regulations implementing the CAA. A155, n. 5.

On May 23, 2007 this Court again reversed the ARB. A160-67. The Court held that substantial evidence supported the ARB's ruling that DOI was not aware of Knox's concerns about asbestos emissions into ambient air. A165-66. However, the Court remanded for consideration of whether Knox had a "good faith, reasonable belief" that DOI had violated EPA asbestos work practice standards and had conveyed his concern to DOI officials. A167. The Court directed the ARB to consider "the entire record in light of Knox's contention that he reported EPA work practice standard violations to DOI management…." *Id.*

On August 30, 2007, the ARB again ruled against Knox, holding that Knox had not demonstrated that he had a reasonable belief that DOI had renovated or demolished buildings containing asbestos, and thus he had only speculated that DOI had violated EPA work practice standards. A168-181. This appeal marks the third time Mr. Knox has appeared before this Court. Almost eight years have passed since he initiated this action.

STATEMENT OF FACTS

William Knox was appointed Training Instructor, Vocational Training Specialist, GS-1712-09, at Harpers Ferry Job Corps Center ("Center"), National Park Service ("NPS"), DOI on November 21, 1999. A562. As Training Instructor, Knox was given the collateral duty of being the Center's Safety Officer. Soon after starting at the Center, he learned of the presence of asbestos in some of the buildings there during a regularly scheduled inspection conducted by the Department of Labor. A11. Upon further investigation, he discovered a report prepared in 1993 by AAS Environmental, an asbestos contractor hired by the Center. A196, A240, A384, A454-512. The report listed specific areas at the Center where asbestos-containing material ("ACM") had been found, including floor tile and mastic in several buildings and drywall/joint compound throughout the maintenance building.[3] A485-489; A199-200. The report stated that ACM should be removed by a licensed contractor before starting any renovation or demolition project that would disturb the ACM and release asbestos fibers, A486-487. It also indicated that the ACM was not hazardous "unless sanded, drilled, or otherwise damaged." A486, A209. The report was missing some pages, so Knox

[3] The report indicated that although the drywall tested positive for asbestos, it should be tested again because it was likely that only the joint compound, or "spackle," component actually contained the asbestos. A486.

contacted AAS to obtain a complete copy. A1272. Mr. Dave Johnson at AAS volunteered to visit the Center and conduct an inspection at no charge. *Id*.

Johnson walked Knox through the entire 1993 report during his inspection. A241. He told Knox that asbestos had been disturbed and that it was illegal not to inform people working in ACM areas about the presence of asbestos.[4] A360-61. He told Knox that Knox was in trouble and had to do something. A241. Ben Hutzler, a former maintenance worker and current electrician, accompanied Knox and Johnson on the inspection and expressed his concern that he had removed tile and drywall that might have contained asbestos. A593.

Knox began questioning other employees about renovations and maintenance activities to find out if they had disturbed ACM, and he became increasingly concerned about the possibility of hazardous work practices at the Center. A273-276.[5] Virtually none of the employees knew about the ACM or the 1993 report.[6] A227, A300, A402-03. Knox referred to his questioning as "fact-finding". A259-60. Knox tried to communicate his concerns to his supervisor, Ms. Valerie Flemming, but she told him there was no asbestos problem. A246.

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[4] Johnson said the Center should have had an Operations and Maintenance Program in place immediately after the 1993 survey. A298.

[5] Knox questioned co-workers, Center staff (including trade instructors), and contractors about what types of projects they had worked on and where those projects were located. *E.g.*, A259-60.

[6] Gloria Brown, Regional Risk Management Officer, testified that the Center did not have an Operations and Maintenance Plan and that as far as she knew, no one at the Center or even the Region was aware of the ACM at the Center. A402-03.

When Knox indicated his intention to contact the Department of Labor inspector for assistance, Ms. Flemming gave him a card for Ms. Gloria Brown, the DOI's Risk Management Officer with the National Capital Region, National Park Service.[7] A247.

In order to address his asbestos concerns, Knox contacted Brown. A247, A384-85. He subsequently faxed Brown a document entitled "Notice of Unsafe and Unhealthful Working Conditions," together with a copy of the incomplete 1993 report, on January 4, 2000. A386, A592-601. On January 6, 2000, Knox met with Flemming, Brown, and DOI management officials in Washington, D.C. to discuss the asbestos issue. A12, A213. It was determined that Brown and her supervisor, Gentry Davis, would conduct an inspection of the Center to verify the presence of asbestos. A12.

When Brown and Davis returned to conduct the inspection on January 11th, Knox pointed out various locations where he believed ACM had been disturbed due to renovation or maintenance activity performed by staff, students, or contractors.[8] A326, A391, A392, A395-396, A398. At a meeting with Knox and Center management following the inspection, Davis and Brown recommended no

[7] Brown was a certified asbestos inspector and project designer who knew the rules, regulations, and science of asbestos. A383.

[8] One of the things Knox pointed out was damaged wallboard in the maintenance building, where holes in the storage room ceilings were apparently caused by contractor activity. A392, A395-96.

more tile buffing, strengthening of the asbestos program, alerting staff to location of on-site asbestos information, and a new asbestos survey. A547. The new survey, released February 16, 2000, confirmed the 1993 survey results and revealed that the actual asbestos content in some of the materials was even higher than indicated in the 1993 report.[9] A357; A513-519.

The possibility that the ACM had been disturbed by renovations and maintenance activity was not addressed until Knox began expressing his concerns. A292, A592-601. Knox believed that the Center's actions were illegal. A 372. He was concerned that previous renovations and maintenance activities had disturbed the ACM, creating a hazardous situation at the Center. A263-265, A275-277.

The management at the Center was aware of these concerns. According to Jay Weisz, the Center Director, air samples were taken as a result of Knox's concern that dry-buffing the floors disturbed asbestos in the tile. A205-206. *See also* A429 (testimony from Davis that air sampling was done in response to Knox's concerns). Knox's direct supervisor, Ms. Flemming, confirmed that steps taken by the Center to verify the information in the 1993 report were a direct result of Mr. Knox's complaints that the ACM had been disturbed. A211-212. Ms. Brown was also aware that Knox was concerned that renovation and maintenance activities

[9] The high asbestos content in some of the floor tile made Knox extra worried about the hazardous dry buffing that was standard protocol at the Center. A357-358.

had disturbed ACM. A391, A392. According to Mr. Davis, Knox wanted them to shut down the center until the disturbed ACM had been removed and someone said it was safe for the students and staff to return. A218.

In addition to communicating his asbestos concerns to DOI management, Knox also contacted various government agencies, including the U.S. Environmental Protection Agency ("EPA"). A215, A323-24. The West Virginia Division of Environmental Protection ("WVDEP") visited the Center as a result of Mr. Knox's asbestos complaints. A296, A436. The WVDEP subsequently issued a letter to the Dept. of Justice indicating that the Center "may very well have violated that part of Section 112 of the Clean Air Act which deals with the handling of regulated asbestos containing material." A125.

Several weeks after Brown and Davis inspected the Center, Knox learned that an effort to terminate him as a probationary employee was underway. A12-13. He sent a letter to then-Secretary of the Interior Bruce Babbitt, seeking his assistance in stopping the discrimination and harassment Knox believed he was experiencing for "exposing the asbestos problem." A606-09. In the letter, Knox stated he was concerned that "[o]ver the years, AHED [sic] Public Law, EPA Laws, and OSHA Laws had been violated." A609. The letter was forwarded to

OSHA and treated as a complaint under the employee protection provision of the CAA.[10]

In the meantime, Knox was improperly terminated from his purported probationary position, effective March 16, 2000. The stated reasons for the termination were: 1) failure to perform duties as assigned; 2) failure to follow instructions; and 3) disruptive and inappropriate behavior. A13. However, Knox was not a probationary employee. On March 18, 2000, agency counsel discovered the "error" regarding the probationary employee designation, and Knox was reinstated. A13, A563. He was placed on administrative leave while personnel attempted to locate a new position at a different location. A449, A451. Knox had also filed several whistleblower appeals with the Merit Systems Protection Board ("MSPB").[11] A13. On September 29, 2000, Knox and DOI settled the pending MSPB matters. *Id*. In September 2000, Knox was appointed to the position of Engineering Equipment Operator, WG-5716-10, Step 5 at Greenbelt Park, a different DOI facility.

However, the settlement through the MSPB process did not end DOI's harassment of Knox. A45. Knox was supposed to get a position with equal pay as part of the settlement, but was instead given a lower position with a lower salary.

[10] On October 18, 2000, OSHA issued a finding in favor of Mr. Knox. A603-04.
[11] In Knox's MSPB appeal dated February 15, 2000, he alleged among other things that DOI engaged in prohibited personnel practices. A572.

A378-379, A381. There are only five steps under his current classification of WG-10, Step 5, so there is no opportunity for advancement (he was previously a step seven under the ten step GS-9 system). A380. Knox was labeled a whistleblower by his new management and co-workers from the day he started his job at Greenbelt. A378-379, A45. He was placed under a "gag" order by one of his supervisors that prevented him from taking his complaints outside DOI. A10, A45. In addition, he was prohibited from freely accessing DOI's main building to visit the Director of the National Park Service or other officials, a restriction that was not applicable to any other employee at that time. A10, A46. Consequently, Knox proceeded with his claims under the employee protection provision of the Clean Air Act.

SUMMARY OF ARGUMENT

The Clean Air Act prohibits retaliatory discharge and discrimination, a provision which must be broadly construed. Under a claim of retaliatory discrimination, the employee must show that he or she engaged in protected activity, the employer knew of the protected conduct, and the employee suffered an adverse impact as a result of engaging in protected activity. An employee's activity is protected if he or she has a good faith, reasonable belief that the employer violated the environmental statutes or applicable regulations.

Asbestos is a statutorily defined hazardous pollutant for which the EPA has promulgated work practice standards as an alternative to emission standards. The work practice standards cover renovations and other activities that may disturb the asbestos. A violation of the work practice standards constitutes a violation of the Clean Air Act.

The ARB erred by failing to apply appropriate legal standards in reviewing whether Knox reasonably believed DOI violated EPA work practice standards. It also ignored this Court's order to reconsider the entire record on remand, and failed to provide sufficient evidence for its ruling, when it concluded that Knox's belief was not reasonable without even considering significant evidence in the Record that demonstrates Knox's belief was reasonable.

Knox was concerned about renovations and maintenance activity that disturbed the asbestos. He expressed these concerns on a number of occasions, both to his direct supervisor and other DOI management officials, as well as to outside agencies such as the EPA. The Record establishes that DOI was aware of these concerns.

Moreover, it is clear from the Record that DOI management retaliated against Knox because of his protected activities. Accordingly, the decision of the ARB should be reversed and remanded with specific instructions to award relief

consistent with the ALJ's judgment or such other relief as is appropriate under law and consistent with the Record.

ARGUMENT

I. STATUTORY BACKGROUND AND STANDARD OF REVIEW

The employee protection provision of the Clean Air Act ("CAA" or "Act") prohibits retaliatory discharge or discrimination[12] against any employee who "assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this Act." 42 U.S.C. § 7622(a) (2004). In general, the elements of a prima facie case for retaliatory discharge or discrimination are: (1) the employee engaged in protected activity, (2) the employer knew of the protected conduct, (3) the employee suffered an adverse employment action, and (4) a nexus exists making it likely the protected activity led to the adverse employment action. *See Sam's Club v. NLRB*, 173 F.3d 233, 242 (4th Cir. 1999)(retaliatory discrimination claim under the National Labor Relations Act); *Simon v. Simmons Foods, Inc.*, 49 F.3d 386, 389 (8th Cir. 1995)(retaliatory discharge claim under the Water Pollution Control Act and the Solid Waste Disposal Act); *Passaic Valley Sewerage Comm'rs v. U.S. Dept. of*

[12] Anti-retaliation provisions prohibiting discrimination are broadly interpreted to include protection from employers' actions that a reasonable employee would find materially adverse under the circumstances. *Burlington Northern & Santa Fe Railway v. White*, 548 U.S. 53, 126 S.Ct. 2405, 2415 (2006).

Labor, 992 F.2d 474, 480-481 (3d Cir. 1993) (retaliatory discharge claim under the Clean Water Act).

The employee protection provisions of the environmental statutes are remedial in nature and are to be broadly construed by the Department of Labor and the courts. *Deford v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983); *see also Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 932-933 (11th Cir. 1995); *Kansas Gas & Elec. Co. v. Brock*, 780 F.2d 1505, 1512 (10th Cir. 1985). The Secretary of Labor has traditionally relied on general labor law precedent to interpret the employee protection provisions in the federal environmental statutes. In the leading case under Section 8(a)(4) of the NLRA, the Supreme Court held that the employee protection provisions must be broadly construed.[13] *NLRB v. Scrivener*, 405 U.S. 117, 121-2, 124 (1972). Knox initiated actions that were intended to carry out the purposes of the Clean Air Act, and his efforts are protected under the remedial scheme established by Congress and implemented by the Department of Labor. 42 U.S.C. § 7622; 29 C.F.R. § 24.2.

Congress has designated asbestos as a hazardous pollutant. 42 U.S.C. § 7412(b). The EPA is authorized under the CAA to describe the emission standards for hazardous pollutants, known as the National Emissions Standards for

[13] The Secretary of Labor has interpreted the various employee protection provisions in the federal statutes broadly and issued regulations, clearly defining prohibitions against intimidation, threats, restraint, coercion and blacklisting. 29 C.F.R. § 24.2(b).

Hazardous Pollutants ("NESHAP"). 42 U.S.C. § 7412(d). For those hazardous pollutants for which specific emissions standards are not feasible, the EPA has the authority to promulgate other standards to control emissions. 42 U.S.C. § 7412(h). In the case of asbestos, the EPA has determined that a specific emission standard is not feasible, and has promulgated a NESHAP that involves work practice standards. 40 C.F.R. Part 61, Subpart M. These work practice standards govern, *inter alia*, renovations of buildings with ACM. 40 C.F.R. § 61.145. The standards define "renovation" to include "altering a facility or one or more facility components in any way, including the stripping or removal of RACM [regulated asbestos-containing material] from a facility component." 40 CFR § 61.141. The standards dictate asbestos emission control procedures, including that all ACM be removed from a facility before starting any renovation or demolition that would "break up, dislodge, or similarly disturb the material[,]" and that ACM stripped during renovations be "adequately wet[.]" 40 C.F.R. § 61.145(c)(1), (3). The violation of a work practice standard constitutes a violation of the CAA. *U.S. v. Walsh*, 8 F.3d 659, 664 (9th Cir. 1993).

This Court held in Knox's second appeal that the EPA asbestos work practice standards could be the basis of Knox's protected activities. A166-67. The Court stated that for Knox to prove he engaged in protected activity, he "is only

required to prove that he had a good faith, reasonable belief that DOI was violating an applicable EPA regulation and that he expressed that belief to DOI." A167.

STANDARD OF REVIEW

This Court reviews a decision of the Administrative Review Board for whether it is supported by substantial evidence and whether it is arbitrary, capricious, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(E), (A); *Blackburn v. Martin*, 982 F.2d 125, 128 (4th Cir. 1992). "Substantial evidence consists of 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" *Blackburn*, F.2d at 128 (quoting *Richardson v. Perales*, 402 U.S. 389, 401, 91 S. Ct. 1420 (1971)). In reviewing the ARB's decision, this Court reviews the entire record, including the ALJ's recommended decision and evidence that is contrary to the ARB's decision. *Id.* (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S. Ct. 456 (1951)). This Court reviews questions of law de novo. *Bechtel*, 50 F.3d at 931.

Where disagreements between the ARB and the ALJ involve questions of fact and credibility, this Court must examine the evidence more critically in determining whether substantial evidence supports the ARB's decision. *Bechtel*, 50 F.3d at 933 (citing *Syncro Corp. v. NLRB*, 597 F.2d 922, 924-25 (5th Cir. 1979)). "[E]vidence supporting a conclusion may be less substantial when an

impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion." *Universal Camera*, 340 U.S. at 496, 71 S.Ct. at 469. The ALJ's findings should be considered together with the consistency and inherent probability of the testimony. The significance of the ALJ's report hinges largely on the importance of credibility in a given case. *Id.*

In this case, ALJ DiNardi, who conducted a 29 day hearing, pointedly stated that Knox's "allegations have been corroborated by his credible and persuasive testimony and which have not been contradicted by the vague and numerous-could-not-recall testimony of the Respondent's witnesses." A14. Yet the ARB scarcely discussed the testimony of Knox and his witnesses; it either ignored such testimony or, contrary to the ALJ's determination, discounted its credibility. Further, some of Knox's testimony differed from that of the Respondent's witnesses, including testimony about events that bear on whether Knox reasonably believed DOI had violated EPA work practice standards. Thus, this Court should apply additional scrutiny in determining whether substantial evidence supports the ARB's decision.

II. THE ARB APPLIED IMPROPER STANDARDS AND IGNORED EXTENSIVE EVIDENCE IN THE RECORD IN ITS DETERMINATION OF WHETHER PETITIONER KNOX HAD A GOOD FAITH, REASONABLE BELIEF THAT DOI VIOLATED EPA WORK PRACTICE STANDARDS.

To show that environmental whistleblowing activity is protected, an employee must prove that his or her allegations were based on a good faith, reasonable belief that the employer violated applicable environmental statutes or regulations. *Knox v. U.S. Dept. of Labor*, No. 06-1726 (4th Cir. 2007) (unpublished), A166-167; *see also Passaic Valley*, 992 F.2d at 478 ("employees must be free from threats to their job security in retaliation for their good faith assertions of corporate violations of the statute."); *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 3 (ARB Apr. 8, 1997) (protected activity must be "grounded in conditions constituting reasonably perceived violations of the environmental laws.") Whether the whistleblower's belief is reasonable is decided on the basis of "'the knowledge available to a reasonable [person] in the circumstances with the employee's training and experience.'" *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 27 (ARB July 14, 2000) (quoting *Minard v. Nerco Delamar Co.*, Case No. 92-SWD-1, slip op. at 7, n. 5 (Sec'y Jan. 25, 1995)). The whistleblower is not required to prove that the problems he perceived actually violated the environmental act or regulation, *Yellow Freight Sys. v. Martin*, 954

F.2d 353, 357 (6th Cir. 1992), nor must the whistleblower's assessment of the hazard prove correct. *Passaic Valley*, 992 F.2d at 479. Further, the whistleblower's complaints need not specify the controlling EPA regulations. *Oliver v. Hydro-Vac Services, Inc.*, 91-SWD-00001, slip op. at 11 (Sec'y Nov. 1, 1995) (citing *Minard*, 92-SWD-1); *Hall v. U.S. Army Dugway Proving Ground*, ARB Nos. 02-108, 03-103, ALJ No. 1997-SDW-00005, slip op. at 11 (ARB Dec. 30, 2004). However, there is no protection for a complaint based largely on assumptions and speculation, or one that expresses only a vague notion that the employer's conduct might negatively affect the environment. *Erickson v. EPA*, ARB Nos. 04-024, 04-025, ALJ Nos. 2003-CAA-11 and 19, 2004-CAA-1, slip op. at 15-16 (ARB Oct. 31, 2006).

A. THE ARB APPLIED IMPROPER LEGAL STANDARDS IN DETERMINING WHETHER KNOX HAD A REASONABLE BELIEF THAT DOI VIOLATED EPA WORK PRACTICE STANDARDS.

It is apparent from its decision that the ARB applied improper legal standards in analyzing whether Knox's belief was reasonable. Rather than determining whether Knox reasonably believed renovation activities at the Center disturbed ACMs, it considered whether renovation activities in fact disturbed ACMs. It is also apparent that the ARB did not follow its own precedent when it failed to decide whether Knox's belief was reasonable on the basis of the knowledge available to a reasonable person under the circumstances with Knox's

training and experience, but required an inappropriate degree of knowledge and certainty. *See Melendez*, slip. op. at 27. The ARB also misuses the record to decide that it does not support Knox's belief, relying on evidence which is disputed or contradicted or which was not known by Knox at the time he made his disclosures.

1. The ARB Improperly Dismissed Ben Hutzler's work activities as a possible source for Knox's belief.

The ARB applied improper standards and ignored contrary evidence in dismissing maintenance worker Ben Hutzler's work activities as a possible source for Knox's belief that DOI violated work practice regulations. The ARB recognized that Hutzler told Knox that he had conducted renovation-type activities in areas that "might have had asbestos," and that Knox reported this conversation to Gloria Brown, DOI's Regional Safety Officer. A177. Nevertheless, the ARB concluded that this evidence could not support Knox's reasonable belief that DOI had conducted renovation activities in areas with asbestos.

The ARB based this conclusion first on the fact that Hutzler only told Knox that there "might" have been asbestos in the tile and drywall he disturbed. *Id.* Yet the ARB acknowledges that Hutzler himself testified that he was "upset because he worked in some of the areas that contained asbestos." *Id.* The ARB is requiring certainty, not a reasonable belief. Moreover, it does not matter if Hutzler was uncertain that the materials he impacted contained asbestos, it only matters that

Knox reasonably believed Hutzler impacted ACM. Knox knew that Hutzler's renovation activities impacted drywall and tile in the maintenance building, and Knox knew from the 1993 AAS report and Johnson's inspection that the tile in various buildings and the joint compound in the drywall throughout the maintenance building contained asbestos. Knox logically concluded that Hutzler's renovation activities disturbed ACM. Indeed, the very fact that Hutzler conducted renovation activities in a facility known to contain asbestos without knowing whether or not asbestos was present in his work area could be the basis for a reasonable belief that the work practice standards had been violated.

Second, the ARB also reasoned that Hutzler "did not indicate that he renovated to the extent that he disturbed, sanded, drilled or otherwise damaged areas containing asbestos, which, according to the Survey Report, would have made the asbestos hazardous." A177. However, the ARB's own description of Hutzler's work would lead to a common sense reasonable belief that it likely disturbed or damaged any asbestos present. The ARB recites that Hutzler sanded, removed tile and drywall, replaced light fixtures and valves, and lifted ceiling tile. *Id.* It is not apparent what additional information the ARB would require to

support a reasonable belief that renovation activities requiring compliance with the work practice standards occurred without such compliance.[14]

Moreover, Hutzler's own testimony bluntly contradicts the ARB's conclusions. He testified that he disturbed drywall in the maintenance building before he knew the joint compound contained asbestos, especially in the area above the drop ceiling when he would change light fixtures and valve stems. A284. He also drove nails into the joints in the drywall, and it created dust. A306-307.

Third, the ARB discounts Knox's reasonable belief because another witness, Gentry Davis, the DOI Deputy Regional Director for safety, testified that he talked to Hutzler about the areas where Hutzler worked, and that those areas were not identified as containing ACM. A177 (citing A423-424).[15] There is no showing that Davis' testimony was more accurate than Hutzler's, or that Knox knew that Davis took this position at the time he formed his belief and made his protected disclosures. As noted above, the whistleblower's assessment of the hazard need not prove correct to receive protection. Rather, it must be reasonable based on the information he had at the time.

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[14] The ARB also bemoans the fact that Hutzler did not know the difference between dust and asbestos. A177. This has no bearing on whether Knox reasonably believed Hutzler's work disturbed ACM.

[15] The ARB stated that Davis's and Brown's January 11, 2000 inspection "revealed that the area where Hutzler had worked did not contain asbestos." A173.

Moreover, the ARB's reliance on Davis's testimony is misplaced. He admitted in later testimony that it was in fact Brown who talked to Hutzler about his work. A425. Davis also did not recall hearing that Hutzler had disturbed anything in the maintenance building. A430-431. But, as noted above, Hutzler testified that he had in fact disturbed drywall in the maintenance building. A284. And Flemming testified that Hutzler told her and other Center management that he may have disturbed ACM in the maintenance building during the course of his work. A448.

2. The ARB Improperly Dismissed James Kircher's work activities as a possible source for Knox's belief.

In a footnote, the ARB dismisses contract maintenance worker James Kircher's testimony because Kircher said "only that the drywall 'possibly' contained asbestos. Therefore Knox cannot rely on Kircher's testimony to establish that he reasonably believed that DOI was renovating areas containing asbestos." A177, n. 57.[16] The ARB is again requiring certainty, not a reasonable belief. The ARB failed to consider what Knox reasonably believed given his knowledge of asbestos locations and hazards from the 1993 report and Johnson's inspection. Knox knew that the joint compound in the maintenance building drywall contained asbestos. Knox knew that Kircher had drilled holes in the

[16] The ARB does not mention Kircher's testimony about drilling through tile. *See* A235, A237.

drywall ceiling in part of the maintenance building to hang lights. It was also Knox's experience that a person hanging something in drywall would want to hit a seam – where joint compound was located – so it would hold better. A342. Thus Knox logically concluded that Kircher's work disturbed ACM. It does not matter whether Kircher was certain that his renovation activities had disturbed ACM, or whether his activities actually disturbed ACM, it only matters that Knox reasonably believed that Kircher's activities disturbed ACM.

3. The ARB Improperly Dismissed Knox's Report to the West Virginia Division of Environmental Protection.

The ARB also finds that Knox's report to the West Virginia Division of Environmental Protection (WVDEP) of improper removal and disposal of floor tiles is not evidence of Knox's reasonable belief that DOI was violating EPA work practice standards. A179-80. The ARB recognizes that Knox's submissions caused the WVDEP's Asbestos Program Manager to believe that the Job Corps Center might have violated those regulations and to conduct an investigation. A178-179. Nevertheless, because upon further investigation, WVDEP found no violation, and because Knox's supervisors testified that no one had disturbed ACMs, the ARB concluded that Knox did not have a reasonable belief, but had "only speculated." A180.

Again, the ARB is not looking at the reasonableness of Knox's belief based on the evidence he had at the time, but at what was concluded upon further

investigation. Further, the ARB is relying on the testimony of Knox's managers, his opponents in the litigation, that there were no violations.[17] There is no question that this was their position – the question is whether Knox had a reasonable belief to the contrary, based on the information and knowledge he had at the time.

4. The ARB Improperly Speculated about the Applicability of the EPA Work Practice Standards.

The ARB briefly speculates that the Center may not fall within the coverage of the EPA asbestos work practice standards. *See* A175. ("First, these standards apply only to buildings containing specific kinds and large amounts of asbestos. We will assume without finding that Knox proved that the required kind and amount of asbestos at some of the Job Corps Center buildings existed."). The ARB provides no support for its conjecture and nothing in the Record indicates that anyone at DOI or the Center thought the work practice standards were inapplicable. While the ARB's result is not affected by this speculation, it is further evidence of the Board's misapprehension of the legal standard. The ARB assumes that Knox would need to "prove[] that the required kind and amount of asbestos . . . existed," to be covered by the whistleblower provision, not that he need only have a reasonable belief that the work practice standards were applicable.

[17] Notably, the ALJ found Knox far more credible than DOI management. A14.

In sum, the ARB has incorrectly applied the legal standard for protected activity under the CAA whistleblower provision by demanding certainty, not a reasonable belief, by requiring an actual violation rather than a reasonable belief of a violation, by finding that a belief was not reasonable based on information that Knox did not have at the time, and by using disputed evidence to vitiate the reasonableness of Knox's beliefs. Because the ARB applied the wrong legal standard, its decision cannot stand. As further demonstrated below, the record amply supports Knox's reasonable belief that the EPA asbestos work practice standards were violated, and this Court should so find. Given the ARB's unwillingness to rule in Knox's favor, it appears that only this Court can provide the justice the ALJ intended he receive over five years ago.

B. THE ARB IGNORED EXTENSIVE EVIDENCE IN THE RECORD THAT DEMONSTRATES PETITIONER KNOX HAD A GOOD FAITH, REASONABLE BELIEF THAT DOI VIOLATED EPA WORK PRACTICE STANDARDS.

By ignoring extensive evidence in the record that demonstrates Knox had a reasonable belief that DOI violated work practice standards, the ARB 1) acted arbitrarily and capriciously and violated this Court's order on remand that it reconsider the entire record, and 2) failed to rely on such relevant evidence as a reasonable mind might accept as adequate to support its conclusion that Knox did not have a reasonable belief. Notably, the ALJ found Knox's testimony "credible

and persuasive[,]" A14, yet the ARB scarcely considered Knox's testimony.[18] Contrary to the ARB's ruling, the record is replete with evidence that Knox reasonably believed that DOI violated EPA work practice standards.

The 1993 AAS Report and Johnson's Inspection

Knox knew nothing about asbestos when he started his job at the Center. A275. The 1993 asbestos report and Dave Johnson gave Knox his knowledge of asbestos at the Center.[19] Knox testified that Johnson's observations and strong admonitions during Johnson's inspection worried him and made him believe there was a real asbestos problem at the Center. A270, A311, A312. Johnson showed him where asbestos floor tile was missing in part of the carpentry classroom, A241, and several areas where tile had been removed and the asbestos-containing mastic was left on the concrete and then carpeted over.[20] A243, A244. He also told Knox that the Center's method for buffing asbestos-containing tile was illegal

[18] The ARB notes only that Knox testified that he was aware there had been construction work on the dorm roofs. A176.

[19] As the ARB noted, "the Survey Report at least implicates the regulations pertaining to renovation and demolition." A176.

[20] It should be noted that the ALJ's credibility findings militate strongly for resolving any discrepancies between DOI management testimony and Knox's testimony in favor of Knox. *See Pogue v. U.S. Dept. of Labor*, 940 F.2d 1287, 1289 (9th Cir. 1991) (The ALJ's credibility determinations deserve weight because the ALJ sees the witnesses and hears them testify, while the reviewing bodies look only at cold records.). The ALJ found Knox's testimony highly credible, as opposed to the "vague and numerous-could-not-recall testimony of the Respondent's witnesses." A14.

because it abraded and wore down the tile over time.[21] A241-A243. Knox testified that he believed Johnson because Johnson was "more educated, well off than I was, and he is the one that pretty much explained to me how serious it was, what kind of trouble we're in."[22] A359. Inexplicably, the ARB did not even mention Johnson's inspection in its decision, let alone consider the formative impact Johnson's observations and warnings had in Knox developing his belief that DOI had violated work practices.

After Fleming dismissed Knox's concerns, Knox took it upon himself to investigate the extent of asbestos disturbance at the Center. A248. Almost none of Knox's co-workers or Center staff knew about the ACM, let alone required asbestos work practices. A227, A295, A300, A353. The more Knox learned, the more he became concerned – given his understanding of ACM locations based on the 1993 report and Johnson's inspection – that various renovation and maintenance projects had disturbed ACM. A275.

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[21] Given the EPA's definition of "renovation," it appears abrasive tile buffing methods such as those used at the Center would fall under the EPA work practice regulations. *See* 40 C.F.R. § 61.141 (renovation "means altering a facility or one or more facility components in any way, including the stripping or removal of RACM from a facility component."). Regardless, Knox must only reasonably believe that the tile buffing violated EPA work practice regulations, he need not prove that the buffing actually violated the regulations. *See Yellow Freight*, 954 F.2d at 357.

[22] The ARB incorrectly states that it was the 1993 report that "caused Knox to believe that an 'asbestos problem' existed[.]" A176.

Knox's Knowledge of Renovation and Maintenance Projects

During Johnson's inspection, Ben Hutzler expressed his concern to Knox that he had removed tile and drywall that might have contained asbestos. A593. Knox found out that James Kircher had drilled through ACM areas, A261, and that the masonry and carpentry instructors had worked on projects that impacted asbestos-containing floor tile. A261, A353. Long-time dorm staff members ("residential leaders") told Knox that there were significant dorm renovations over time, including new room construction and other reconfigurations.[23] A261, A275, A276, A352, A353. They showed him where they had constructed new rooms. A358. Knox understood that these projects would have disturbed the ACM tile in the impacted areas. A261, A262, A275, A276. Knox observed contractors drilling holes for fiber optic cable in drywall in the maintenance building, and he thought he saw them drill into the asbestos-containing joint compound.[24] A272-274, A277. Knox testified that once he knew the ACM locations and he had talked to co-workers and Center staff about past projects, he came to realize "what kind of work and construction has happened over the years and get a full, you know, picture of exactly, you know, what happened." A309.

[23] The dorm staff also explained to Knox how they buffed the floor tile, which was the method that Johnson told Knox would disturb the asbestos. A276, A358.
[24] Knox understood that it was only the joint compound and not the drywall itself that contained asbestos. A340. Hutzler confirmed that neither the HVAC contractor or fiber optic contractor knew about the ACM. A301.

Knox also realized from his own observations that numerous renovation projects in the maintenance building must have disturbed asbestos-containing joint compound in the drywall. A355. These included the ceiling fan installation in the bathroom, drop ceiling installation in the main room, drilling through walls for cable, and nailing into drywall to install cabinets and other fixtures. *Id.* It was Knox's experience that someone hanging something in drywall would want to hit a seam – where joint compound was located – so it would hold better. A342. Given the complete lack of knowledge about the ACM at the Center, Knox had no reason to think these projects utilized proper asbestos work practices.

Co-Worker Testimony

Knox's co-workers' testimony establishes that Knox reasonably believed they impacted ACM during renovations. Kircher testified that he did not know about the ACM until he heard Knox talking about it, A230, and that he (as noted above in section II.A.2) disturbed the drywall ceiling in the maintenance building by drilling holes to hang electrical lights. A232.[25] Kircher also testified that he may have drilled through ACM when he installed door stops in dorms 3 and 4, as he later found out there was asbestos tile under the carpet where he had drilled. A235, A237.

[25] Kircher generated a lot of dust and was not wearing any protective equipment. A232. He still did not know if the area he drilled contained asbestos, A233, but as noted above in section II.A.2, the reasonableness of Knox's belief does not hinge on whether Kircher was certain the materials he drilled contained asbestos.

Hutzler started working at the Center in February 1994, but he did not learn about the ACM or the 1993 report until May 1999. A278. He took photos, which were admitted into evidence, that show damaged and/or deteriorating joint compound areas in maintenance building wallboard.[26] A282-A284, A286. One photo showed repair work that cut through a joint in a bathroom wall. A283. Contrary to the ARB's conclusions, and as noted above in Section II.A.1, Hutzler testified that he disturbed drywall in the maintenance building,[27] A284, and drove nails into the joints in the drywall. A306, A307. He said the bricklaying instructor, Mr. Ganoe, was removing old doors and installing new ones in ACM areas. A297, A298.

John Carls, the Training Instructor before Knox assumed that role, testified that he was "sure [Kircher and Hutzler] probably did" work on ACM areas, and that although he had seen the 1993 report, he did nothing to warn or discourage them.[28] A228.

[26] Hutzler testified that the photos depicted ACM areas identified in the 1993 report. A287, A288.
[27] Specifically, Hutzler testified that he disturbed the material shown in the photos, which depicted various areas of drywall with joint compound. A284.
[28] Carls said that nobody told him he should keep people from working in ACM areas, so he let Kircher and Hutzler do whatever projects needed completion. A228.

January 11, 2000 Inspection and the New Survey Report

Knox's inspection with Gloria Brown and Gentry Davis and the results of the new survey could have only strengthened his belief that renovation and maintenance activities had disturbed ACM. Brown testified that she recalled seeing damage to various parts of the maintenance building drywall during the January 11, 2000 inspection, including some of the damage identified in Hutzler's photos. A392, A395-A396. Knox testified that Davis and Brown stood back while Knox showed them ACM problem areas, and when Knox started to lift a ceiling tile to show them the original drywall ceiling and joint compound above the drop ceiling in the maintenance shop, Brown told him to stop. A346, A347. Brown testified that she and Davis cautioned Knox about lifting ceiling tiles "because of the possibility of creating a problem[.]" A394. Their obvious apprehension while Knox simply showed them these areas could have only added to his belief that previous renovations had disturbed ACM in the maintenance building.

Knox showed Brown asbestos-containing floor tile in dorms 3 and 4, including around thresholds where tile was "badly worn" and chipped such that it could cause concern in someone not overly familiar with asbestos.[29] A387, A388.

[29] Knox also testified that he showed Brown and Davis areas in his office, dorms 3 and 4 and the medical building where asbestos-containing tile had been removed and the asbestos-containing mastic was left on the concrete and then carpeted over. A328-A330, and he knew the difference between the carpet glue and the original asbestos-containing mastic leftover from the tile. A328. Brown and Davis denied

Brown told Knox that floor tile in good condition was not hazardous unless it was disturbed in some way, and she cautioned him to be careful in pulling up carpet to show her tile and told him "not to disturb [tile] to any great extent….I didn't want anything to happen where fibers could possibly have been released." A389, A390. Her warnings could have only furthered Knox's belief that the dorm renovations he heard about from Center staff had indeed disturbed ACM. She also advised that the Center's method of using a high speed buffer on the asbestos tile was "inappropriate," and she and Davis recommended wet buffing. A404, A405. The carpentry instructor told Davis that some tiles had been replaced in the carpenter's shop, A428, verifying Knox's belief (based on Johnson's inspection) that tiles were missing and that the carpentry instructor had disturbed asbestos tile. *See* A241 (Knox discussing missing tile in carpentry shop), A261 (Knox stating carpentry work impacted tile).

Brown testified that Knox thought ACM had been disturbed, A416-A417, and that Knox may have alerted her to reported incidents of ACM disturbance.[30] A406. She also said it was "probably probable" that employees over the years were involved in incidents where ACM was disturbed and they were exposed to

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that he showed them any such areas, but again it should be noted that the ALJ found Knox to be highly credible. A14.

[30] Brown said that no ACM disturbances were confirmed. A417. But again, Knox need only prove that he had a reasonable belief that DOI work practices disturbed ACM, not that they actually disturbed ACM.

asbestos. A407. If Brown, a certified asbestos inspector who knew the rules and science of asbestos, A383, thought it probable that former employees had disturbed ACM, it was certainly reasonable for Knox to believe that various renovation and maintenance activities over the years – both those he was told about and those he could observe (bathroom ceiling fan installation, drop ceiling installation, etc.) – had disturbed ACM.

Knox testified that at the end of the inspection, Davis and Brown told him he was right to alert them, A330, and in a meeting with management later that day, Brown told Knox he was doing a great job and thanked him for his hard work. A332, A400-A401.[31] The inspection and ensuing actions, particularly Davis's and Brown's recommendations and Brown's praise of Knox, could only have reinforced Knox's belief that DOI had violated work practice regulations.[32]

After the February 16, 2000 asbestos survey report verified the results in the 1993 survey, A513, Management told everyone at the Center to stop buffing the floors, and Knox removed the existing buffers from the dorms. A269. Knox testified that management had to know he was telling the truth about work practices disturbing ACM once the new survey report came out. A270. In a

[31] Brown testified that she "thanked Mr. Knox for taking me to work sites and showing me the areas that he had concerns about and also complimented Knox on his diligence in terms of pursuing the asbestos issue[.]" A400-A401.

[32] Knox testified that at that point he believed that DOI management knew he was telling the truth about Center renovations and maintenance disturbing ACM. A334.

February 29, 2000 letter discussing the results of the new survey, Brown and Davis recommended that the drywall ceiling throughout the maintenance building be removed because of its "present condition," and until then no work should be performed that could disturb the drywall ceiling.[33] A410, A519. This only confirmed Knox's belief that Center renovations had disturbed ACM in the maintenance building.

In failing to consider the extensive evidence in the Record demonstrating Knox's reasonable belief, the ARB acted arbitrarily and capriciously and violated this Court's order that it reconsider the entire record, and this Court should so hold. Further, given the extensive evidence in the record that is contrary to the minimal and highly questionable evidence the ARB relied on for its ruling, it cannot be said that substantial evidence supports the ARB's decision.

This Court should reverse the ARB and issue an order on remand that the ARB find that Knox reasonably believed that DOI violated EPA asbestos work practice standards. Justice requires nothing less given that Knox has gone almost eight years without any of the substantial relief awarded by the ALJ.

[33] Brown and Davis also stated that an Operations and Maintenance Plan "must be developed by the Center to manage all of the identified asbestos-containing material[.]" A519.

III. PETITIONER KNOX INFORMED DOI OFFICIALS OF HIS CONCERNS ABOUT WORK PRACTICE VIOLATIONS

In order for his whistleblowing activity to be protected, Knox also must demonstrate that he informed DOI officials about his concerns that EPA work practice standards had been violated. *Knox,* No. 06-1726, slip. op at 8; A167. It is not necessary that he specify the controlling EPA regulations in his disclosures. *Hydro-Vac Services,* slip op. at 11. The record contains multiple examples of Knox expressing his concerns about Center work practices to DOI officials.

Knox voiced concerns that the ACM had been disturbed to both Flemming, his direct supervisor, and Weisz, the Center Director. A205-206, A211-213.[34] He told Deputy Regional Director Gentry Davis and Risk Management Officer Gloria Brown of his concerns regarding renovations and maintenance that had disturbed the ACM and the need for ACM abatement. A218, A220, A391-392, A394-396, A398. According to Stanley Briscoe, an architect for the National Capital Region who attended one of the meetings between Knox and DOI management, Knox told everyone in the meeting about his concerns related to drilling and other activities that may have disturbed ACM. A419. According to Kircher, Knox expressed concern for the students, staff, and everyone at the Center. A238.

[34] Weisz said that Knox expressed concern that the Center's floor tile buffing methods had disturbed ACM over time. A205-206.

Mr. Knox also raised his concerns to DOI's highest official, the Secretary of the Interior. This Court acknowledged in its previous opinion that Knox's letter to then-Secretary Babbitt, which included concerns that "[o]ver the years, . . . EPA laws . . . had been violated[,]" A609, arguably tended to establish on its own that Knox "informed DOI officials about his concern that EPA-work practice standards had been violated." A167. Significant evidence demonstrates that Knox told DOI officials of his concerns about work practices.

IV. DOI WAS WELL AWARE OF PETITIONER KNOX'S PROTECTED ACTIVITY REGARDING HIS COMPLAINTS ABOUT WORK PRACTICE VIOLATIONS.

ALJ DiNardi stated that "[t]he record is replete with evidence that [DOI] knew of Mr. Knox's protected activities. . . ." A56. Weisz said "I had people coming to the center from all kinds of agencies in regard to asbestos and air samples[,]" A197, and confirmed that it was because of Knox. A205. He verified that Knox told him that he believed employees had been exposed to asbestos. A194.

Flemming, Knox's supervisor, explained that the Center's actions in taking air samples, having a doctor come out to speak to the employees, and taking other steps to verify the information in the 1993 report were a direct result of Knox's concerns that renovations and maintenance had disturbed the ACM. A211-212.

She testified that she was aware that the West Virginia Department of Environmental Protection came to the Center to check out the asbestos in response to Knox's complaints. A436-437.

As noted earlier, Mr. Briscoe stated that Knox told everyone at a Regional meeting about his concerns related to drilling and other activities that may have disturbed the ACM. A419. Ms. Brown testified that Knox expressed concerns to her about renovation activities around ACM in the dormitories, and the holes made by a previous contractor in the maintenance building ceiling, another ACM location. A391-392.

Mr. Davis testified that Knox told them asbestos was all over the Center and wanted them to shut the Center down until it was removed. A218, A220. He also said that Knox threatened to call the EPA, and did in fact call both the EPA and OSHA. A215, A222. He explained that Knox's threats were based on his interpretation of regulations that he thought required the DOI to take certain actions that had not been taken. A222-223. Davis also told Briscoe that they needed to make sure they followed regulations during the upcoming renovation of a dormitory because of the concerns Knox raised about asbestos. A422.

As ALJ DiNardi stated, it is obvious, "even to the cursory reader of these transcripts," that Knox engaged in protected activities and that DOI was aware of these activities and retaliated against him because of it. A73. In light of the

overwhelming evidence in the record, this Court should hold that Knox engaged in protected activity by raising concerns about work practice violations, and that DOI management was aware of those concerns.

V. THE RECORD ESTABLISHES THAT DOI RETALIATED AGAINST PETITIONER KNOX BECAUSE OF HIS PROTECTED ACTIVITIES

In the interest of judicial economy, fairness and, most importantly, justice, Mr. Knox again requests that this Court find liability in this case and issue specific instructions to that effect on remand. As noted earlier, ALJ DiNardi awarded Knox significant relief after a 29 day hearing, relief which Knox still has not received almost eight years later despite this Court already deciding two previous appeals in his favor. This Court should not give the ARB any further opportunity to find yet another unsupportable reason to rule against Knox while delaying the ultimate dispensation of justice as intended by this remedial statute. Remanding additional issues for another ARB decision would only waste resources and result in additional unnecessary delay in the resolution of this case.

This Court has the Record before it and will review the facts in this case for a *third* time. All three appeals have addressed different aspects of the same issue: whether Knox engaged in protected activity. In order to fully resolve Knox's claim, there must also be determinations as to whether DOI management was

aware of Knox's protected disclosures, and as to whether he was retaliated against based on his protected activity. This Court should make those determinations.

The final element in Knox's claim is establishing a nexus between the protected activity and the adverse employment action. *Sam's Club*, 173 F.3d at 242. The ALJ addressed this element at length in his decision. JA. 56-70. In a harsh rebuke of DOI's actions, ALJ DiNardi stated

> This case really boils down to the simple fact that there existed at the Job Center and at Greenbelt a conspiracy among virtually all of those who came into contact with [Knox] to get him because he was a whistleblower and one who would not stay within the chain-of-command because his internal complaints to his superiors were producing no results.

A73.

ALJ DiNardi found direct evidence of discrimination, a close proximity in time between the protected activity and the discrimination, and no legitimate reasons for the discrimination. A64-72. The ALJ also found the testimony of Mr. Knox and his witnesses to be more credible than that of the DOI managers.[35] A39, A46-47. Further, the type of discrimination to which Knox was subjected could not possibly have anything other than a retaliatory purpose, including being subjected to a gag order at Greenbelt. See A39, A43 (ALJ discussing gag order). This Court should rule in Knox's favor on this issue based upon the materials in the Record relied upon by the ALJ to reach his conclusion.

[35] Special deference is given to the ALJ's credibility findings. *Sam's Club*, 173 F.3d at 240.

CONCLUSION AND RELIEF REQUESTED

The ARB used improper legal standards and ignored extensive evidence in the record to reach its erroneous decision that Knox did not have a reasonable belief that DOI violated EPA asbestos work practice standards. The ARB demanded certainty, not a reasonable belief, by requiring an actual violation rather than a reasonable belief of a violation, by relying on information that Knox did not have at the time, and by using disputed evidence to dismiss the reasonableness of Knox's beliefs.

The record in this case is substantial, with 29 ALJ hearing days resulting in almost 5,000 pages of testimony and over 140 exhibits, yet the ARB discussed scant few possible bases of support for Knox's belief that DOI violated asbestos work practices. The ARB failed to consider the vast majority of the evidence in the record that supports Knox's belief and which overwhelmingly contradicts any evidence the ARB relied on. In so doing, the ARB violated this Court's order that it consider the entire record, and failed to rely on such relevant evidence as a reasonable mind might accept as adequate to support its conclusion that Knox did not have a reasonable belief.

As ALJ DiNardi found, Knox is a conscientious and dedicated employee who took his job as Safety Officer very seriously. When he became aware of the presence of asbestos and potential asbestos problems at the Center, he took it upon

himself to investigate whether unknowing co-workers, staff, students and contractors had disturbed ACM during renovation and maintenance projects. He learned of numerous troublesome renovation and maintenance activities, and he informed DOI management of his concerns about hazardous work practices and sought to remedy the situation. Unfortunately, instead of being grateful they had such a conscientious employee, DOI management responded with discriminatory retaliation and harassment.

Absent correction from this Court, employees like Knox will go silent and EPA's efforts to insure work practices that prevent disturbance and emission of asbestos will be blunted. Judge DiNardi found that Knox's willingness to place the public interest ahead of his own career had elevated him to the "pantheon" of such "brave, dedicated and conscientious public-spirited citizens" as Karen Silkwood and Frank Serpico. A10-11. Mr. Knox should not have to wait any longer for relief.

WHEREFORE, Petitioner William Knox requests that the Court reverse the ARB's decision and direct the agency to reinstate all the remedies awarded by the ALJ, or such other remedies as are appropriate under law and consistent with the Record.

Respectfully Submitted,

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_____

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REQUEST FOR ORAL ARGUMENT

Pursuant to Loc. R. 34(a), Petitioner William Knox requests the opportunity to present oral argument.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

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January 31, 2008 (s)_____

Adam E. Draper
Attorney for Petitioner

CERTIFICATE OF SERVICE

Fourth Circuit Court of Appeals
No. 07-2116

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WILLIAM T. KNOX,

Petitioner,

v.

UNITED STATES DEPARTMENT OF THE INTERIOR,

Respondent.

----------)

I, _____, being duly sworn according to law and being over the age of 18, upon my oath depose and say that:

I am ADAM E. DRAPER, Attorney for Petitioner

That on the **31st day of January, 2008**, I served 2 copies of the within **Brief for Petitioner** in the above captioned matter upon:

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