

**GEORGE ZELIGER,**

V.

Case No. \_\_\_\_\_

### Respondents.

## 1

## **I. PARTIES**

The respondents Seidman, Colman, Civian, Wert and Golledge are supervisors at MADEP that employed Complainant Zeliger from January 23, 1999 to the present as an Environmental Engineer IV at the MADEP office in Boston, Massachusetts. MADEP is responsible for, among other things, environmental compliance with the federal Clean Air Act. Dr. Zeliger can be contacted through the undersigned attorney. Nancy Seidman may be contacted at: Massachusetts Department of Environmental Protection, One Winter Street, Boston, 02108, 617-556-1020; James Colman may be contacted at: Massachusetts Department of Environmental Protection, One Winter Street, Boston, 02108, 617-292-5549; Fred Civian may be contacted at: Massachusetts Department of Environmental Protection, One Winter Street, Boston, 02108, 617-292-5821, Mark Wert may be contacted at: Massachusetts Department of Environmental Protection, One Winter Street, Boston, 02108, 617-292-5598, and Robert Golledge, Jr. may be contacted at: Massachusetts Department of Environmental Protection, One Winter Street, Boston, 02108, 617-292-5856.

## **II. BACKGROUND**

### **A. The Clean Air Act and the I/M program**

The CAA amendments of 1990 (National Ambient Air Quality Standards or NAAQS) require that metropolitan areas with the most serious air quality problems implement an enhanced vehicle inspection and maintenance (I/M) program. In 1996, the federal Environmental Protection Agency (EPA) found that certain sections of Massachusetts were in non-compliance with these criteria, exceeding both ozone and carbon monoxide standards by elevated amounts. Accordingly, Massachusetts was required to reduce the amount of emissions of nitrous oxide and carbon monoxide from both fixed sources (e.g., power plants) and mobile sources (e.g., cars) by at least 9% by the end of 1999.

In response to EPA's mandate, Massachusetts Department of Environmental Protection (DEP) initiated the I/M program. The I/M program monitors emissions from automobiles, trucks and buses by testing vehicles for emissions levels. Massachusetts instigated its I/M program to avoid severe sanctions specified under the CAA; possible sanctions can include loss of federal highway dollars.

EPA recommended use of the IM240 test, which is designed for centralized (state run) testing facilities. The IM 240 uses a dynamometer drive trace that continually measures emissions for 4 minutes (hence the 240, which stands for the number of seconds the drive trace takes). The IM 240 simulates speeds of up to 57 mph. However, Massachusetts chose to use a test that could be used by decentralized testing centers (privately owned facilities), and one that took less than the four minutes necessary for the IM 240 test. The Massachusetts test, MA 31, also uses a dynamometer drive trace, but it measures emissions for 31 seconds, with simulated speeds ranging up to 30 mph. The MA31 test uses the same

start-up cut points as the IM240 in order to establish pass/fail values for the three pollutants tested: carbon monoxide, nitrogen oxides, and hydrocarbons. EPA allowed Massachusetts to use this new test, but cautioned, "At this time, there is no information available relating to the Massachusetts test to either the IM240 test or EPA's FTP"(memo from Pete Hagerty, EPA, November 10, 1999). In a letter dated May 11, 2000 from Susan Studlien, EPA, to Jim Colman, DEP, EPA states, "...your letter indicates DEP's intent to conduct a MA 31 to I/M 240 correlation study" to ensure conformity between the two tests.

Dr. Zeliger was hired as an Environmental Engineer IV (statistician) on January 23, 1999 to ensure that the I/M emissions tests gave comparable results to the approved IM 240 test. In June, 2001, DEP received the results of the correlation study, called the Arizona Study (because the test was performed in Arizona). These tests showed clearly that the MA 31 test gave completely different results than the EPA recommended IM 240 test. Specifically, the MA31 test was failing significantly more cars than the IM 240 test. Therefore, the MA31 test was resulting in "false failures" of cars that should pass, and the actual true failure rate was low. Beginning in June of 2001, Dr. Zeliger warned his supervisors that the MA31 test was not comparable to the IM 240. In response, on or about July 11, 2001, DEP and its consultant arbitrarily converted the data from the MA31 test so that the failure rates would appear similar to the failure rates of the IM 240 test. Dr. Zeliger continued to report warnings to his superiors about the failures of the emissions testing program over the next several years.

However, instead of telling EPA of the problem with the test, DEP attempted to manipulate the data by applying a "conversion factor" to the test program. In 2002, the MA Inspector General's office found discrepancies between emissions test results performed in 2000 and 2002 on the same vehicles. Specifically, the IG had emissions tests performed on three vehicles; these tests showed that in 2002 the vehicles' emission levels for nitrogen oxide were, on average, inexplicably lower by 37 percent than tests performed in 2000. The tests also showed that in 2002, the vehicles' emissions levels for carbon monoxide were, on average, lower by 58 percent than tests performed in 2000. This information is troubling in light of the fact that the vehicles tested by the IG had not undergone repairs or preventative maintenance measures during the course of the two years.

In order to provide comparative data of 2002 emissions test in different states, the IG tested emissions from the same vehicle in MA, RI and NY. Again, the emissions test results raised concerns about the accuracy of the I/M program. The average of three MA emissions tests for nitrous oxide were 56 percent less than the average on the same three vehicles tested in RI, and 19 percent less than the results of one vehicle tested twice in NY. Similarly, the average of three emissions tests for carbon monoxide performed on the same vehicle in MA were 36 percent less than the average of emissions tests performed on the same three vehicles in RI, and 16.9 percent greater than the average of two emissions test performed in NY on the same vehicle.

## **B. George Zeliger's Position and Duties as Environmental Engineer IV**

The Department of Environmental Protection (DEP) advertised for an Environmental Engineer IV position in August of 1998. The Vacancy Announcement called for a "results-oriented quality assurance and quality control expert for DEP's Emissions Checkup program. Emissions Checkup is the new Massachusetts program for automobile emissions inspection and maintenance...."

Major duties of this position included, but were not limited to:

- "finalize the specifications for the emissions testing equipment and select test protocols and cutpoints
- evaluate and approve the contractor's acceptance testing procedures for the equipment and oversee workstation acceptance testing
- monitor the impact of cutpoints and protocols and recommend improvements
- monitor quality control and quality assurance data and activities to verify that prompt, appropriate action is taken to correct problems."

Moreover, the advertisement required that the applicant have "expertise in statistical process control." Dr. Zeliger was hired on January 23, 1999 for this Environmental Engineer IV position to oversee the quality of the emissions program data, and to recommend changes to ensure that the program is accurate.

Therefore, Dr. Zeliger's work affects not only the millions of vehicle owners in the Commonwealth, but also the health of the Commonwealth's citizens.

## **III. MADEP, SEIDMAN, COLMAN, WERT, CIVIAN AND GOLLEDGE TOOK ADVERSE EMPLOYMENT ACTIONS AGAINST DR. ZELIGER**

When Dr. Zeliger began informing his supervisors and DEP's consultant, Sierra Research, about the flaws in the emissions test in the spring of 2001, no one listened to him. Instead of attempting to fix the real flaws with the test, DEP management decided to convert the data resulting from the flawed test, thereby concealing the flaws. Dr. Zeliger repeatedly told his supervisors that the test itself must be fixed. When his supervisors did not listen, Dr. Zeliger went to the Massachusetts IG, the media, and ultimately, to the EPA IG.

Dr. Zeliger's disclosures resulted in disciplinary action being taken against two DEP employees, Mark Wert and Fred Civian. His disclosures also forced an audit of the program, which resulted in costs to one of MADEP's consultants of \$15 million, and the I/M program and MADEP itself were subjected to considerable negative publicity. Once Respondents learned of these protected disclosures, they began a campaign of harassment directed at Dr. Zeliger. The harassment directed at Dr. Zeliger included negative performance evaluations, micro-management of his work schedule and work product, disciplinary actions for his work schedule, humiliating and sarcastic e-mails and comments, anonymous job advertisements being left on his desk, and ultimately, a job reassignment to tasks clearly designed to ignore

his technical capabilities, such as data entry. As Dr. Zeliger is a Ph.D. statistician, the reduction of duties to data entry can be nothing but retaliation for his disclosures.

#### **IV. DR. ZELIGER ENGAGED IN PROTECTED ACTIVITIES UNDER THE FEDERAL CLEAN AIR ACT, AND MADEP, WERT, SEIDMAN, COLMAN, WERT AND GOLLEDGE KNEW OF DR. ZELIGER'S PROTECTED ACTIVITIES**

A chronology of facts relevant to Dr. Zeliger's case, including facts related to protected activities and managers' knowledge of such activities is provided in the table below.

##### **Chronology of Events, Protected Environmental Reports by Dr. Zeliger, and Repercussions from the Reports**

###### **May 16, 2001**

Sierra, DEP's consultant, sends an e-mail to Mark Wert, stating that the emissions test results are of "...substantial concern. The false failure rate of 55% is the highest by far ever seen by Sierra. To put this in perspective, most sets of cutpoints are designed to limit the false failure rate to no more than 5%."

###### **June 11, 2001**

Michael St. Denis of Sierra sends an e-mail to Mark Wert of DEP, stating in part, "This afternoon I received a call from George Zeliger. George wanted to discuss the calculations of false failure rates and excess emissions. George started out by saying that he had told [his supervisor] "many times" that the current IM emissions standards are too low, but that he is not being listened to. He specifically said that he thought the implementation of the latest set of cutpoints was arbitrary...George said he has spoken to his union about the option of contacting the press....He wanted to be sure his job would be protected if he contacts the newspapers. He said he wants to explain to the newspapers that motorists are being falsely failed."

###### **June 14, 2001**

Dr. Zeliger wrote an e-mail to Mark Wert, Fred Civian (his supervisor at the time), stating "...my recommendation is to perform the necessary conversion of the cutpoints introduced on or around April 1, 2001....a couple of queries I have run against our database suggest that there may be thousands of vehicles failing the test..."

**June 27, 2001**

Dr. Zeliger sends an e-mail to Sierra, copied to Mark Wert, stating, "...at this time we have possibly tens of thousands of vehicles failing tests in MA because the cutpoints were set up incorrectly..." He also takes issue with the fact that Sierra analyzed a "clipped" data set (i.e., a smaller subset of the data collected; specifically, although they obtained valid data from 612 vehicles, they only used a select subset of 341 vehicles).

**June 28, 2001**

Richard Joy of Sierra writes an e-mail to Mark Wert of DEP admitting that "While the selection of 2X the cutpoint as where to clip the data to produce interim conversion factors is relatively arbitrary..."

**July 11, 2001**

DEP developed "conversion factors" to change the data so that the false failure rates in the MA 31 test are similar to the failure rates of the IM 240 test. These conversion factors were not what Dr. Zeliger had recommended to fix the emissions test.

**July 20, 2001**

Dr. Zeliger wrote an e-mail which stated "It looks more like the points were handpicked to form a pattern that looks more acceptable....I would like to remind [you] that false failures caused by not having performed the necessary adjustment of MA99 data to IM 240 standards are happening at least since April 1, 2001 when the last cutpoint tightening was made..."

**August 9, 2002**

Mark Wert of DEP e-mails Sierra, stating, "...We made some adjustments in July that cut the failure rate by 50%....the July adjustments may have been an over-correction – we anticipate making further adjustments in August or September...doing this, however, will not likely address the underlying reason for our low [true] fail rate..."

**February, 2003**

The Massachusetts IG about the emissions program approaches Dr. Zeliger; he provides the IG with documents and information.

## **February, 2003**

The Massachusetts Inspector General issues a report on the I/M program, claiming that there were "troubling discrepancies between emissions test results performed in 2000 and 2002 on the same vehicles."

## **April 4, 2003**

Dr. Zeliger receives an e-mail from Fred Civian in response to Dr. Zeliger's question regarding who should sign his time sheet. The e-mail is entitled "ACTION - who is your supervisor?" The e-mail states, "I am your supervisor. I have been telling you about that change since February. You signed an EPRS earlier this week reflecting that fact. That is why my name should show up on your timesheet under the title "supervisor". For some of your duties, your work for those duties is being overseen by other people, because they are the leads for those projects. I hope this is clear to you. Fred"

## **April 11, 2003**

Dr. Zeliger responds by e-mailing Civian the following:

"Fred,

I am sorry that the regrettable misunderstanding regarding who signs my timesheets took place. I feel a need to lay out the facts straight.

1. As you remember, I came to your office and asked whether I should use your name instead of Paul's on the timesheet. The reason of my asking was Lee's remark that there is an error, i.e. a wrong supervisor name, on the timesheet, and it was the first time she made the remark. Never within at least a year before a wrong supervisor name was a problem with my timesheets.
2. When over a year ago Mark first put me under Paul's supervision, I specifically asked whether his decision also affected the administrative structure; particularly -- who would be signing my timesheets. Mark explained that he would continue signing them. It can be easily verified that that was exactly what happened.
3. When it was announced that Laura becomes an interim branch chief, she reminded everyone specifically to change the name on the timesheet.

4. When it was announced that as of February 17 Paul takes over the branch chief duties, he again explicitly announced that his name should be used since he becomes the new (interim) branch chief.

In other words, a clearly established pattern could be seen.

5. Finally, since February I have submitted five (including February -- eight) timesheets, all signed by Laura and Paul, and Lee never warned me that the name was incorrect; neither did you.

I started writing this response a week ago, on Friday, April 4, around 11 AM. I decided to postpone sending it to cool down, since the conversation we had at around 10:15 AM on that day about the change of the name on the timesheet left me in a quite upset emotional state. In view of the facts described before, I didn't see what was wrong in my actions, and I felt that my human as well as professional dignity was hurt by your questioning. I don't believe this is in anybody's interest -- my performance and morale would hardly improve as a result.

George”

#### **May 8, 2003**

Dr. Zeliger received an e-mail from Mark Wert, the Inspections/Maintenance Branch Chief, and one of Dr. Zeliger's supervisors at the time. The e-mail stated, “George ...FYI... An amendment to our conversation yesterday re contacting EPA on the annual reports -- all contacts w/EPA (including questions) should still be through or approved by the branch chief and/or Fred (as it was when I was there) -- otherwise, the result will be EPA confusion and conversations at cross purposes since staff have generally not been involved in previous conversations and agreements with EPA and because staff are not authorized to make statements for the department on the program.”

#### **June 18, 2003**

Dr. Zeliger sends Fred Civian a table and an e-mail entitled “How to Fix the I/M program.” The e-mail states that there is an “urgent necessity of the switch [in tests].”

#### **June 19, 2003**

Dr. Zeliger receives an e-mail from Fred Civian, stating, “George - Just a reminder to put that work on hold for now. Please let me know if you call or e-mail anyone at EPA about this. Thanks, Fred.” “That work” Civian referred to was the information on “How to Fix the I/M program.”



### **On or about June 23, 2003**

Dr. Zeliger provides information to the Environmental Protection Agency's IG. He meets with them several times, and provides documents and e-mails over the next several months.

### **July 6, 2003**

Inspector General Sullivan recommends that Governor Romney take action immediately to suspend DEP officials from playing any role in the planning, management and oversight of an audit of the I/M Program. Sullivan states that these officials "have spent two years hiding and obscuring information that should have been made public and should have been reported to the EPA. My Office's investigation of internal DEP documents and e-mail communications has shown that these officials have manipulated data to cover-up serious program inadequacies since Secretary Sullivan ordered that an audit be conducted." Moreover, the Inspector General told Governor Romney in his report, "I am writing to inform you of serious, ongoing problems with the Massachusetts Department of Environmental Protection's (DEP) Enhanced Vehicle Inspection and Maintenance Program (the I/M Program) . Specifically, this Office's investigation has concluded that DEP officials have failed to administer the Enhanced Vehicle Emissions Program in accordance with federal Clean Air Act regulations. By so doing, DEP officials are currently allowing tens of thousands of vehicles in Massachusetts to emit illegal levels of toxic pollutants into the Massachusetts atmosphere and, by so doing, are jeopardizing future receipt of federal highway funds by the Commonwealth. Furthermore, in 1999, DEP officials instituted a system that has been shown to produce inordinate variability from test to test, thereby, in many cases, subjecting Massachusetts' motorists to invalid rejection stickers and unnecessary repair costs. According to the report, DEP officials covered-up the results of a federally-mandated 2001 test of its emission system that showed that the system produces erroneously high and widely-variable readings of auto emissions gases and subsequently altered the software that controls test results of individual vehicles."

Fox 25 News does a investigative broadcast relating to the emissions matter.

### **July 7, 2003**

Sullivan's report, which is released, cites a whistle-blower inside the DEP who claimed that officials maintained an appearance that "everything is fine, no discrepancies, no changes . . . because the DEP didn't want to admit that they goofed."

**July 8, 2003**

Lieutenant Governor Kerry Healey calls for the state's new Department of Environmental Protection commissioner, Robert Gollledge, to investigate his own department's handling of the state auto emissions program. At DEP, Dr. Zeliger is assigned an impossible task of collect information from states with enhanced IM program regarding their Phase 1/Phase 2 submissions within three days.

**July 14, 2003**

Dr. Zeliger receives an e-mail from Andrew Gottlieb of the Commissioner's office, stating, "As you may know, the Commissioner has asked myself, Phil Griffiths and Richard Lehan to review the issues surrounding the I+M program and provide him with a report. In order to ensure that our review is thorough and complete, we would like to meet with you Tuesday July 15 at 1 pm in my office. You have the right to bring a union representative with you should you choose."

**July 17, 2003**

The internal review of the I/M program was completed and sent to Commissioner Gollledge. In the review, the authors repeatedly referred to a "technical specialist" within the I/M program who spoke to the Massachusetts IG. The report states, "...in the Inspector General's report, a technical specialist did have fundamental disagreements about both the implementation of the correlation study and the validity of using the interim conversion values. He reiterated his general concerns in our interview with him....In the end, his supervisors ultimately relied on the professional experience and advice of [their contractor]..."

**July 21, 2003**

DEP releases study to EPA admitting that the emissions test is not accurately measuring nitrogen oxides. Specifically, Seidman states, "The Massachusetts test needs to more effectively identify NO<sub>x</sub> emissions..."

**July 30, 2003**

Dr. Zeliger and others in the I/M program receive an e-mail from a member of the Commissioner's staff stating, "Please be advised that there is a mandatory meeting of the I+M program staff listed above and the Commissioner Thursday [July 31] at 2:30 in the Commissioner's Conference Room on the 2nd floor."

**August 7, 2003**

A meeting between Fred Civian, Dr. Zeliger's supervisor at the time, and Dr. Zeliger, under the guise of a Stage C (annual evaluation) Employee Performance Review System (EPRS). Civian acknowledged that he had not conducted the required progress review prior to the annual evaluation. Civian stated that Dr. Zeliger could

not “work under general supervision,” and that he did not deserve the rank of Environmental Engineer IV. Civian was unable to answer Dr. Zeliger’s requests to define “general supervision.” Civian also blamed Dr. Zeliger for DEP’s failure to submit the required annual report to EPA by July 31, 2003, despite the fact that DEP was more than two years late with the report, and it was not Dr. Zeliger’s responsibility to write the report. Dr. Zeliger was given the grade “Meets Expectations Minus,” a negative rating which is not officially available to supervisors. Dr. Zeliger stated that he believed it was Civian’s desire that Zeliger leave the department, and Civian did not deny this statement. Dr. Zeliger stated that he was unhappy with his job, and that when he found another job, he would tell the media about his concerns with the program. Civian responded why Dr. Zeliger kept “addressing performance issues of the program.” Dr. Zeliger stated that he routinely warned the Department about the flaws in the test, and these warnings were ignored. He also stated that when the Internal Departmental Board appointed by Commissioner Gollidge interviewed him, he informed the Board about his warnings. Civian laughed and asked sarcastically, “And that was what the so called *technical specialist* said to the IG?” Dr. Zeliger replied that there was no need to make a secret of the fact that it was he who was the “technical specialist” in the IG’s report. Mr. Civian immediately signed the negative EPRS form and asked Dr. Zeliger to sign it. Dr. Zeliger refused. Shortly after this exchange, Dr. Zeliger overheard Civian speaking to someone on the phone about him. Civian stated, “He is having a strong resentment....he understands what is going on....he is looking [for a job]...he is bullying me. He says that as soon as he’s out from here he’ll be on Fox25 [news station].”

### **August 8, 2003**

Dr. Zeliger receives an e-mail from Civian which states, among other things, “... you are not showing minimal initiative (e.g., after 4 years of working here you did not know enough about EPA's structure to know that there are 10 EPA regions, each of which are responsible for ensuring that states submit Annual Reports)...I want you to spend between 15 and 30 minutes each day on the internet learning about EPA and its equipment auditing requirements and Annual Report requirements.... you said that you had not read DEP's AZ study submittal because you were not provided a copy...If you want a copy, take the initiative to ask for one when you need it. The report and summary are available on DEP's website under the new items category. I hope that you will choose to take the initiative to acquire the knowledge you need to do your work here....But there is no substitute for you choosing to do good work on time.”

Dr. Zeliger’s supervisors task Dr. Zeliger with finding out if other states are complying with EPA’s requirements instead of allowing him to work on how to fix the MA31 test. Dr. Zeliger receives another e-mail from Civian stating, “Please try to complete your program evaluation work as soon as you can: copies of all approved program evaluations; a report showing status of program evaluations, comparison to

applicable EPA regs, your analysis as to whether each state fully or partially complied with the reg requirement. Other ongoing work included completing the QA/QC audit and equipment audit project; a report showing status of equipment audits, and comparing their methodologies.... Last, you asked for access to W: drive folders that don't appear connected to your projects (the commissioner and the cost folders); I'd like you to concentrate on what you need to do to get caught up with your currently assigned projects; then if you have additional time let's discuss what else you could work on."

#### **August 19, 2003**

The Environmental Protection Agency IG issues a subpoena to Commissioner Golledge for all the records relating to the I/M program.

#### **August 26, 2003**

Dr. Zeliger sends an e-mail to Nancy Seidman, reporting on his efforts to track down other state reports. His e-mail states, "I finally got a call from Ann Arnold of NJ. She told me that NJ has not submitted any reports to the EPA so far. Her attempts to collect reports from other states were no more successful than mine. Most states who responded just gave her links to their Web sites. The only report she believes she received was from TX (she promised to check and let me know). However, I also received an e-mail from TX with an explanation of their approach to the reporting; there was nothing new in what they wrote compared to what Jim Lindner, Pete Hagerty, and other EPA folks told me. I also got a call from CT. They informed me that the copy of their report I obtained from Pete Hagerty is the most recent – they don't have any newer reports. Finally, I spoke again with Joe Tuttle of NY. He said that to obtain a copy of their report more contemporary than the one we have we have to write a formal letter of request to their Division Director (I have his contact information). This is their new policy.

However, he told me that a couple of months ago, before the new policy has been implemented, they sent a copy of their 2002 report to Mark Wert. This puzzles me – I asked Mark whether he has any materials pertinent to EPA reporting, and he said he does not.

I am confused – why after over four years of working on the program and after having missed at least one mandatory submission deadline we still don't know what the requirements are? The EPA Web site has all the necessary documents posted; most evaluation methodologies are developed by Sierra Research, which is our contractor. Mark spent countless hours discussing all those issues with Sierra; there is a host of e-mails from and to Sierra regarding the issue – why are we still asking the questions?"

#### **August 27, 2003**

Seidman replies in an e-mail: "As follow-up to our conversation last week, I am attaching the information we sent to EPA in October of 2000 about our plans then for the program evaluation. This is information I got from Mark that is on our W drive....In reviewing our conversation last week, I believe it is not relevant to discuss what Mark did or when; also my request is not about the EPA requirements; I am more interested in how you view the CT and NY reports, how they evaluate their programs, and what is of value to us. We are where we are now, and I asked you to complete this task."

Dr. Zeliger replied, in part, "The first two years of my employment I was essentially doing what I was hired to do, that is various kind of statistical and quality control related analyses. As you possibly know, I came to some conclusions and gave warnings about some issues with the program, which were basically ignored. Moreover, for the second two and a half years and especially beginning 02/06/02 I was essentially cut off from any communication within the program, was not invited to meetings, conference calls, didn't receive any materials, etc. As a result I was unable to keep up with the development of events, was unable to become familiar with the program jargon (like Phase 1 and Phase 2), etc. All that made my task unnecessary difficult....I am not concerned at all with Mark's personal performance; my complaints are about not providing continuity of the work process and the flow of information."

#### **September 4, 2003**

Dr. Zeliger sends an e-mail to Fred Civian, copied to Nancy Seidman and Commissioner Golledge. The e-mail states, "As you are aware, I have been concerned about I/M's vehicle emission testing program for several years now. My numerous e-mail messages, as well as other documents, including those from Sierra Research, Bob Whitby of NY DEC, etc., which are readily available on the DEP network and as hard copies, clearly articulated issues with the MA[31] test that I raised. Originally viewed only as potential, those issues unfortunately materialized as real problems because of ignoring my warnings.

Specifically, I was the first to notice the essential structural difference between the IM240 and MA31 driving traces. I raised issues with VMAS and its time alignment with the bench (besides issues raised by Sierra), which make the results of our measurements even less reliable. Finally, I was the first to bring up the issue of the discrepancy between the results of MA[31] and IM240 tests in the Arizona study. Subsequently, I expressed severe concerns with the way of handling the cutpoint values and, broader, with the problem of converting MA[31] measurements into the IM240 scale.

My recommendations on principles of statistical design of the Arizona study were

ignored, as well as my other warnings. Meanwhile, I was essentially separated from the continuing development in my capacity of a technical expert in my field. I was cut off from participation in meetings, conference calls, etc. I became a subject of various adverse administrative actions. A few examples: an unwarranted adverse performance evaluation; disciplinary hearings for my hours, which were never questioned before during my four years in the office and which are not questioned in case of other employees; repeated accusations in poor communication skills and maligning other people's reputations, which were never supported by any proofs; assigning to me tasks outside of my field of expertise while other members of the group are doing what I was hired for, etc.

Most recently, you mentioned "the technical specialist" in the report of the MA Office of IG during our EPRS meeting on August 7, just after you gave me an essentially negative performance grade. The context of the conversation indicated that you believed I was the "technical specialist" who provided information to the IG. I readily confirmed your guess since there was nothing for me to hide – I was repeatedly instructed to tell the truth, and that was what I did. However, I felt the way you made the mentioning was disturbing.

Given my concerns with the program, and the fact that the Massachusetts and EPA IGs as well as DOT are now looking into the situation, I feel that any retaliatory action taken against me would be in violation of Massachusetts General Laws Chapter 149, Section 185.

George”

#### **September 24, 2003**

Commissioner Gollidge sends an e-mail to the staff laying out his themes for the year. Among them is the following statement: “DEP has always been an agency that has encouraged and supported vigorous debate of emerging policy and regulatory agendas. While benefiting from extensive discussion of complex matters, the discussion process sometimes prevents DEP from acting quickly to provide clear direction to the public and the people we regulate. In the changed world in which we now live, DEP needs to become more nimble and responsive. It is my intention to continue to encourage a full discussion of issues but to no longer consider consensus as a prerequisite to decision making. I will continue to look for input from a wide range of sources, taking disparate views into consideration, and will make decisions. The ability to chart out a policy direction in a timely manner, even where some disagreement exists, is more important than achieving complete consensus.”

#### **September 26, 2003**

Commissioner Robert Golledge removed Mark Wert and Fred Civian from their jobs, citing "repeated lapses in judgment" for compromising the effectiveness of the emissions program. Civian was suspended without pay for 60 days, and Wert was reassigned outside the program.

### **September 30, 2003**

Since Dr. Zeliger's supervisor, Fred Civian, was suspended without pay, Nancy Seidman became his new supervisor. Dr. Zeliger received the following e-mail from Seidman, which described new procedures consisting of micro-management of Dr. Zeliger's schedule and work

"As of September 30th I will be your supervisor - assigning and reviewing your work (or asking others to do that as I deem necessary), approving any changes in your schedule, and signing your time sheet, which as you know is due to me by 10 am on Friday unless Lee Andrews requests other timing from all Division staff.

My understanding is that your work hours are 10 am to 6pm. Please let me know if this is not correct immediately. If you will not arrive at the office by 10am I need you to call me that morning before 10 to notify me. My direct line is 617/556-1020. You must formally request and receive my approval one week in advance for any foreseen changes to your schedule or foreseen use of vacation or personal time. You must request and receive my approval for any unforeseen changes to your schedule or unforeseen use of vacation or personal time before that time is taken. These requests must be addressed to me.

Finally, I expect a weekly status report from you on Friday before you leave with an update (a paragraph will do) on the work you've completed that week. Sending this update to me by email is fine.

If you have any questions about these issues, please set up a time with Lee to see me immediately. thank you in advance for your cooperation. -Nancy"

To Dr. Zeliger's knowledge, no other employees in the I/M program are required to prepare weekly reports or receive approval for minor schedule issues. Moreover, in his past four years of working at MADEP and keeping the same schedule, no one had ever before complained that he was not working the correct hours.

### **September 30, 2003**

The Massachusetts IG issued a statement which said: "Despite a warning from Inspector General Gregory Sullivan, Department of Environmental Protection (DEP)

Commissioner Robert Golledge, Jr. filed a false report to the Federal Environmental Protection Agency on July 21, 2003 claiming that the DEP emissions program performed better than it actually did. ...the DEP knew as early as 2001 that a car-by-car comparison of the data would reveal glaring problems with the program, but DEP never believed anyone would actually perform such a comparison."

The statement also said that, "the review has found evidence of an intentional cover-up masking the fact that MA was passing 57% of the cars that should have failed and failing 38% of the cars that should have passed...our investigation has found wildly divergent results when testing the same vehicle using different testing stations."

### **October 3, 2003**

In response to a request by Seidman, Dr. Zeliger e-mails Seidman and Golledge, deliberately copying the EPA IG, a copy of his comparison of the various emissions tests, their pros and cons. The e-mail states, "Advantages of the ASM test are seen best in comparison to other relevant tests. Attached to this message, per your request, is the table with summaries of features of several tests, as well as a few older documents from Sierra, NYS, etc., which support my conclusion that ASM is the only test the program can adopt.

I first circulated this set of documents on June 18, 2003. You were on the distribution list. Others were Fred Civian, Sarah Weinstein, Jim Colman, and a few IM staffers. In the accompanying message I mentioned that the table might need some further work; particularly, I kept in mind establishing a working relationship with Jim Lindner of EPA and Joe Beebe of NCVECS, both leading specialists in the field.

Fred responded by informing me that he wants me to stop working on the project immediately (twice on 06/19/03 and then indirectly on 08/08/03) and expressed a strong negative concern regarding the idea of talking to EPA. Sarah, Jim, and you, as well as all the staffers but one, did not react. Moreover, as you and I discovered during our meeting on 10/01/03, you do not have the message with the table on your computer, although do have some follow up messages. The only explanation I have is that you deleted the message.

Please keep in mind that I developed the table at home on my own time, with my own equipment. It was never formally made a task given to me. It was never on my EPRS, and I was not given a smallest credit for it in my overall negative evaluation. As a result of the reaction to my gesture of good will and an attempt to contribute to the program to the best of my abilities, skills, and qualifications at the moment when the program was in a crisis, I consider now the table my own intellectual property. I have informed Fred Civian about that on 06/18/03.

I don't see any serious contras to ASM test. EPA says it is 90% as effective as IM240 (see attached documents by Jim Lindner, EPA leading specialist in the field, and



Sierra), which could be considered a con. In my opinion, however, the loss of 10% in effectiveness is more than compensated by ASM benefits....

Certainly, implementation of ASM would require some efforts -- including software development -- but I am not inclined to call them cons. After all, had we chosen ASM from the beginning as recommended by Sierra in Michael St. Dennis' presentation -- the efforts would be a lot smaller than those necessary for implementation of MA31 or any other loaded test."

#### **October 7, 2003**

Dr. Zeliger receives an e-mail from Seidman, stating, "George, can you tell me why you copied the Commissioner on this message? and who are "nepeer" and "dennis poltrino" and why have you copied them as well? -Nancy"

Seidman then sends a second e-mail that states, "George, I am disappointed in your "cons" list. I consider the switch in software to be significant for the cost and time involved. What about inspector training for a new test and the rollout to 1500 stations? In addition, 10% loss in program effectiveness, if that is the right number would be significant for MA at this point, facing development of a SIP for the 8 hour ozone standard, where we will need every ton we can find, especially in NOx. I also find the tone Mr. St. Dennis' a bit inappropriate. He is glossing over significant issues that states face in balancing cost to consumers, stakeholder interests, and the history of IM which is complicated and convoluted in all states where it has been implemented, just to mention a few areas. -Nancy"

#### **October 8, 2003**

Dr. Zeliger responds to Seidman's inquiry regarding why he copied his e-mail to the Commissioner, and who the other recipients were.

"I copied it to the Commissioner because I find the issue very important and because I sent a short e-mail warning against choosing an inappropriate test to him before. "Nepeer" is an e-mail address of Kyla Bennett, New England PEER Director, who is my attorney. Dennis Poltrino is Special Agent in Charge at the EPA IG Office in Boston. I copied the material to him at my attorney's advice since I am a witness in a federal investigation."

#### **October 27, 2003**

Seidman sends Dr. Zeliger an e-mail micromanaging his hours, and refusing his request to move to a different cubicle, as the noise around his cubicle is unbearable. The e-mail states, "I want to follow-up on our conversation of Oct 17th. Core hours are 10-3 each day. Therefore, you are required to be here by 10 am each morning. If you can not be here by 10 am, you need to call me directly in advance, and explain

why that is not the case. As we discussed, I signed your timesheet for the week of October 12th though your hours were not consistent w/ this policy. We agreed that would be the last week I would do that. In the future should your hours not comport with the core hour requirement, you will be required to take personal or vacation time to make up for the missed time. Finally, you had asked me a few weeks ago to consider allowing you to change cubicles. Since I am serving as your supervisor on a temporary basis, I have decided that such a move is not appropriate at this time.”

#### **November 26, 2003**

Fred Civian returns to DEP after his 60-day suspension without pay. Dr. Zeliger and other staff receive an e-mail that states, “We will have a short staff meeting at 10:00 a.m. Monday, December 1, 2003 to welcome Fred Civian back. It will be held in the lunch room.”

#### **December 8, 2003**

Dr. Zeliger receives an e-mail from Seidman informing him that Fred Civian will be attending his performance evaluation meeting: “I’d like to meet w/ you later this week to discuss this and I’d like Fred to attend that meeting, since he was responsible for supervising you last fiscal year, and I can use his help in developing this year’s EPRS.” Given that Dr. Zeliger’s disclosures resulted in Civian’s 60-day suspension without pay, the inclusion of Civian was clearly inappropriate and retaliatory.

Dr. Zeliger also submits his weekly report, which states, “I am looking at how the order in which two variables (IM240 and MA31 or any other for that matter) are included in the regression equation effect the converted value of the cutpoint. Namely, Sierra considered MA31 value being the independent and IM240 the dependent variables. At the first glance, this makes conversion from MA31 (actually measured) to IM240 (needed for EPA reporting) a little easier. However, the approach introduces a distortion, which makes the converted values smaller, while the converted cutpoint value greater. As a result, the number of false passes grows.”

Seidman replies to Dr. Zeliger by e-mail: “George, can you tell me what you consider to be the value of doing this work now? Thanks. –Nancy”

#### **December 9, 2003**

Dr. Zeliger responds to Seidman in an e-mail which states, in part, “At this time our emissions testing methodology is essentially based on data conversion from MA31 to IM240 measurement scales. So far I am not aware about any intentions to change the methodology, at least in the foreseeable future. However, should we decide to switch, only switching to IM 240 or ASM would not require data conversion; with IM147 we would have to deal with exactly the same issues we are dealing with now. Therefore,

any analysis leading to a better understanding of how the conversion works has, in my opinion, a high practical value since eventually it will lead to getting more accurate and reliable results.

I made many practically important comments on statistical issues in the MA I&M program through my almost five years with DEP. Those comments addressed practically every statistical facet of the program.

Nonetheless, the analysis I am working on now is still important and logically will be the closing one. Although some of my previous comments already condemned Sierra's approach to data and – specifically – cutpoints conversion as insufficient, the latest analysis is valuable because I am looking at the things through Sierra's eyes and stay completely within Sierra's approach.

Even if DEP decides not to implement my recommendations that will stem from this analysis, as has happened in the past, at least you and other managers will be able to make an informed decision....

Since I didn't have any other tasks – you have not assigned me any new tasks for approximately two months now - I decided that there was no reason to postpone the analysis, and that now is a good time.

I would like to point out that I am a specialist in statistical data analysis, especially quality related, was hired as one, and generally speaking, I believe that any analysis I undertake that may result in more accurate testing is important and timely. Please let me know as soon as possible if you do not agree.

On another matter, I would like to take this opportunity and to share with you the following. As I repeatedly complained, loud conversations, both over the phone and person to person, in a close proximity of my cubicle, on some days badly hurt my ability to do my work, which normally requires a high level of concentration and, correspondingly, quiet environment.

However, there is a positive side in the situation. Since I have been practically isolated from the rest of the group by not being invited to meetings, conference calls, not being sent documents, etc., for a very long time, those phone and other conversations became a source of information about what's going on in the program for me.

Now I can tell you that not everything I hear in those conversations is technically correct. Wrong explanations were given to customers; wrong ideas about statistical process control and calibration issues were expressed. Last Thursday I had a brief discussion with Paul – following his phone conversation with Craig, in which he described a meeting with Agbar – regarding calibrations. I could clearly see how the

necessary questions about the process were not asked, the necessary research not done, and, consequently, wrong recommendations were made.

I am sure that what reached my ears despite the measures to protect myself from the noise I undertook was only a small portion of what is going on. If I understood these conversations correctly, I am afraid that the program will drive itself into new problems if things continue developing the way they do now. I would like to help – indeed, I was hired to help the program. I therefore ask that you consider including me in these future meetings, etc.

George”

### **December 10, 2003**

Dr. Zeliger was a member of the list serve ENHIM ([enhim@ganet.org](mailto:enhim@ganet.org)); this is a list serve organized to maintain direct communication between the states that administer or have interest in the administration of an emissions inspection and maintenance program. ENHIM is restricted to government employees. On December 10, 2003, Dr. Zeliger realized he was no longer receiving e-mails from ENHIM, and he contacted Connie Colman of Georgia Department of Natural Resources, the list server administrator, informing her about the problem. Ms. Colman told Dr. Zeliger his subscription would be restored next day. However, his subscription was not restored, and Ms. Colman would not return his telephone calls. On January 8, 2004 and January 15, 2004, Dr. Zeliger e-mailed Ms. Colman to ask her the status of his subscription. On January 20, 2004, Nancy Seidman told Dr. Zeliger that “It turns out actually that it was Georgia who took [you] off. Paul [Davis] has talked to them, and they are really forthcoming about why something that they had heard...things....” Dr. Zeliger replied, “I don’t understand.” Seidman responded, “...that we are having problems with the program.” Seidman implied that the Georgia DNR removed Dr. Zeliger because they were afraid that he would disclose something that MA DEP wanted to keep hidden. Seidman said that Dr. Zeliger’s enrollment might be restored and she would ask Paul Davis to undertake the necessary steps should I agree not to post anything on the list without Paul’s authorization. When Dr. Zeliger asked Davis about the list serve, Davis replied that it had been a “computer glitch” which removed Dr. Zeliger’s name.

### **December 11, 2003**

Seidman mistakenly e-mails Dr. Zeliger notes she has written to herself about him and then unsuccessfully tries to recall them. The notes state, in part, “notes for george (sic)– 12/11/03. Meeting scope – 10 minutes me, then him then discussion until noon; just let him know, expect discussion to be friendly and open; if tone deteriorates then we will stop the meeting...My observation is that big issue for him feeling more a part of the group is that I and others feel he is uncooperative and difficult to deal w/;

not congenial and is sometimes rude to others, has made his feelings about colleagues known, that he considers them unfit to do their jobs and beneath him to be working w/ - major barrier to be able to contribute to group. Another observation and issue from my point of view is his work and work products are not understandable to me or others; one of the major responsibilities as scientist or engineer w/in DEP is to help others understand what he views as problem and why and most particularly offer solutions to address situation. He frequently offers problems but no realistic solutions – saying stop the test is not helpful. ... Will add back in auditing responsibility – expect after first of year that he will spend a lot of time in field, perhaps as much as 50% since we need a lot of help w/ audits; others are being trained to do this work now in office and regions and as we see what other help we need will be asking him to do as well.”

#### **January 7, 2004**

Dr. Zeliger and other staff in the I/M program receive an e-mail from Commissioner Golledge that states, in part, “From time to time I plan to make time on my schedule available to meet individually with anyone who wants to meet with me. It is important to me to have the chance to talk to as many of you as possible and to hear directly from you about your ideas and concerns. While I have, and will continue, to schedule larger meetings with regions and bureaus, I recognize that group settings are not always the best or most comfortable forum for everyone.”

#### **January 16, 2004**

Dr. Zeliger responds via e-mail to Seidman after Seidman leaves a note asking Dr. Zeliger about making up sick time. His e-mail states, “I have a question regarding the sticking note you attached to the copy of the timesheet I found on my chair yesterday. You asked what I was going to do about Friday (Jan 9) and Wednesday (Jan 7), when I came at 11 AM.

Regarding Friday, today I checked at the Payroll the exact amount of my sick, vacation, and personal time, and put the amended timesheet in the folder for your signature.

As for Wednesday, I also called you in advance and left a message in your voice mail box letting you know that my cast needs an adjustment (in fact, they gave me a new one at St. Elizabeth Hospital), that I have a morning appointment and will be somewhat late. This is how you told me to handle things (i.e., to inform you in advance if I have to be late) and this is what our Intranet manual requires. I signed in when I came back and made up the time the same day, which can be easily seen from the sign-in sheet. Since I had a few morning appointments in the past, did exactly the same things, and you didn't have any questions, I am confused -- what is different this time? Thanks.”

**January 20, 2004**

Dr. Zeliger receives a reply from Seidman via e-mail which states, in part, "In the future, if you call in before 9:30 with your status (and attempt to speak to me or Lee in person before leaving a voice mail), and are less than an hour late, you can make up the time on that day. More than an hour's worth of time will mean that you will need to take sick time (if applicable), personal or vacation time to make up the time. And please be advised that your flex time schedule is authorized by me and can be revoked at any time. -Nancy"

**January 27, 2004**

Dr. Zeliger e-mails Seidman, expressing his discomfort at having Civian manage his work. The e-mail states, in part, "Frankly, after having read Fred's comments I feel like he is my supervisor again. Having had an events rich period of Fred's supervision in the past, I feel quite uncomfortable to find myself again under his management - or, rather, micromanagement. I don't believe this would improve my performance or the technical quality of the document I am working on. While I will welcome Fred's comments on the draft document, I am wondering what his role will be in the day to day oversight of my work."

**January 28, 2004**

Seidman responds by e-mail, stating, "I disagree w/ your assessment of Fred['s] ... comments. Fred's comments on the focus and organization of the document will serve to make it much more focused and better organized. I find his writing style well organized and executed. Also, his comments on the content follow from your EPRS scope - he is indicating areas he feel you may be over emphasizing and others that may not be covered in your outline and should be included. I want you to hear him out today. He is not acting as your supervisor on this effort; he is serving as a commenter and reviewer. I see today's meeting as a team effort to help you improve your document and make it more useful to me and the IM group."

**February 10, 2004**

Dr. Zeliger sent an e-mail to Seidman, stating, "During our last meeting on Jan 20 you raised the issue of disappearance of my name from the I&M Solutions, aka ENHIM, listserv. You said that the Georgia folks running the listserv removed my name and that the apparent reason of the removal was "problems with our program." I didn't want to discuss the issue during the meeting. However, it keeps bugging me. My name was never mentioned in the media or any reports published on the IG Office Web site. The only names of the listserv members that were ever mentioned were Fred's, Mark's and Bert's. I only posted something on the server once and contacted

the list technical administrator once on 08/06/2003 asking to subscribe Fred, so by no means I was a popular figure. Bert, Mark, Julie were known a lot better; however, their names apparently were not removed. Why of the whole group I seem to be the only one whose name was removed?"

Seidman did not respond.

#### **February 12, 2004**

Dr. Zeliger asks Civian for some help in finding materials for a report. His e-mail to Civian, states, in part, "Fred, when I asked Nancy what your and Bert's roles as reviewers of my unfinished work would be, she said, among other things, that your comments would help me to focus. As much as I hate saying this, I have no choice but mentioning that this historical discussion, very important and informative in itself, is not really germane to my work and in fact distracts me badly from completing it. The help from you I do need at this time is your recommendation regarding who personally I should talk to "to obtain the ranges and estimates for CURRENT cost and scheduling information," as you wrote in a previous messages. Frankly, I hoped you, as the supervisor of the program for many years, would be able to provide the information."

#### **February 13, 2004**

Civian responds with a sarcastic response: "George – It's great that you can spend the hours it takes to write and do research for your lengthy e-mails to colleagues and still keep your required work on schedule....Fred"

#### **February 18, 2004**

Dr. Zeliger e-mails Seidman, asking permission to attend an in-house negotiations training. The e-mail states, "When discussing my duties for the future we agreed that due to the work force reduction I will have to perform some work for other Department divisions. Some time ago Bill Sirull was seeking volunteers interested in helping with some field inspections, and I gave my tentative consent.

Recently Bill sent a few messages regarding the forthcoming training; you were not in the office on those days, so I was not able to ask your opinion. I am forwarding Bills messages as attachments; he and Jeff Gifford are organizing training sessions, which will take place on Monday, Feb 23, Wednesday, March 10, and Tuesday, March 16. Please advise.

I would also like to participate in the Negotiation Skills Training Workshop on Tuesday, April 6, Helen Waldorf announced today (please let me know if you don't have a copy of her message). Thanks."

**February 19, 2004**

Seidman responds, refusing to allow Dr. Zeliger to attend the training. "George, I am surprised to have this request coming from you at this late date. If the report you have due this week is completed on time then you can attend the training next week, and the subsequent trainings. Also, I will want to discuss which days you're out doing the five inspections before you do them.

Also, if you'd like to help with the inspection work, then I think that is enough work outside the group at this time, and I am not approving the negotiation training."

**February 24, 2004**

Seidman e-mails Dr. Zeliger with a warning that he may be suspended from his employment due to his lateness with a report: "As I discussed in a meeting with you today, your draft report on the analysis of the MA31 test, (as described in duty 1 of your EPRS, which we signed on December 19th) was due to me as a draft report on February 13th. You asked for a week extension on Feb 10th, which I granted. This meant the report was due on February 20th. Since I have not received the report, I gave you an oral warning that the report was late, and I asked that it be submitted by the end of the day tomorrow, Feb 25.

Please note that failure to adhere to this warning will result in additional progressive discipline that may be in the form of a written warning or your suspension without pay from the workplace.

Since the meeting was to provide you with an oral warning, no information will be placed in your personnel file. -Nancy"

**March 1, 2004**

Civian scrawls, "B.S." on a table submitted by Dr. Zeliger. When Dr. Zeliger asks Civian what that means, Civian responds that it is "colloquial for 'nonsense.'"

**March 2, 2004**

Dr. Zeliger e-mails Commissioner Golledge, asking for a meeting: "I would like to take advantage of your invitation to meet one on one to express my deep concerns with the situation around the I&M program. I am afraid that vital decisions regarding replacing the existing emissions test are being unnecessarily delayed, which may cause further problems for the department in the future." April McCabe, DEP's Conflict Resolution Moderator, warns Dr. Zeliger that "the meeting would be a sidestepping of the chain of command" for which he could be disciplined.



### **On or about March 8<sup>th</sup> – 10<sup>th</sup>, 2004**

Dr. Zeliger meets with Commissioner Golledge to discuss his concerns with the I/M program. During the meeting, the Commissioner asks Dr. Zeliger what he will do if the DEP decides not to change the current emissions test. Dr. Zeliger jokingly replies that he will kill himself. Both the Commissioner and Dr. Zeliger laugh.

### **March 16, 2004**

Dr. Zeliger is asked to meet with Colman and Seidman. He is questioning intently about his remark to the Commissioner about his “intention to commit suicide” if a new test is not accepted. Dr. Zeliger explains that he made the statement jokingly, and Colman and Seidman imply that his mental health might be compromised.

### **April 27, 2004**

Upon arrival to his office, Dr. Zeliger discovered an advertisement for a job on his desk. The advertisement was for a Management Analyst II (a position much lower than his Environmental Engineer IV) position at the Dept. of Public Health, located in Tewksbury. There was no note with the job description, but it had clearly been left by someone in the office.

### **June 4, 2004**

Dr. Zeliger and others in DEP receive an e-mail from Commissioner Golledge about the I/M program. It states, in part, “On July 5th of last year, just before I started my tenure as Commissioner, the Massachusetts Inspector General (IG) sent the Governor a scathing report on the emission testing component of the Massachusetts Automobile Inspection and Maintenance Program (I&M Program). The story received prominent media coverage, both on television and in the print media. I met Governor Romney for the first time a few days later and he issued me a straightforward and empowering directive - fix the I&M Program. This week we reached an enormous milestone in our effort to fulfill the Governor’s charge. On Tuesday I announced a major amendment to the Commonwealth’s contract with Agbar Technologies, the Contractor who runs the I&M Program. This change will (1) require all of the testing equipment to be upgraded; (2) result in cleaner air for Massachusetts; and (3) maintain the balance between effectiveness, cost and motorist convenience that is the hallmark of the I&M Program. Responding to the Governor’s directive over the last 11 months has taken an extraordinary amount of time and energy from many people within the Department, from many different areas. Today I would like to take the opportunity to share with all of you some details of the changes to the I&M Program, and to acknowledge the enormous effort made by the Department and our partners and stakeholders to achieve this important milestone. The magnitude of this effort, and of this achievement, particularly in this period of broad budgetary challenges facing the Department, should not be understated. After reviewing the issues raised

by the IG, and consulting with the EPA and representatives of the auto inspection and auto repair industries, our analysis of the I&M program identified two major problems. First, the tailpipe testing equipment was not performing as reliably as it was designed to - by September, 2003 our routine auditing discovered that critical equipment components were failing audits 38% of the time. Second, a study comparing the Massachusetts testing system to the US EPA standard established that we were falling 10% short of our target for identifying excess emissions of NOx (NOx = nitrogen oxides, one of the principle components of smog and one of three pollutants targeted by the I&M Program). The program changes announced on Tuesday address directly the problems with tailpipe testing equipment and the shortfall in NOx emissions reductions, but these changes also signify a fundamental structural change to the program by fully implementing "On-Board Diagnostic" (OBD) testing using a car's computer, which will replace tailpipe testing altogether for 60% of the Massachusetts fleet this year. The four principle elements of the changes to the tailpipe testing program are:

- The Contractor will ensure that all critical components of the testing equipment meet a 90% performance reliability level, and any equipment that cannot meet this standard will be replaced;
- Every piece of testing equipment will be upgraded with state of the art NOx sensing technology in order to better identify cars emitting excess NOx;
- The Contractor will implement significant improvements to their regular maintenance and inspection station service efforts; and
- If new performance requirements associated with the above are not met, the Contractor will pay significant damages to the Commonwealth.

The costs for these changes are estimated to be around \$15 million, and will be wholly borne by the Contractor. There will be no costs passed on to motorists, inspection station owners, or the Commonwealth. The current contract expires in October, 2006 but if the contractor meets all of the new performance standards over specified time periods, they will receive two one-year extensions of the contract through October 2007 and then October 2008.

The implementation of OBD testing is expected to begin on June 15th of this year. Most cars from Model Year 1996 and later will now be tested using OBD. In 2004, this represents approximately 60% of cars and trucks in the Massachusetts fleet. Every year this percentage will grow, and we anticipate that sometime between 2008 and 2010 we will be able to eliminate tailpipe testing altogether from the I&M program.

Taken as a whole, the changes announced Tuesday represent an enormous achievement for the Department. The US EPA has approved our program with these changes, and I am confident that the Commonwealth will benefit from them. Getting to this point has taken a huge effort by staff in my office, the Bureau of Waste Prevention in Boston and the Regional Offices, the Office of the General Counsel, the

Mailroom and many others within the Bureau of Administrative Services, but everyone in the Department has contributed to our success. Staff from every Bureau helped with the management of over 800,000 documents associated with various investigations of the program, an effort we estimate to have taken about 5-7 FTE over the last year.

We have survived an enormous challenge to the reputation of this Department and will make significant improvements to our most publicly visible program. I want to thank all of you for your efforts and support."

#### **June 14, 2004**

Dr. Zeliger finds another advertisement on his desk for a job outside the MADEP. This job is with the Board of Higher Education. There is no note with the advertisement.

#### **July 12, 2004**

Dr. Zeliger is rejected for an interview for promotion to the position of Branch Chief of the I/M program. The rejection letter states that the applicant pool was "competitive."

Dr. Zeliger receives an e-mail from Seidman which states, "As mentioned in my voice mail last Friday, you had signed in around 11 am one day and around 10:45 another. I asked you to send me an email or voice mail to let me know why you were late both days, but did not hear from you. As I said in my voice mail, core hours begin at 10 am and you are required to be here by then. If you expect to be later than 10:30 am, I expect you to call and let me know, with an explanation."

Dr. Zeliger responded in an e-mail that stated, "Sorry for not sending this response sooner. The reasons I signed in at 11:02 AM last Wednesday and at 10:45 AM last Thursday was that I didn't feel well. Both accidents were not malicious or intended, they just happened because I couldn't help but slowing down. I didn't call you because I basically was on my way and was trying and hoped to be on time.

Please note that I always am putting in the required hours per day and often more by staying late.

As I explained to you in the past, I am in a severe distress caused by my work situation, which affects my physical and mental health, and, eventually, my performance. I hoped that as time passes and things calm down, the overall situation improves. Unfortunately, this does not seem to happen -- to a great degree because of a string of events, each of which taken separately perhaps does not deserve any

serious attention; however, looked at combined together, they seem to form an ominous pattern.

To give you just a couple of examples, two times in the recent past I found on my desk unsolicited and anonymous printouts of descriptions of seemingly statistical positions outside of the department, which I perceived as hint to leave. Your comment during our last meeting that my colleagues don't want to work with me because I "destroy everything I participate in" in my mind falls into the same pattern, as well as your suggestion "to get over and to stick to the made decisions", as if it is my poor personality, not my technical expertise, that causes my disagreements with what's going on.

I confess that a continuing confusion between the message and the messenger does take its toll on me; unfortunately, there is not much I can do about it. I cannot suddenly start tolerating the idea that  $2 \times 2 = 5$  after I devoted a major part of my life to first studying and then making my personal contribution to the contrary. Besides, as I mentioned in our last meeting, there is no question in my mind that as soon as someone starts checking how tests are going these days, they will immediately discover the same problems as in the past. And I am not alone -- for example, look at the NESSARA's Web site; many of their concerns are very similar to mine, even though I never discussed my views with anybody from the organization, and don't know anybody of them personally.

This e-mail was not intended to discuss in depth my technical views; I mentioned a few of facts - and there are some more - Just to give you an idea why I am having medical problems that occasionally slow me down. Please believe me that I am making every effort to be in compliance with the rules, it is just that sometimes things do not work the way I'd like them to."

#### **August 30, 2004**

Dr. Zeliger receives an e-mail from Thomas G. Massimo Division Director, Workforce Services Division, stating, "You are hereby ordered to report to the 4th Floor Conference Room in Boston tomorrow, Tuesday, at 4:00 PM for a meeting with me and your supervisor. It has come to my attention that you are unable to maintain the schedule you have requested under the AWS policy, and have been warned several times in the past. The purpose of this meeting will be to issue disciplinary action and to discuss your schedule going forward. You may bring union representation if you wish."

#### **September 1, 2004**

Dr. Zeliger is called into a meeting with Seidman. In that meeting, Seidman explains that other DEP divisions needed his help. Seidman stated that Steve White, the

Division Director of the Bureau of Waste Prevention Program Support, had a considerable backlog of air quality data forms. Seidman stated that Dr. Zeliger was to perform data entry for those forms. Seidman specified that Dr. Zeliger would be working in this new office three days a week, for at least the month of September. Seidman said Dr. Zeliger would be responsible for inputting 10 to 35 forms daily, and to pay attention to details.

Dr. Zeliger stated, "So, I am about to be sent to the galleys." Seidman asked what he meant. Dr. Zeliger then said he intended to discuss the idea with his lawyer, and Seidman replied that Dr. Zeliger was to start the new job the following Monday regardless of any discussions.

Later on that day, Seidman sent the following e-mail to Dr. Zeliger, copied to Steve White and Robert Boisselle: "As discussed today, here's the description I got from Bob Boisselle about the project. Please see below for the questions to Bob and other issues discussed at our meeting. Description from Bob B:

Able to log into DEP data systems and have the ability for detail when entering data from prepopulated forms from industrial sources.

Assist in the Source registration/Emission statement mailing and processing.

After training in SSEIS the individual should be able to enter data from SR/ES side by side form at a minimum rate of 10 per day to 35 per day.

Bob - please explain what you mean by "ability for detail" - seems like a word or two is missing there? Also, do you have time to train George in SSEIS tomorrow Thurs or Friday? He arrives by 10 and is here until 6. Please contact him directly to set this up.

George, assuming Bob has time tomorrow or Friday to train you, then next week you would start the three days per week working on SSEIS entry. If Bob is not available then you would still start next week but with the training. Steve will find you space on the 8th floor to sit and you will sign in on the 8th floor on those days and Steve will be your supervisor. I would prefer that the days you work on SSEIS are fixed (i.e., M,W,F) but they could fluctuate if other assignments mean you need to shift days. Please let me know how you'd like to handle this.

Also, you and I will meet the week of October 4 to assess how the work is going. I will talk to Steve and Bob beforehand to see how the backlog is going, and whether they can continue to use your help with SSEIS. After September the number of days you're doing data entry may remain at 3 but it will not increase.

Please let me know if you have other questions. Thanks."

**September 30, 2004**

Dr. Zeliger receives the following e-mail from Seidman: "... I was surprised that you attended the Advisory meeting yesterday without asking me whether that was OK before the meeting (or did you ask Paul?). I would have given approval, but you should have asked in advance. Had you asked in advance, my question would have been whether you had arranged to make up time for data entry with Steve, since that was what you were assigned to do yesterday?

Finally, I was surprised by your question to Paul on O2 sensors at the meeting. Those meetings are for public, outside stakeholder input, not for staff to question other staff. In the future, if you have issues or questions to raise, please do so in advance with Paul, or wait until after the meeting. If both of you decide it is worth bringing the issue up with the Advisory group, then Paul will do that. We can discuss these issues on Tues if you'd like. Please let me know when you'd like to meet."

### **November 16, 2004**

Dr. Zeliger sends a note to Seidman expressing his concerns regarding his performance evaluation and his duties. The note states, "I have some concerns regarding my 2005 EPRS form. First of all, I would like the rules and requirements of the EPRS to be stuck to more strictly. I would like receiving better explanations of the points included in the form – for instance, I never received a clear explanation of my "contributing role in unit" (see section A, Performance Planning). I would also like the EPRS yearly schedule to be followed better; in other words, I would like not to deal with the situation when a casual meeting gets announced a semi-annual Progress Review meeting a couple of weeks after it has happened. However, my main concerns are about the contents of my duties. Should a stranger has looked at my EPRS, she would decide that most of my time I am providing QA/QC and statistical expertise to the staff, developing a statistical course, performing analyses, etc. In fact, until the last week 60% of my time I was doing data entry – a job that does not require my qualifications at all, and for which I would never apply due to my poor vision.

As I informed you last week, data entry for SSEIS – to which I have been assigned temporarily, as you explained, to help another unit – has been completed. Your response was that I continue working on the 8<sup>th</sup> floor because you believe Steve has some other items for me. Steve did not tell me anything about "other items" when I finished working on SSEIS. So far he has not responded to my request to tell me what the new task would be (I am told, he is not in today; I sent my request yesterday, though). All this puzzles me as to what the nature and the cause of my continued stay on the 8<sup>th</sup> floor are.

I am respectfully requesting a clarification and, most importantly, a clear time frame for the assignment. If it continues indefinitely, in my opinion this substitutes a major change in my duties, and I am requesting a proper documentation of the fact."

**November 24, 2004**

Dr. Zeliger receives an e-mail from Seidman, indicating that his reassignment is now apparently permanent and full-time. The e-mail states, "As I've mentioned, I'm following up on your meeting with Paul last week on ACCESS assignments. Paul and I have talked, and your assignments are described below. I hope this email will address some of the questions you raised with me last week when we met.

Beginning the week of Nov 29th, you will work on the 8th floor 2 days/week; I have talked to Steve about that. The other three days you will be working with ACCESS to generate the Excel data tables and charts needed for the 2001 and 2000 reports on the IM program to EPA.

You will have until Jan 14th to complete the data tables and charts for the 2001 report, using three days per week that you are working in IM. You will be able to ask Craig for assistance in generating these tables and charts since you will be using queries he has developed to prepare the 2002 and 2003 reports. You can go to Craig for background orientation regarding the queries and how he formatted the tables and charts in Excel, but we are assuming that since you have been trained in ACCESS that you will complete this assignment on your own and won't need ongoing assistance from Craig.

Paul and I have discussed the amount of time we believe reasonable, based on the time taken for preparing the 2003 annual report and have accounted for your being new to these tasks in developing this deadline. You will use the data report tables and charts from the 2003 report [Appendix B and Appendix D] as a model for how your tables and charts should appear when completed.

Paul will provide you with a folder that contains the 2003 report's queries and appendices to use as a starting point. Paul and Craig have set aside 3 hours for your orientation, from 9:00 to noon on Tuesday, November 30. You are to attend this orientation session.

Once you have completed the 2001 data tables and charts, we want you to do the same work for 2000. That work must be completed by February 11<sup>th</sup>. You will be doing that work on your own, without going to Craig for assistance on the queries.

This data is critical to completing some of our commitments to EPA. They know the reports are late, and have given us the ability to extend our timeline. Once you have completed the data, Laura or others will complete the text that goes with the reports and prepare them for review in DEP and submittal to EPA.

Once you have completed these two assignments successfully in Mid-February then

we intend to ask you to work on other data queries related to tracking Contract Amendment 4. If your work on the reports goes well we will further reduce the time you spend working with the 8<sup>th</sup> floor as other assignments increase. I will amend your EPRS for FY05 to show the work you've been doing with Steve's Division since the Fall, and reflect this ongoing assignment. I will give that to you next week."

#### **December 2, 2004**

Dr. Zeliger asks his new supervisor, Steve White, what work he has for him to do. White responds, "Here are the tasks that I need you to complete:

- 1) Martha Roy needs help with financial tracking information, there is a considerable amount of transaction notices that will benefit from a program perspective and organization
- 2) Mercedes could use some help with this weeks data entry on asbestos notifications, once done with Martha, please check in with Mert.
- 3) Overall, we could use some help with better organization of our fiscal side of the house, see Martha and Winnie for this
- 4) I still need some refinement with the personnel database, including queries by division, account, etc."

Dr. Zeliger sends an e-mail to White which states, "Steve, Just for the record, I am working on Martha's staff; the work consists of removing staples and clips from a stack of documents, copying a few pages, and then stapling and clipping the papers together. I hope I will be able to finish the pile Martha gave me by the end of day tonight, tomorrow morning at the very latest.

While I was making copies, Tom DeNormandie passed by; following what you told me about an hour ago about my tomorrow job I told Tom that I am supposed to be helping him tomorrow. His response, "Doing what?" I said that it was me who wanted to know what I will be doing tomorrow, to which he said, "I appreciate your availability, but I have no idea." Please advise.

George"

#### **Mid-December, 2004**

Dr. Zeliger is asked to make copies, address and stuff envelopes, and do mailings as part of his new assignments.



**V. MADEP, SEIDMAN, COLMAN, CIVIAN, WERT AND GOLLEDGE HAD A MOTIVE TO RETALIATE AGAINST DR. ZELIGER AND HARASS DR. ZELIGER BECAUSE HE RAISED ENVIRONMENTAL COMPLIANCE CONCERNS THAT THREATENED THE COMMONWEALTH'S ABILITY TO OBTAIN MILLIONS OF DOLLARS OF FEDERAL MONEY**

There is substantial direct and circumstantial evidence that Seidman, Colman, Civian, Wert and Golledge took the adverse actions against Dr. Zeliger because Dr. Zeliger made protected disclosures both internally to management and externally to USEPA IG, the Massachusetts IG, Public Employees for Environmental Responsibility (PEER), the public, and the media. There was close proximity in time between Dr. Zeliger's protected disclosures and the actions taken against him. Seidman, Colman, Civian, Wert and Golledge were well aware that Dr. Zeliger had provided information to the IGs and suspected that he had contacted the media as well. This is evidenced by: 1) Sierra's June 11, 2001 e-mail to Mark Wert, thereby informing DEP that Dr. Zeliger had talked to his union representative about going to the press with his concerns; 2) the July 7, 2003 MA IG report which refers to the technical specialist, together with the July 8, 2003 IG report which refers to a "whistleblower" 3) the July 17, 2003 internal review of the I/M program produced by Commissioner Golledge's office includes a reference to the "technical specialist" who spoke to the MA IG – the report also indicates that the internal review team also spoke to that technical specialist; 4) the August 7, 2003 performance evaluation that Dr. Zeliger had with Civian, in which Civian directly and sarcastically referred to the "technical specialist" who spoke to the IG; 5) Dr. Zeliger's e-mail to Civian, Seidman, and Golledge admitting that he was the "technical specialist" referred to in the IG's report and the internal review; and 6) Dr. Zeliger's e-mail to Seidman stating that Dennis Poltrino, the man he copied on some of his e-mails, was the EPA IG. Civian, Seidman, Colman, Wert and Golledge also expressed hostility towards Dr. Zeliger's protected activities by, among other things, 1) telling Dr. Zeliger that he should not talk to EPA directly (in effect, issuing a gag order on Dr. Zeliger's normal communications with the federal agency overseeing the program); 2) telling Dr. Zeliger that he should no longer work on ways to fix the I/M program; 3) reassigning him to inappropriate tasks when he persisted in bringing up the flaws in the emissions testing program; and 4) in the case of Civian, making sarcastic comments about his disclosures to the IG, and linking his negative performance evaluation to the disclosures. The law recognizes each of these circumstances as evidence of retaliatory motive.

Dr. Zeliger became a very unwelcome messenger to Seidman, Colman, Civian, Wert and Golledge because he: 1) drew attention to the flaws in the I/M test; 2)

helped the MA IG make their case against DEP, which resulted in disciplinary actions taken against two DEP managers, including Civian himself; 3) made the public aware of the flaws in the emissions testing procedure by going to a television station and newspapers. Dr. Zeliger's continued work to expose the flaws in the emissions testing program.

Dr. Zeliger spoke honestly about a real threat to the environment, and to public health. His intent was not to get DEP employees in trouble, but to fix a flawed emissions test that affected all vehicle owners in the Commonwealth, and the air quality of the region. Rather than publicly acknowledging Dr. Zeliger's concerns and suggestions on how to fix the emissions program, MADEP's managers hid the truth from the public and the investigating agencies, and developed ways to hide the flaws in the system. Although the MADEP now acknowledges that some of the machines used to measure vehicle emissions were not working, and are replacing all the sub-par machines, they persist in using the flawed MA 31 test. Rather than addressing the difficult environmental and financial issues related to fixing the flawed MA 31 test, as is their legal and ethical responsibility, Seidman, Colman, Civian, Wert and Golledge decided to take the politically easier way out: shoot the messenger. Dr. Zeliger's honesty and integrity basically cost him his job – with a PhD in statistics, Dr. Zeliger is reduced to making copies and doing data entry. But Dr. Zeliger's livelihood is not the only casualty. Public health has been compromised for politics and profit as a result of the cover-up of which Dr. Zeliger's reassignment is only a part. This is exactly what the federal environmental statutes' employee protection provisions were meant by Congress to prevent and remedy.

## **VI. JURISDICTION**

CAA jurisdiction, pursuant to 42 U.S.C. § 7622, is present because the CAA amendments of 1990 (National Ambient Air Quality Standards or NAAQS) require that metropolitan areas with the most serious air quality problems implement an enhanced vehicle inspection and maintenance (I/M) program. In 1996, the federal Environmental Protection Agency (EPA) found that certain sections of Massachusetts were in non-compliance with these criteria, exceeding both ozone and carbon monoxide standards by elevated amounts. Accordingly, Massachusetts was required to reduce the amount of emissions of nitrous oxide and carbon monoxide from both fixed sources (e.g., power plants) and mobile sources (e.g., cars) by at least 9% by the end of 1999. In response to EPA's mandate, Massachusetts Department of Environmental Protection (DEP) initiated the I/M program. The I/M program monitors emissions from automobiles, trucks and buses by testing vehicles for emissions levels. Massachusetts instigated its I/M program to avoid severe sanctions specified under the CAA; possible sanctions can include loss of federal highway dollars.

Dr. Zeliger raised substantial and tangible concerns about the accuracy and validity of the emissions test used by the MADEP, and these concerns, when aired publicly, jeopardized the Commonwealth's access to millions of dollars of federal highway dollars. To date, MADEP is still using the flawed emissions test.

42 U.S.C. § 7622(a) states that “No employer may discharge any employee, or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee....commenced, or caused to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter or under any applicable implementation plan.....[or] assisted or participated ....ina nay manner in such a proceeding or in any other action to carry out the purposes of this chapter.” 42 U.S.C. § 7622(b) states that any employee who believes that he has been “...discriminated against by any person in violation of subsection (a) of this section may, within thirty days after such violation occurs, file (or have any person file on his behalf) a complaint with the Secretary of Labor alleging such ... discrimination.” The straw that broke the camel’s back in the litany of harassment against Dr. Zeliger occurred on November 24, 2004 when Seidman informed Dr. Zeliger that his previous temporary transfer appeared to be permanent. This complaint was filed with the Department of Labor and the Occupational Safety and Health Administration in Boston on December 23, 2004. Therefore, this complaint has been filed in a timely fashion pursuant to 42 U.S.C. § 7622(b).

## **VII. RELIEF REQUESTED**

As a result of the unlawful retaliatory actions of MADEP, Seidman, Colman, Wert, Civian and Golledge against Dr. Zeliger, Dr. Zeliger has suffered substantial damages. Dr. Zeliger requests that OSHA and/or the adjudicating agencies issue and order and award the following relief:

- a. An Order declaring that each of the Respondents unlawfully retaliated against Dr. Zeliger in violation of the Clean Air Act;
- b. An Order prohibiting any further retaliation or discrimination against Dr. Zeliger;
- c. An Order expunging Dr. Zeliger’s employment record of any negative references or inferences that may have been caused or can be attributed to the unlawful retaliation;
- d. An Order requiring that Dr. Zeliger be promoted immediately to Branch Chief of the I/M Program;
- e. An Order requiring back pay and lost benefits to be paid to Dr. Zeliger from the date that he was unlawfully denied the Branch Chief position through the present;
- f. An Order awarding monetary relief to Dr. Zeliger and against the Respondents, jointly and severally, to compensate him the emotional distress, hostile work environment, and other unlawful discrimination of not less than

\$75,000;

- g. An Order awarding monetary relief to Dr. Zeliger and against the Respondents, jointly and severally, to compensate him for damage to his reputation of not less than \$100,000;
- h. An Order awarding exemplary damages of not less than \$500,000 to Dr. Zeliger and against the Respondents, jointly and severally, for the wanton, willful, and malicious actions taken against him when he attempted to protect the public and the environment from harm;
- i. An Order awarding payment of all attorneys' fees and costs (including but not limited to transcripts, travel, and expert witness fees) to Dr. Zeliger and against the Respondents, jointly and severally;
- j. An Order providing such other relief as may be requested or determined by the agency to be just and appropriate.

Respectfully submitted,

Kyla Bennett, Esq.  
New England PEER  
P.O. Box 574  
North Easton, MA 02356  
508-230-9933 (voice)  
508-230-2110 (fax)  
Email: [nepeer@peer.org](mailto:nepeer@peer.org)

*Richard E. Condit*  
Richard E. Condit, Esq.  
General Counsel  
PEER  
2001 S Street, NW, Suite 570  
Washington, D.C. 20009  
Tel. 202.265.7337