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ARB No.: 98-087

Case No.: 1997-SDW-7

File Nos.: 8-0600-97-015
8-0600-01-005
8-0600-01-006

ADRIENNE ANDERSON,
Complainant,

v.

METRO WASTEWATER RECLAMATION DISTRICT,
Respondent.

Appearances:

Susan J. Tyburski, Esq.
For the Complainant

Richard P. Brentlinger, Esq.
For the Respondent

BEFORE: **DAVID W. DI NARDI**
District Chief Judge

RECOMMENDED DECISION AND ORDER

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SUMMARY OF THE CASE

Adrienne Anderson ("Complainant" or "Anderson" herein) seeks relief under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9610, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. § 6971, the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. § 1367, and the Energy Reorganization Act ("ERA"), 42 U.S.C. § 5851. On May 2, 1997, Anderson filed a **pro se** complaint with the U.S. Department of Labor alleging that Respondent Metro Wastewater Reclamation District ("Metro") violated the employee protection provisions of various federal environmental statutes by retaliating against her for engaging in protected activities. The matter could not be resolved administratively and the complaint was referred to the Office of the Administrative Law Judge. A hearing on the merits was held before this Administrative Law Judge on November 6, 7, 8, 13, 14, 15 and 16, 2000, at which hearing the parties offered documentary evidence and testimony in support of their respective positions. Additional evidence was filed on pot-hearing basis, as well as post-hearing briefs and supplemental briefs relating to two (2) additional complaints filed by Complainant with reference to her alleged treatment by the Respondent.[1]

I have thoroughly reviewed and considered the totality of this closed record and I find and conclude that Complainant has established that she engaged in a variety of protected activities which resulted in Respondent engaging in the following adverse and discriminatory actions:

(1) cutting her off or ruling her out of order during Board meetings;

(2) keeping her from voting on the Lowry settlement by delaying her confirmation by the City Council until June 1996;

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[1]The following references shall be used herein: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for an exhibit offered by the Complainant, JX for a joint exhibit and RX for an exhibit offered by the Respondent. Evidence offered post-hearing has been admitted as relevant to the issues and will be discussed in the decision.

(3) ordering her off Metro property in March 2000 when she appeared for a press conference to voice her concerns about the Lowry settlement;

(4) denying her requests to distribute material concerning the Lowry Landfill or to put this issue on the agenda;

(5) denying her June 25, 1997 request for a special Board meeting to investigate public and worker health and safety concerns raised by Metro employees;

(6) forcing her to make Open Records Act requests for information, and then charging her for such information;

(7) monitoring her activities and public statements;

(8) circulating derogatory e mails and other communications about her;

(9) subjecting her, via an April 16, 1997 letter, to a special disclaimer requirement which was not imposed on other Board members, specifically Ted Hackworth; and

(10) communicating its desire that she not be reappointed to the Metro Board, which resulted in her failure to be reappointed.

Complainant is entitled, therefore, to certain relief and this will be discussed below.

A. INTRODUCTION

Adrienne Anderson was appointed to the Metro Wastewater Board of Directors on February 22, 1996. (CX 5) Her appointment was subsequently confirmed by the Denver City Council in June 1996. As a member of the Board of Directors of Respondent Metro Wastewater Reclamation District ("Metro" or “Metro Wastewater"), Complainant raised concerns about the safety and legality of Respondent's planned participation in the clean-up of the Lowry Landfill Superfund Site, and thus began the hostile environment for the Complainant.

Metro, a political subdivision of the State of Colorado created pursuant to the Metropolitan Sewage Disposal Districts

Act, C.R.S. § 32-4-501 **et seq**. (2000), treats wastewater from over fifty municipalities and sanitation districts throughout the Denver Metro Area. A Board of Directors appointed by the member local municipalities or sanitation districts governs Metro. The Board is vested by statute with all powers to carry out the functions of Metro. § 32-4-510 The Board acts as a policy making body whose appointees are determined by the population of the member municipalities per statute C.R.S. § 32-4-509(2). At the times involved in this case, Metro's Board consisted of 59 members.

The Mayor of Denver nominated Anderson to the Metro Board of Directors in February, 1996. (CX 5) In June 1996, the Denver Public Works Committee recommended her appointment as one of Denver's twenty (20) representatives to the Metro Board, and that appointment was later confirmed by the Denver City Council. (CX 98) On July 16, 1996, Anderson appeared at her first monthly Metro Board Meeting and took the oath of office. (RX 24) At this very first Board Meeting, Anderson abstained from voting on all issues except those relating to the Lowry Landfill Superfund Site. (RX 24)

According to District Manager Robert Hite at the first board meeting on July 16, 1996, Anderson, like other new Board Members, told the entire Board who she was and what she did for a living. Anderson then advised the Board that they had made a terrible mistake at the Lowry Superfund Site and she was going to correct the errors. (TR 1318, l. 22 - 1319 l. 11)

Throughout the balance of 1996 and into 1997, Anderson was very vocal at monthly Board Meetings and Operations Committee Meetings concerning her opposition to Metro's position taken at Lowry. (**See**, **e.g.**, RX 25, 32, CX 44 and 76) and Metro Board minutes (7/16/96, 8/20/96, 3/18/97, 4/15/97, 5/20/97, 6/17/97, 7/15/97 and 11/18/97).

As noted, on May 2, 1997, Anderson filed a **pro se** complaint with the U. S. Department of Labor alleging that Metro violated the employee protection provisions of various federal environmental statutes by retaliating against her for engaging in protected activities. (**See** Complaint, May 2, 1997 letter from Adrienne Anderson to Thomas J.Buckley.) Ms. Anderson alleged that Metro took the following actions against her in retaliation for her protected activities: (1) circulated a memorandum on April 9, 1997, which contained "unfounded accusations and

insinuations of impropriety;" (2) held secret sessions of two committees of Metro's Board of Directors ("Board") without her knowledge; and (3) sent her an intimidating letter on April 16, 1997, threatening to censure her for speaking at an April 2, 1997 public meeting.

In a decision issued on June 6, 1997, David W. Decker, Regional Supervisory Investigator of the U. S. Department of Labor, upheld Ms. Anderson's claims under the "whistleblower" provisions of three environmental statues. (**See** June 6, 1997 letter from David W. Decker to Joel A. Moritz) The Investigator found that Respondent discriminated against Ms. Anderson by: (1) issuing "intimidating and threatening letters" as a result of her "protected activities;"(2)"fail[ing] to accurately reflect concerns and comments by Complainant in public records of meetings held by the Board;" and (3) "refus[ing] to hear motions for amendments which Complainant has made."

Both parties appealed in part the Investigator's decision. Complainant appealed the Investigator's denial of her claim under the Energy Reorganization Act, as well as the general questions of remedy and relief. (**See** June 12, 1997 letter from Adrienne Anderson to Chief Administrative Law Judge). Respondent appealed "all adverse findings and determinations," including the finding that Complainant was an "authorized representative of employees." (**See** June 11, 1997 letter from Joel A. Moritz to Chief Administrative Law Judge.) Both parties sought a **de novo** review before an Administrative Law Judge.

Before a hearing on the merits, Respondent moved for summary judgment on the issue of Complainant's standing as an "authorized representative of employees. My most distinguished and now retired colleague, Judge Samuel I. Smith, granted summary judgment for Respondent on this issue on February 19, 1998. Following briefing on appeal, the Administrative Review Board (ARB) reversed Judge Smith’s decision, ruling that summary judgment on the issue of standing was not appropriate. In its March 30, 2000 decision, the ARB found that the term "authorized representative" under the applicable environmental statutes "encompasses any person requested by any employee or group of employees to speak or act for the employee or group of employees in matters within the coverage of the environmental whistleblower statutes which prohibit retaliation..."(**See** March 30, 2000 decision, pages 7-8.) The ARB further determined that "an individual selected by a union representing employees covered by the whistleblower protection provisions to speak or

act for the union (and by extension the employees) in matters within the purview of the environmental statutes at issue here is also protected by the statutes' prohibitions of retaliation against 'authorized representatives." (**Id**. at 8.) As a result, this case was remanded for a hearing on the merits.

As already noted, a hearing on the merits was held before this Administrative Law Judge on November 6, 7, 8, 13, 14, 15, and 16, 2000. During this hearing, Complainant, as more fully discussed below, established that she engaged in a variety of protected activities which resulted in Respondent engaging in certain adverse and discriminatory actions, as further discussed herein:

The campaign of retaliation against Ms. Anderson for her protected activities constitutes a continuing violation of her rights under the employee protection provisions of applicable environmental statutes. Complainant requests that this Administrative Law Judge order Respondent to rescind its threatening April 16, 1997 letter, issue a public apology and promise not to retaliate against her or others in the future for engaging in protected activity. Complainant also asks the Judge to order Respondent to pay compensatory damages to Complainant in the amount of $500,000 for damage to her professional reputation and loss of future income, and a minimum of $50,000 for the mental anguish and emotional distress caused by Metro's adverse actions.

DISCUSSION OF ISSUES

I. AS AN AUTHORIZED REPRESENTATIVE OF METRO EMPLOYEES, ADRIENNE ANDERSON HAS STANDING TO PURSUE HER WHISTLEBLOWER COMPLAINTS.

The speaking or action of Anderson which triggered the subject whistleblower complaint occurred on April 2, 1997 at an EPA public hearing regarding Lowry. (RX 2) At the hearing on April 2nd, Anderson identified herself as a Metro Board member and a teacher at the University of Colorado ("CU"), (RX 2 p. 35), and that she was appointed to the Board by the Mayor of Denver to represent worker health and safety issues. (RX 2 p. 39)

Prior to Anderson speaking at this hearing, Donald

Holstrum, then president of the OCAW[2], the union local,spoke. Mr. Holstrum, after identifying himself as president and counsel for the OCAW stated, "And **we (OCAW) represent the lab workers** at the Metro wastewater facility ..." (RX 2 p. 28, emphasis supplied). Immediately after Mr. Holstrum had spoken and immediately preceding Anderson introducing herself, Phil Goodard, introduced himself as the elected health and safety representative for the Metro lab workers (OCAW). (RX 2 p. 34) When Al Levin introduced himself, he stated that he was a director of Metro and that he was there "as a concerned citizen". (RX 2 p. 50)

The OCAW representatives clearly identified whom they represented. Even Mr. Levin qualified his introduction as a director of Metro, although not to the satisfaction of the Chairman, that he was there as a concerned citizen. Only Anderson did not indicate on whose behalf she was speaking. There can only be two possible reasons for this, either she was trying to impress the audience and bolster her credibility by introducing herself as a director and as professor at CU or, as Metro believes, knowing that certain Metro managers, staff and legal counsel were in attendance, she was purposely attempting to hide her affiliation with the OCAW. With this knowledge, at the time, the only reaction Metro could have was the one it did have; to take action against a Board member and not against an "authorized representative" of employees, according to Metro's essential thesis.

Even under the broad and liberal definition given to the phrase "authorized representative of employees" by the ARB, the employees or the union must still request that the "authorized representative" speak or act on their behalf "on matters within the purview of the statutes." Anderson presented no evidence at trial that anyone requested her to speak on their behalf at the April 2, 1997 EPA meeting. (TR 362, ll. 2-9) And it was as a result of her actions at that meeting that Metro took the alleged adverse action.

Throughout this trial, Anderson most credibly testified that she was appointed by the Mayor of Denver in 1996 to represent the workers at Metro. Metro, however, disputes that her appointment by the Mayor of Denver was different from any

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[2]OCAW stands for the Oil, Chemical & Atomic Workers' Union.

other appointment to Metro's Board of Directors.

The Colorado statute regarding appointment of Board Members to Metro does not provide that the appointment be for a purpose or represent a constituency other than representing the appointing municipality. **See**, C.R.S. § 32-4-509(2), (3) and (4). Further, her appointment by the Mayor to represent worker health and safety issues does not confer upon her the standing of "authorized representative" of the workers. Only the employees themselves can authorize her, according to Metro.

Anderson admitted during her testimony at the hearing that neither she nor anyone else to her knowledge provided Metro with any written documentation which would support her appointment to the Board with the specific authority to represent the workers of Metro. (TR 676, l. 24 - 679 l. 23) In fact, the February 22, 1996 letter to Anderson confirming her appointment from Mayor Wellington E. Webb indicates that she is "to serve the citizens of the City and County of Denver in this important role". (CX-5)

Shortly after Anderson became a Board member in July 1996 she authored a letter to Ted Hackworth, Chairman of the Operations Committee, concerning her role on the Board. In her own words Anderson states:

> Clearly, there has been a dearth of representation to the Metro Board from the occupational and environmental health sectors in the past; Mayor Webb is wisely seeking to provide greater representation of these interests on behalf of Denver's residents and sewage system rate payers in recent appointments. (RX-31)

Noticeably absent from Anderson's letter to Mr. Hackworth is anything about her role being an "authorized representative" of the employees of Metro. Metro strenuously objects that Complainant was or could be an "authorized representative" of the employees at Metro when she was appointed, pursuant to statute, to represent Denver on the Metro Board. It is clear that her only role was that of an "authorized representative" of Denver, not of the employees of Metro, according to Metro.

If it is determined that Anderson is an "authorized

representative" of the employees of Metro, Metro submits that this Administrative Law Judge must also find that Metro had notice of such authorization being granted by the workers to Anderson in order for Metro to be liable. All Metro Board members who testified at the hearing consistently stated that in their dealings with Anderson they viewed her as a fellow Board Member and not as an "authorized representative" of the workers, according to Respondent's essential thesis.

The ARB noted that the legislative history of the FWPCA was modeled after provisions in the Federal Coal Mine Health and Safety Act. The regulations promulgated under that Act require that after receiving notice that two or more miners have appointed a representative the operator must post that designation. **See, Kerr-McGee Coal v. Federal Mine Safety & Health Review Commission**, 40 F.3d 1257, 1260 (D.C. Cir. 1994) and 30 C.F.R. § 40.4. It is clear under these regulations that the employer must be made aware that the person is acting as a representative of the workers. Common sense would dictate the same result here. Metro must have had notice to be liable, according to Metro.

Metro submits that the evidence at the trial showed that while on the Board, Anderson was far more involved with the OCAW than anyone at the time knew. Although unknown by Metro at the time, she was clearly serving two masters and was in a conflict of interest situation in violation of Metro's Bylaws and her fiduciary duty to Metro. On at least two occasions, she misrepresented her close ties to the OCAW.[3] The first was in her confirmation hearing before the Denver Public Works Committee when, by her own account, she said in response to Councilman and Metro director Ted Hackworth's concerns regarding her affiliation with the OCAW that "he (Mayor Webb) does intend for me to serve in a role on the labor issues relative to that plant. And so I – I certainly would want to have input from any of the workers, union workers and non-union workers at the facility so I would want to be in touch with them." (CX 9, Anderson's corrections p. 6-7) She does not, however, indicate the closeness of her relationship with the OCAW, which provided notice to Metro regarding her alleged protected status as an "authorized representative of employees." The second was when

[3]One could infer that Metro's argument here is at cross-purposes to its essential thesis.

she voted for the OCAW salary increases in December 1996 at the Metro Committee and Board meetings and affirmatively stated “that she does not now, nor did she when she was appointed to the Metro District Board of Directors, work for the Oil, Chemical & Atomic Workers Union.” (CX 44)

Not only did Anderson never inform Metro that she claimed to be an “authorized representative” of the workers, but purposely misled Metro as to her affiliation with the OCAW. While Anderson told Metro Board members that she did not work for the OCAW at the time of her appointment, she does not bother to mention that she claims to be their representative on the Board, until she filed this case. **See e.g.**, CX 9 (Anderson’s corrections p. 6-7) CX 44 (does not work for OCAW), TR 1420 l. 21 - 1421 l. 19). Anderson had numerous occasions to inform Metro that she was an “authorized representative” of the OCAW, but chose instead to hide this information and mislead the Metro Board members. The only explanation for this conduct was that she had never been authorized by the OCAW to act on their behalf or she was purposely trying to keep Metro Board members in the dark as to her true affiliation with the OCAW. **See also**, CX 10 (where the OCAW representative discusses Anderson’s appointment referring to her appointment as the appointment of an “equitable board member”, rather than as their representative).

Therefore, even if the OCAW did authorize Anderson to represent them, which Metro denies, Anderson should still be denied protected status because she not only failed to inform Metro of her status, but purposely hid her true relationship with the OCAW from Metro, according to Metro.

The four "whistleblower" provisions under which Complainant seeks relief protect "employees" and "authorized representatives of employees" against retaliation for airing complaints or allegations of employers' non-compliance with these environmental statutes. The Energy Reorganization Act, 42 U.S.C. §5851(l)(a), 2 does not refer to "authorized representative," but instead prohibits discrimination against an employee when he, or "any person acting pursuant to [his] request," engages in protected activity.

Because the whistleblower statutes and regulations do not define "authorized representative," we must turn to a consideration of the plain meaning of the term. Black's Law Dictionary defines "authorize" as "to empower ... to give a

right or authority to act ... implying a direction to act." **Black's Law Dictionary** at 133 (6th edition 1990). This Dictionary defines "representative" as one who "represents, or stands for, a number or class of persons." **Id**. at 1302. This Administrative Law Judge, applying this plain meaning to the evidence presented concerning Ms. Anderson's appointment and tenure on the Metro Board, finds and concludes that she is clearly someone who was "empowered" and "directed to act" on behalf of "a class of persons" -the employees at Metro Wastewater Reclamation District, and I so find and conclude.

Ms. Anderson served as an authorized representative of Metro employees even before she was appointed to the Metro Board. The Metro lab workers' union, OCAW (or PACE) employed Ms. Anderson during 1994 and 1995 to work with its members on safety and bargaining issues. Ms. Anderson explained:

> "I was asked to exclusively assist the workers at the Metro Wastewater Reclamation District over their health and safety concerns, their lack of a contract after many years, and to assist in building support in the general community about their plight at that facility." (TR 257, lines 20-24)

In 1994, Ms. Anderson submitted a Colorado Open Records Act request to Metro Wastewater concerning air quality information on behalf of Metro's unionized workers. (CX 3) Ms. Anderson communicated her health and safety concerns to Metro workers while serving as a consultant for their union. (CX 2)

The process of Ms. Anderson's subsequent appointment to the Metro Board provides clear evidence of her standing as an "authorized representative of employees." Marilyn Ferrari credibly testified that, in late 1995, Mayor Webb's labor liaison Paul Wishard asked OCAW to submit resumes of people to represent them on the Metro Board. He told Ms. Ferrari that the City of Denver was "very interested in having ... anybody that you feel would be sympathetic to your cause on the Board." (TR 106, lines 11-13) Pat Farmer confirmed this discussion with Paul Wishard. (TR 634, lines 10-20) Marilyn Ferrari, along with the union's Strategic Campaign Coordinator Allison Left, then wrote to Mayor Webb "to ask for representation on the Board of Metro Wastewater. Someone who could be an advocate for the union workers." (TR 86, lines 22-24) (**See also** letter to Mayor Webb, CX 4)

Ms. Ferrari explained that the union sought Ms. Anderson's appointment to the Board because she had worked with the union in the past. She asked Ms. Anderson to prepare a resume and confirmed that Ms. Anderson was willing to represent the workers on the Metro Wastewater Board. (TR 106-107) Current PACE[4] president Jed Gilman testified:

> "...there were some health and safety concerns that needed to be addressed, that we needed to have a labor friendly person appointed to the Board, and the feelings were that Adrienne would do a very effective job in covering the issues that we needed, you know, felt like we had to have addressed." (TR 202, line 24 - TR 203, line 4)

Alison Laevey testified that she recalled Ted Hackworth raising issues concerning Ms. Anderson's status as friend of the union members" and extreme environmentalist" at the Public Works Committee's second confirmation hearing in June 1996. Ms. Anderson responded to Mr. Hackworth's concerns:

> "She acknowledged that she had been asked by the Mayor to serve on the Board to represent the workers, and she acknowledged her history and experience with various environmental groups." (Tr. 88, lines 9-12)

Ms. Laevey also recalled "Councilman Hackworth attacking her for her views on unions and Ms. Anderson saying I'm here to represent the workers, or something to that effect." (TR 101, lines 7-9) Ms. Anderson confirmed these statements. (TR 311-316) Following this meeting, Ms. Laevey sent Ms. Anderson a letter (CX 10) and explained:

> "She was our representative on the Board ... and I wanted her to have some information for when ... Councilman Hackworth would come attacking the union..." (TR 89, lines 2-7)

By "our representative," Ms. Laevey meant "the lab workers the Oil, Chemical and Atomic Workers..." (TR 89, lines 10-11)

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[4]PACE is the successor of OCAW.

Ms. Anderson most credibly testified that she was asked to serve as the representative of the lab workers at Metro. (TR 271, lines 11-16) Upon her appointment to the Metro Wastewater Board of Directors, Ms. Anderson informed Richard Plastino and Ted Hackworth that she "had been appointed to represent the workers." She told numerous Board members the same thing during a dinner meeting at Gaetano's restaurant (TR 682-683), a meeting from which several members stormed out of and hastily exited the restaurant.

Following the confirmation of her appointment to the Metro Board, Board Chairman Richard Plastino asked Ms. Anderson to lunch. During this lunch, Ms. Anderson described her interchange with Ted Hackworth concerning her affiliation with the union. (TR 318-319) She informed Mr. Plastino that she "was put on by the Mayor's office to represent the workers' interests." (TR 319, lines 5-6)

As the workers' representative, Ms. Anderson was asked "to find out what was going on, what we would actually be treating... (TR 93, lines 15-18) Ms. Anderson shared the results of her research with Ms. Laevey and assisted her with strategies to address worker and public health and safety concerns arising from Metro's plan to accept wastewater from the Lowry Landfill. (TR 91, line 11 - TR 92, line 21) Ms. Anderson continued to provide this information and to work "very closely with the workers" while she was on the Metro Board. (TR 97, lines 10-20) Clearly, Ms. Anderson's past association with the union and her advocacy of environmental issues made her a target for Metro's animosity and adverse actions.

Denver City Councilman Dennis Gallagher was well aware of Ms. Anderson's work with labor unions, specifically "the OCAW":

> She had been working with them on a lot of issues ... when I was in the legislature." (TR 70, lines 20-22)

Councilman Gallagher spoke in favor of Ms. Anderson's appointment to the Metro Wastewater Board, "[b]ecause of my work with her in the past, and knowing that she would be someone who would look out for environmental health and safety." (TR 74, lines 18-20)

At her very first Metro Board meeting, Ms. Anderson indicated that "she was appointed by the Council and the Mayor's

office to represent the concerns and the welfare of the employees." (TR 143, lines 21-23) She raised occupational health concerns on behalf of workers who were going to perform repair work on a sewer line in contaminated groundwater and soils in Globeville. (**See** CX 39) Ms. Ferrari also credibly testified that Ms. Anderson raised worker health and safety issues before the Metro Board. (TR 110, lines 9-16) Former Board member Al Levin confirmed that Ms. Anderson raised issues concerning Metro employees while serving on the Board. (TR 144, lines 1-7)

Councilman Ted Hackworth admitted that he was well aware of Ms. Anderson raising concerns about worker safety at Metro:

> ""Q. ...isn't it true that Ms. Anderson often raised issues concerning worker safety while she was on the Board?
>
> A. The question is --- yes. I remember statements to that effect.
>
> Q. And when Ms. Anderson would raise -- discuss her objections to the Lowry waste water plan, didn't she also speak to her concerns about worker safety and how that plan might affect workers?
>
> A. Yes.
>
> Q. And wouldn't you consider worker safety to be an important working condition of employees at Metro?
>
> A. Yes." (TR 1371, lines 6-18)

Ms. Anderson also worked with the union to make presentations to the Board about worker and public health and safety concerns. The union would assist Ms. Anderson in distributing materials prior to or during Board meetings. (TR 1374, line 8 - TR 1375, line 5) In March 2000, Ms. Anderson and the lab workers' union organized a news conference at Metro to publicize a legal action to seek an injunction against acceptance of potentially radioactive wastewater from the Lowry Landfill. (TR 204-205) Jed Gilman testified that Ms. Anderson attended this press conference "[a]s a spokesperson on behalf of the workers that are affected by this plan [to accept wastewater from Lowry]." (TR 205, lines 4-5)

Mr. Hackworth regarded Ms. Anderson as having a prounion

bias and he "also attacked the union." (TR 88, lines 22-23) Metro Board Chairman Richard Plastino knew that Ms. Anderson was connected with the lab workers. (TR 1014, lines 24-25) Metro Public Relations Director Steve Frank was also well aware of Ms. Anderson's association and influence with the union: "It was my understanding that she has worked with them all along." (TR 919, lines 11-12) Mr. Frank reported:

> "Anderson has also orchestrated union members handing out various printed materials to Metro district board members at board meetings and numerous mailings from OCAW and other labor groups to individual board members..." (CX 108B)

Metro employees were also well aware of Ms. Anderson's appointment to the Board of Directors as their representative. Former Metro employee Tony Broncucia testified that he approached Ms. Anderson because he was "concerned for the workers and the health risks going on." (TR 821, lines 10-11) Former Metro employee Delwin Andrews contacted Ms. Anderson in May or June 1997 for assistance in getting his job back because he "knew that she represented the workers on the Board at Metro." (TR 234, lines 5-17) He heard from other Metro employees "that she was representing the employees ... on the Metro Board." (TR 235, lines 3-4)

Mr. Andrews and Mr. Broncucia gave Ms. Anderson a copy of a letter the Operating Engineers union was asked to sign by Metro Wastewater supporting Metro's plan to accept wastewater from the Lowry Landfill. In exchange for signing and sending this letter of support to the EPA, Metro offered to reinstate two of four employees who were terminated for falsifying time cards. (TR 236-238; CX 67) Mr. Andrews and Mr. Broncucia also shared their concerns with Ms. Anderson about Metro accepting wastewater from Lowry:

> "We handled this stuff every day, the sludge. We, you know, we were exposed to it."(TR 241, lines 18-19)

In May 1998, the Metro lab workers union, OCAW, recognized Ms. Anderson's efforts on the workers' behalf with the Brown-Silkwood award "for health and safety." (TR 217-267, lines 19-22) Ms. Anderson was given this award in recognition of her diligent work on health and safety issues for Metro employees. (TR 219, lines 16-23) Newspaper articles identified Adrienne

Anderson as the advocate or representative of Metro employees. (**See, e.g.**, CX 51 and CX 64)

Metro Wastewater representatives were clearly aware of Ms. Anderson's reputation as a worker representative. In fact, Ted Hackworth candidly admitted that Ms. Anderson's status as a worker representative created an untenable conflict of interest with her responsibilities as a Metro Board member.[5] (TR 1436, lines 6-9; TR 1439, lines 9-23) Furthermore, Mr. Hackworth did not believe that his own status as a Denver City Councilman created any such conflict, despite the fact that the City and County of Denver owned the Lowry Landfill. (TR 1430, lines 3-12) During Ms. Anderson's initial confirmation hearing before the Denver Public Works Committee, home builder Tom Satler's appointment to the Metro Board was confirmed as "a representative of the housing sector, housing builders." No suggestion was made that such an appointment constituted a conflict of interest. (TR 306-307)

The Secretary of Labor, as well as the courts, have interpreted the environmental whistleblower provisions broadly to effectuate their remedial purpose of protecting employees, as well as their representatives, who raise safety concerns. Stressing this principle and cautioning against applying a "narrow, hyper-technical reading" of employee protection language, the court in **Kansas Gas & Electric Co. v. Brock**, 780 F.2d 1505, 1512 (10th Cir. 1985) upheld an "expansive reading" of language in the ERA to protect an employee who had lodged internal complaints that were not mentioned in the statute. (**Id.** at 1509) The Secretary has extended similar protection to workers under the Clean Air Act, explaining that "employee protection provisions ... are to be construed broadly and reasonably to achieve their purposes." **Poulos v. Ambassador**, 86-CAA-1 (Sec'y April 27, 1987), slip op. at 6.

In analogous situations that arise outside of "whistleblower" law, but where employee protection and worker safety are involved, courts have specifically construed terms like "authorized" and "representative" broadly. In **Kerr-McGee Coal Corp. v. Federal Mine Safety & Health Review Comm**. 40 F.3d

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[5]However, Mr. Hackworth saw no conflict of interest with the members of the Board who were successful business people or entrepreneur in their full-time jobs.

1257 (D.C. Cir. 1994), the court addressed the question of whether non-elected labor organizations or other third parties could serve as "miners' representatives" who enjoyed "walkaround rights" during mine inspections mandated by the Federal Mine Safety and Health Amendments Act ("MSHA").[6] The court rejected Kerr-McGee's argument that the term "miners' representative" applied only to "employees" and to parties who had been elected as a bargaining representative by a majority of miners. (**Id**. at 1262) Instead, the court ruled that a broad definition of representative" was appropriate, and held "the fact that the UMWA was not a collective bargaining agent ... did not prevent it from acting as a miners' representative. (**Id**. at 1261)

The court also pointed out that non-employees, especially those who, like Ms. Anderson, have expertise in particular areas of worker safety and health, might play a unique role that an employee might not be able to fulfill. (**Id**. at 1263) Recognizing such third parties as "representatives" was consistent with the broad remedial purpose that underlies MSHA. **See also In re Inspection of Caterpillar., Inc.**, 55 F.3d 334 (7th Cir. 1995) (striking employees can be "employee representatives" under Occupational Safety and Health Act).

The ARB, in its March 30, 2000 decision remanding Ms. Anderson's complaint for hearing, followed the rationale expressed by the cases cited **supra**. **Anderson v. Metro Wastewater Reclamation District,** 97-SDW-7, D&O of ARB (March 30, 2000). The ARB found that the term "authorized representative" under the applicable environmental statutes "encompasses any person requested by any employee or group of employees to speak or act for or the employee or group of employees in matters within the coverage of the environmental whistleblower statutes which prohibit retaliation..." (**Id**., slip op. at pages 7-8) The Review Board further determined that "an individual selected by a union representing employees covered by the whistleblower protection provisions to speak or act for the union (and by extension the employees) in matters within the purview of the environmental

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[6]Cases interpreting and applying MSHA are especially instructive in the construction of "whistleblower" provisions, many of which were modeled on that statute. **See e.g. Pennsyl v. Catalytic**, 83-ERA-2 (Sec'y Jan. 13, 1984), slip. op. at 3 (looking to MSRA when deciding that refusal to work unsafely could be protected activity under ERA.)

statues at issue here is also protected by the statutes' prohibitions of retaliation against 'authorized representatives. **Id**., slip op. at page 8.[7]

In view of the foregoing, I find and conclude that the evidence overwhelmingly establishes that Ms. Anderson is indeed an "authorized representative of employees" in the plainest meaning of those terms. Clearly, Ms. Anderson has standing to pursue a whistleblower complaint as an authorized worker representative. Moreover, this standing, and Ms. Anderson's known association with the lab workers' union, generated blatant animosity and disparate treatment by Metro representatives towards Ms. Anderson. This animosity was manifested in a series of adverse actions directed against Ms. Anderson as the workers' representative. Under the broad protections provided by the environmental whistleblower statutes, and as interpreted by the Review Board in **Anderson v. Metro Wastewater Reclamation District**, 97-SDW-7, D&O of ARB (March 30, 2000), Ms. Anderson clearly has standing to pursue her complaint, and I so find and conclude.

II. MS. ANDERSON HAS ESTABLISHED A PRIMA FACIE CASE THAT METRO TOOK ADVERSE ACTION AGAINST HER AS THE RESULT OF PROTECTED ACTIVITY.

In order for Anderson to prevail, she must establish the following:

A. That she is as an authorized representative of the employees of Metro.[8]

B. That she was engaged in a protected activity.

C. That she was discriminated against or received

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[7]The ARB's decision herein, and the reasons given for reversing the Summary Judgment granted in favor of Respondent by my distinguished and now retired colleague, Judge Samuel J. Smith, constitutes the Law of the Case herein, and it will be further discussed below.

[8] It is undisputed that Anderson was never an employee of Metro. She served a two-year term on Metro's Board of Directors and acknowledges that does not constitute employment. (TR 665, l. 24 - 666 l. 2; RX – 30).

disparate treatment by Metro.

D. That Metro knew of the protected activity when it took the adverse action.

E. The protected activity was the reason for the adverse action.

See, Trimmer v. U.S. Dept. of Labor, 174 F.3d 1098, 1101 (10th Cir. 1999); **Carrol v. U.S. Dept. of Labor**, 78 F.3d 352, 356 (8th Cir. 1996); **Simon v. Simmons Foods, Inc.**, 49 F.3d 386, 388 (8th Cir. 1995).

The traditional preponderance of evidence standard is to be used in complaints under environmental whistleblower statutes. **See, Martin v. Dept. of the Army**, ARB No. 96-131 at 6 (July 30, 1999) and **Ewald v. Commonwealth of Virginia**, Case No. 89-SDW-1 at 11 (April 20, 1995).

Once a complainant has proved all the elements of the **prima facie** case by a preponderance, the respondent may rebut the **prima facie** case by presenting evidence that it had a legitimate non-discriminatory motive for the action taken.[9] **See, Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y February 15, 1995) (setting out the general legal framework) "In any event, the complainant bears the ultimate burden of proving by a preponderance of the evidence that he was retaliated against in violation of the law. **Id**. and **Agbe v. Texas Southern University**, ARB No. 98-072 (July 27, 1999) (respondent does not carry the burden of proving a negative proposition, that it was not motivated by Complainant's protected activities when it took the adverse action. Throughout, Complainant has the burden of proving that the employer was motivated, at least in part, by Complainant's protected activities). Once the respondent produces evidence that the complainant was subjected to the adverse action for legitimate non-discriminatory reasons, the rebuttable presumption created by complainant's **prima facie** showing drops from the case. **Carroll** at 6.

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[9]Under the ERA, the employer has the burden to demonstrate by clear and convincing evidence that it would have taken the same action in the absence of the protected activity. **See, Trimmer v. U.S. Dept. of Labor**, 174 F.3d 1098, 1102 (10th Cir. 1999).

There is one variant to this format. Where an employee establishes by a preponderance that illegitimate reasons played a part in the employer's adverse action, the employer has the burden of proving by a preponderance that it would have taken the adverse action against the person for the legitimate reason alone. (**Id.**) This is known as a dual motive case. If there is rebuttal, the complainant, to prevail, must demonstrate that the proffered reason for the adverse action is not the real reason by showing that discriminatory reasons more likely motivated the action or that the proffered explanation is unworthy of credence. **Texas Dept. of Comm. Affairs v. Burdine**, 450 U.S. 248, 256 (1981); If the trier of fact decides there are dual motives, the respondent cannot prevail unless it shows it would have reached the same decision in the absence of protected conduct. **Young v. CBI Services, Inc.,** 88-ERA-8 (Sec'y Dec. 8, 1992), slip op. at 6.

The ARB in its Decision and Remand Order of March 30, 2000 provided guidance as to whether or not Anderson has standing as an "authorized representative" under the applicable whistleblower statutes.

> Accordingly, Anderson is an "authorized representative" of Metro employees if a Metro employee or group of Metro employees requested her to speak or act for the employee or group of employees in matters within the coverage of the SWDA, CERCLA or FWPCA, or if a union representing Metro employees (**e.g.**, OCAW) requested her to speak or act for the union, (and by extension the employees) in matters within the purview of the statutes. (**See** pages 8 and 9 of the ARB's decision.)

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse employment action because she engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse employment action and (4) the existence of a causal link or nexus, **e.g.**, that the adverse action followed the protected

activity so closely in time as to justify an inference of retaliatory motive. **Jones v. ED&G Defense Materials., Inc.**, 95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 7, **citing** 64 F.3d 261, 277 (7th Cir. 1994).

A respondent may rebut the **prima facie** showing made by a complainant by producing evidence that the adverse action was motivated by a legitimate nondiscriminatory reason. If such rebuttal evidence is produced, the complainant must then prove that the proffered reason was not the true reason for the adverse action, that the reason was merely pretextual and that the protected activity was the actual reason for the adverse action. **Jones v. ED&G Defense Materials, Inc.**, 95-CAA-3 (ARB Sept. 29, 1998), slip op at p. 7, **citing St. Mary's Honor Center v. Hicks**, 509 U.S. 502, 505-508 (1993).

As will be discussed at greater length below, Complainant has met her burden of establishing a **prima facie** case. Because Respondent has failed to rebut this evidence with legitimate, non-discriminatory reasons for its treatment of Ms. Anderson other than her protected activities, Ms. Anderson is entitled to certain relief, and I so find and conclude.

III. ADRIENNE ANDERSON ENGAGED IN PROTECTED ACTIVITY OF WHICH METRO WASTEWATER WAS WELL AWARE.

The employee protection provisions have been construed broadly to afford protection for participation in activities in furtherance of the statutory objectives. **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 25, **citing Tyndall v. U.S. Environmental Protection Agency**, 93-CAA-6, 95-CAA-5, ARB June 14, 1996). Protected activities include employee complaints which "are grounded in conditions constituting reasonably perceived violations of environmental acts." **Jones v. ED&G Defense Materials., Inc.**,95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 8, **citing Crosby v. Hughes Aircraft Co.**, Case No. 85-TSC-2, Sec. Final Dec. and Ord., Aug. 17, 1993, slip op. at 26, **aff'd, Crosby v. United States Dep't of Labor,** 1995 U.S. LEXIS 9164(9th Cir.); **Johnson v. Old Dominion Security**, Case Nos. 86-CAA-3, et seq., Sec. Final Dec. and Ord., May 29, 1991, slip op. at 15. Raising internal concerns to an employer, as well as the filing of formal complaints with external entities, constitute protected activities under §24.1(a). **Melendez v. Exxon Chemicals**

Americas, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), slip op. at p. 10.

Raising complaints about worker health and safety "constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." **Melendez v. Exxon Chemicals Americas, supra** at p. 10. **See also Jones v. ED&G Defense Materials, Inc.**, **supra** at p. 8, **citing Scerbo v. Consolidated Edison Co**., Case No. 86-ERA-2, Sec. Dec. and Ord., Nov. 13, 1992, slip op. at 4-5. Further, the gathering of evidence in support of a whistleblower complaint, including the gathering of evidence by means of tape recording, is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). **Melendez v. Chemicals Americas, supra** at p. 10.

Metro concedes that Anderson's speaking out in public and in the media regarding Metro's policies at Lowry was a protected activity under the subject whistleblower statutes, provided Anderson proves that she actually believed that Metro was violating the environmental laws at issue and that her belief was reasonable. **See, Melendez v. Exxon Chemicals Americas**, ARB Case No. 96-015 (July 14, 2000) (decided under CAA and TSCA); and **Minard v. Nerco Delamar Co.**, 92 SWD-1, Sec'y Dec.,(January 25 1994).

Respondent submits that Anderson's activities are not protected because she did not actually believe Metro was violating environmental laws or if she did, her belief was not reasonable.

Respondent points out that Complainant is a vocal "activist" who has a history of supporting various causes. Local columnist Al Knight of the **Denver Post** in an April, 1999 article stated, "given Adrienne Anderson's record for accuracy it is a wonder that anyone still listens to this self-appointed environmental activist."[10]

The question remains whether or not she actually believed that Metro was violating the environmental laws at issue and

[10]Another example of the blatant animosity fostered by the Respondent and perpetuated by others.

whether her belief was reasonable. Respondent submits that Anderson has neither alleged nor offered any evidence that Metro was violating the environmental laws at issue. Assuming, **arguendo,** that Anderson did actually believe that Metro's acceptance of the Lowry Landfill effluent would violate environmental laws, Anderson's belief cannot be considered reasonable in light of the scientific evidence to the contrary, according to Respondent's thesis.

Although Anderson has continually chastised Metro, the City & County of Denver, the EPA and the Colorado Department of Public Health and Environment (CDPHE) for approving the POTW Treatment Option plan, Anderson has never alleged any violations of the acts at issue in this whistleblower complaint, according to Respondent. A belief that the environment may be negatively impacted by an employer's conduct is not sufficient to invoke the whistleblower provisions of environmental laws. **See Minard v. Nerco Delamar Co.**, 92-SWD-1 Secretary Dec., p. 11 (January 25, 1995) "An employee's complaints must be grounded in conditions constituting reasonably perceived violations of the environmental acts." **Id. See also, Melendez v. Exxon Chemicals Americas**, ARB No. 96-051 at 63 (July 14, 2000) (coverage for complainant's activities that otherwise qualify for protection under the environmental statutes is contingent upon proof that those activities were based on complainant's actual belief that the respondent was acting in violation of the statutes and that the belief was reasonable).

Respondent also submits that Anderson cannot meet her burden of proof on this element because the EPA and the CDPHE who are charged with carrying out the laws at issue approved the plan that Metro was implementing.

Respondent further submits that Anderson has only alleged that this is bad and dangerous policy and could lead to man-made radionuclides entering the environment through Metro's application of biosolids. In her testimony Anderson stated that the issue she was speaking out about was:

> The Lowry Landfill issue and my work on behalf of the workers to expose their - - what we considered to be their very dangerous plan to distribute plutonium throughout the environment through these means. (TR 439, ll. 7-11)

While this may be a laudable goal, Anderson never alleges that the POTW Treatment Option or Metro violates any of the federal acts at issue in this case. (**See also**, TR 362 ll. 2-9, where Anderson states that the POTW Treatment Option is "not appropriate given the nature of the waste"). Without an allegation, based upon a reasonable belief, that Metro has violated any of the federal acts, Anderson's claim must fail, according to Respondent. **See, Minard** at 11.

Even if, **arguendo,** she had alleged a violation of the acts, considering the enormous amount of scientific evidence to the contrary and the EPA and CDPHE approval of the POTW Treatment Option, Anderson's beliefs cannot be considered reasonable. Anderson has had ample opportunity to digest the vast amount of scientific data regarding the POTW Treatment Option at the Lowry Landfill Superfund site. Yet she continues her crusade with indifference to the facts and the findings of the EPA and the CDPHE, according to the Respondent.

Respondent further submits that Steve Pearlman of Metro provided "extensive, unrefuted and compelling testimony" regarding the scientific aspects of Metro's treatment of the effluent waste stream from Lowry. Numerous exhibits were admitted in support of his testimony. (RX 57, 58, 59, 60, 61, 62, 63, 64, 65 and 66).

Respondent points to the EPA press release dated June 30, 1997 which states "there is no evidence to conclude that any radioactive waste from Rocky Flats was disposed of at the Lowry Landfill Superfund site in Arapahoe County. . . EPA officials base this conclusion on their complete and thorough analysis of site sampling results and historical records." (RX 66) The press release further addresses the so-called "smoking gun" on which Anderson relies with reference to the alleged dangerous levels of plutonium at the site. "According to EPA Project Manager Mark Herman, [Anderson's] conclusion was apparently drawn by taking certain parts of EPA documents out of context and misinterpreting the information." (RX 66)

Respondent further posits that Anderson and her students claim to have poured through the documents on file in the EPA document repository regarding the Lowry Landfill. (**See e.g.**, CX 52, 86, 87 and 91) Anderson, despite being repeatedly informed that the results originally obtained regarding man-made

radionuclides at Lowry have never been confirmed and mountains of data supporting the rejection of the earlier results, continues to rely on the faulty data. Further, part of the data from the “smoking gun” relied upon by Anderson was later specifically rejected by the same independent laboratory that generated the data. (RX 71) The rejection of the data by Teledyne Isotopes laboratory occurred on June 1, 1992, long before Anderson’s appointment to the Board. RX 71 is the EPA document which Anderson claims to have thoroughly reviewed.

Respondent further posits that in light of all the evidence to the contrary regarding the presence of man made radionuclides at Lowry, and the approval of the plan by EPA and CDPHE, Anderson’s belief in the violation of any of federal statutes at issue is not reasonable. From a scientific standpoint, her position is frivolous and groundless and she provided no scientific evidence to allow the court to conclude that her belief was reasonable, according to Respondent.

As noted above, Adrienne Anderson was appointed to the Metro Wastewater Board of Directors on February 22, 1996. (CX 5) After she was appointed to the Board by Mayor Webb, Ms. Anderson researched the history of the Lowry Bombing Range. She initially discovered that the U.S. Army Corps of Engineers had designated a 50,000 acre area, which included the Lowry Landfill, as a "catastrophic risk zone." (TR 274, lines 13-16) The significance of this designation was that "the chance of somebody being injured or killed was high, by going out to that territory." (TR 274, lines 18-20) Ms. Anderson wrote the Governor about her concerns. (CX 6) She then made a radio appearance on March 4-5, 1996, in which she discussed the hazards at this Superfund site, including radioactive materials. (TR 276-278; CX 7, CX 8)

Ms. Anderson's confirmation hearing before the Public Works Committee was scheduled to be held in May 1996. However, as Ted Hackworth, (for some unexplained reason) was not present at this hearing, he demanded that a second confirmation hearing be scheduled so that he could question Ms. Anderson. (TR 297-298) This second confirmation hearing was scheduled for June 4, 1996. (CX 9) Meanwhile, the Metro Board approved the Lowry settlement in June. (RX 98) As a result of Ted Hackworth's insistence on a second confirmation hearing, Ms. Anderson did not attend her first Board meeting until July 1996, and was therefore prevented from voting on the Lowry Landfill settlement. Thus, began the conspiracy against Complainant. (TR 317)

Following her appointment to the Metro Board, Ms. Anderson did some preliminary research concerning the Lowry Landfill, and had concerns about Metro's plans to accept wastewater from Lowry which might contain radioactive waste. She raised these concerns with her fellow Denver representatives on the Metro Board during a pre-dinner meeting at Gaetano's restaurant in July 1996. (TR 324-327) When Ms. Anderson voiced her concern over the presence of radioactivity at Lowry, a Board member named Wilder "slammed down his fork and starting yelling at [her]." (TR 328, lines 5-6) He said, "those are very outlandish accusations, young lady, in a very demeaning way." (TR 328, lines 8-9) He "stomped out of the dinner meeting" with Board members Ted Hackworth and Robert Warner.[11] (TR 328, lines 14-17)

Ms. Anderson discussed this reaction with Board members Al Levin and Steve Fout. They decided that Mr. Fout would make a motion at the Board meeting that evening to have an EPA representative brief the Board on the issues that Ms. Anderson was raising. (TR 328-329) However, when Mr. Fout made that motion, Chairman Plastino "said that would not be necessary, and that the Metro Wastewater staff people could provide that information to the Board." (TR 330, lines 1-3)

During Ms. Anderson's first Operations' Committee meeting as a Metro Wastewater Board member in July 1996, she asked for an opportunity to discuss information she had uncovered concerning the Lowry Landfill. (TR 331-332) Chairman Ted Hackworth "very angrily gaveled me out of order, banged it down, and said, we've discussed that and we're not going to hear anything about it." (TR 332, lines 13-15) Ms. Anderson was "baffled by that level of hostile response" and felt she "had important, and critically important information that should be brought to the committee in a confidential way." (TR 332, lines 15-19) She discussed this interchange with Board member Al Levin, who explained that, during the previous operations' Committee meeting, a Board member representing the City of Aurora had complained to Mr. Hackworth about Ms. Anderson's appointment. (TR 333, lines 332-333) This Board member, Tom Griswald, asked Mr. Hackworth "why did you let that whacko on the Board? (TR 333, lines 6-7) Four months earlier, the Mayor of

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[11]A blatant manifestation of and lack of collegiately and their hostile attitude towards the Complainant.

Aurora had been confronted with Ms. Anderson's concerns over Lowry on a live radio talk program. (TR 334-335; **see also** CX 8) Even at this early stage, Ms. Anderson was subjected to adverse action and disparate treatment as the result of speaking out about hazards environmental hazards.

Following these initial experiences with the Metro Board, Ms. Anderson conducted extensive research into the history of the Lowry Landfill through Colorado Open Records Act and Freedom of Information requests to various state and federal agencies. (**See** CX 11-38) Ms. Anderson then began speaking out in various public arenas about the concerns she had as the result of her research, and her statements were reported in the media. (**See** CX 50, 51, 52, 60, 62, 63, 64, 66, 82, 86, 87) Ms. Anderson also participated in investigations conducted by various government agencies, and provided information she had uncovered concerning the Lowry. Landfill to these agencies. (CX 91, 92, 94)

Al Levin testified that, when the Board members voted to approve the Lowry settlement and accept wastewater from this Superfund site, they were not given any indication that radioactive waste may be present at this site.[12] (TR 158, lines 7-10) He never saw the Harding-Lawson study which found evidence of manmade radionucleates associated with nuclear weapons manufacturing and testing at the Lowry Landfill. (TR 175, lines 3-15) The first time he had any inkling that such an issue existed was when Ms. Anderson raised it. (TR 158, lines 11-13) Mr. Levin, after hearing Ms. Anderson's concerns, felt that an independent lab should evaluate the potential for radioactive waste coming through the Metro sewage system. (TR 159, lines 3-9) Mr. Levin testified:

> "My concern is, inasmuch as I was not informed regarding the findings of Harding-Lawson & Association [sic], I regret that I approved the findings of the Board regarding the servicing of the waste water from Lowry." (TR 175, lines 21-25)

There is no dispute that Metro Wastewater was well aware of Ms. Anderson's protected activities - In fact, Metro's Public Relations Director Steve Frank was responsible for tracking her activities and responding to them apparently as part of a “ready

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[12]Another indication of a failure to disclose material information to the public.

response team," to use a political analogy. (**See** CX 108B; TR 936-941) No other Metro Board member was tracked in this manner. Mr. Frank was well aware of Ms. Anderson's contacts with Congress and the state legislature about Metro's plans to accept Lowry wastewater. Mr. Frank was also well aware of Ms. Anderson's numerous media interviews:

"Q. Metro was aware of numerous newspaper articles in which Ms. Anderson spoke out against the Lowry plan, isn't that right?

A. Certainly we were." (TR 940, lines 21-24)

Mr. Frank reported Ms. Anderson's activities to Metro management at their request. (**See** CX 108B; TR 936-941) As a result, when asked about Metro's awareness of Ms. Anderson's protected activities, he responded: It was impossible not to be aware." (TR 940, line 20)

Metro Board Chairman Richard Plastino testified that he was aware of Ms. Anderson speaking out in opposition to the plan to accept wastewater from the Lowry Landfill on radio talk shows and in press conferences. (TR 1036) In fact, Chairman Plastino circulated a transcript of Ms. Anderson's appearance on a radio program to Metro Board members. (CX 54) These protected activities directly resulted in adverse treatment of Ms. Anderson by the Metro Wastewater Reclamation District and its Board, and I so find and conclude.

IV. ADVERSE TREATMENT OF ADRIENNE ANDERSON BY METRO WASTEWATER ACTIVITIES WAS MOTIVATED BY MS. ANDERSON'S PROTECTED ACTIVITIES.

Respondent further submits that Metro has not discriminated against Complainant, denies that it treated her in a disparate fashion and posits that its evidence presented at the trial demonstrated that Metro had a legitimate non-discriminatory reason for taking the action that it took herein, **i.e.**, the threat of censure, to ensure that members of the Board comply with the Bylaws, (RX 1, RX 72) **See also Robert Rules of Order,** 9th Ed. Ch. XX, Disciplinary Procedures, p. 638 (1990 Ed.)

Respondent further submits that the actions of the Board in disciplining a Board member who is not a "team player" or "one of the boys" is irrelevant to any whistleblower claim. While Respondent attempts to isolate the disciplining of Complainant

as limited to her capacity as a Board member, this isolation cannot be permitted because, as found above, Complainant is the "authorized representative" of the Metro workers. Moreover, while Respondent posits that "Anderson had a full and fair opportunity to present her position," my reading of the record leads ineluctably to the conclusion that she was denied that forum at every opportunity, as further discussed below. The operation of the Board's meetings involving the Complainant certainly cannot be characterized, in my judgment, as "the way representative democracy is supposed to work." When those meetings involved the Complainant, they were conducted in an autocratic and disparate fashion.

Again Respondent attempts to walk "the high wire" when it concedes that when it issued the letters to Directors Anderson and Levin indicating that they could be censured and that it was aware that Anderson had publicly taken positions critical of the Metro's Board's position on the Lowry Landfill POTW Option. However, Metro was not attempting to stifle her speaking out but only to enforce its inherent disciplinary power and to manage and run an orderly Board. (**See** RX 4 and 7) In that setting, Anderson's activities were not protected under the whistleblower laws at issue. A "threat" of censure to a member of a Board of Directors does not constitute adverse action as contemplated by the whistleblower acts, according to Respondent.

Anderson has not met her burden of proof on these elements. The evidence in the record is overwhelming that the action taken by Metro was to maintain an orderly Board and enforce Board rules, not to repress her free speech or discriminate against her, according to Respondent's essential thesis.

However, I disagree with the Respondent for the following reasons.

An "adverse action" has been defined as simply something unpleasant, detrimental, even unfortunate, but not necessarily (and not usually) discriminatory." **Marcus v. U.S. Environmental Protection Agency**, 1996-CAA-3 (ALJ Dec. 15, 1998), slip op. at p. 28, **citing Stone & Webster Engineering Corp. v. Herman**, 115 F.3d 1568, 1573 (11th Cir. 1997). Under 29 C.F.R. §24.2(b), as amended, an employer is deemed to have violated the particular statutes and regulations "if such employer intimidates, threatens, restrains, coerces, blacklists, discharges or in any other manner discriminates against any employee" because of

protected activities. Consistent with this regulation, a wide range of unfavorable actions has been held to constitute adverse action within the context of employment discrimination complaints. **Melendez v. Exxon Chemicals Americas, supra** at 24.

Ms. Anderson's protected activities led to a variety of adverse actions taken against her by Metro. From the very beginning, her public and worker safety and health concerns arising from Metro's plan to accept wastewater from the Lowry Landfill Superfund Site caused negative reactions from Metro Board members. Former Board member Al Levin testified that, when she would try to raise questions about the "welfare and well-being of the employees, she was ridiculed or demeaned." (TR 144, lines 5-7) Mr. Levin also recalled:

> "...the administrative staff sat on one side of -- one table, on one side of the room, and the conversation between them was always low, but occasionally I would hear a word like troublemaker, there she goes again, words to that effect ..... Upon occasion they would -- one of them in particular, would throw a piece of paper at her or someone would tell her to shut up -- I heard that very loud and strong."[13] (TR 144, lines 10-14, 18-23)

Pat Farmer testified that, when Ms. Anderson would raise issues concerning Metro workers to the Metro Board, "[t]hey weren't very receptive to her, " and "there was a lot of animosity towards her. (TR 637, line 17 - TR 638, line 3) The Metro Wastewater public website contained a posting under the name of Robert Hite indicating that Ms. Anderson was "routinely ignored by board members..." (CX 110) This attitude was confirmed by Board member and Denver City Councilman Ted Hackworth:

> “Q. Did the manner in which she projected her position turn off some of her fellow Board members?
>
> A. I'd say definitely.
> Q. Why? Describe it. What happened?

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[13]An obvious lack of civility among those presumably following **Robert’s Rules of Order**.

A. Almost an attitude of new kid on the block, but that she would tell us how it would be done." (TR 1367, lines 9-14)

Former Metro employee Tony Broncucia testified that he observed an obvious difference in the way Ms. Anderson was treated by the Metro Board, as compared to other individual Board members. (TR 836, lines 10-13) When Ms. Anderson handed out information, "you'd see people crumbling them up, throwing them on the floor." (TR 836, lines 15-17) When Ms. Anderson "wanted to voice her opinions, there were always objections.,(TR 836, lines 18-19) Mr. Broncucia explained:

" The Board meetings were fixed. I mean, it was a - they wouldn't let her talk ... Anybody that was at that Board meeting would see that she was shut of off so, many times." (TR 835, lines 4-8)

Mr. Broncucia believes that Metro "got rid of him and co-worker Delwin Andrews because they talked to Ms. Anderson about their concerns regarding Metro's testing and safety practices. (TR 833, lines 11-16) Mr. Broncucia testified that Metro's plan to accept wastewater from the Lowry Landfill "raised a lot of concerns with a lot of people, but the workers wouldn't talk about it, because they were afraid of losing their jobs." (TR 827, lines 1-8) He and Mr. Andrews talked to the Complainant and then lost their jobs, ostensibly for filing false time cards.

When Ms. Anderson submitted a June 25, 1997 request to the Metro Board to investigate, **inter alia**, allegations of “blackmail” raised by Tony Broncucia and Delwin Andrews (CX 68), this request was denied. However, Mr. Hite took it upon himself to investigate these allegations, and discovered that "there was some fact to it." (TR 1483-1485) He reported his discovery to the Executive Committee; but for some inexplicable reason, he did not report his findings to Ms. Anderson[14], who had originally raised the allegations. (TR 1485, lines 15-25)

Marilyn Ferrari testified that one evening she was passing out an article for Ms. Anderson to the Metro Board members. one of the Board members named Zamagni "threw the article at Adrienne." No efforts were made to control him. (TR 111, lines

[14]Another example of disparate treatment.

7-15) This paper was thrown in a "violent" fashion. (TR 123, lines 19-23)

Former Metro Board member Al Levin described similar treatment of Ms. Anderson by Board member Zamagni:

> "He threw a paper at her -- a rolled up piece of paper and said shut up, very loudly and curtly." (TR 145, lines 24-25)

Mr. Zamagni also told Ms. Anderson and other "union people" to "shut up and sit down. He did not display this type of behavior to anyone else. (TR 119, line 20 - TR 120, line 4) Robert Hite confirmed that Mr. Zamagni was never disciplined or censured for such behavior. (TR 1470, lines 4-14) Ms. Ferrari described her impressions when no one on the Board objected to Mr. Zamagni's rude behavior:

> “I considered it acquiescence. I considered that they agreed with what he had done because nobody spoke up, nobody reacted. They just acted like this was normal behavior. (TR 126, lines 22-24)

Mr. Levin summarized the attitude of his fellow Board members concerning Ms. Anderson's discussion of worker health and safety issues:

> "On a couple of occasions when she tried to raise a - few questions about the welfare and well-being of the employees, she was ridiculed and demeaned ..... occasionally I would hear a word like troublemaker, there she goes again, words to that effect..." (TR 144, lines 5-7; 11-14)

Derogatory comments concerning Ms. Anderson were never ruled out of order. In contrast, Ms. Anderson's attempts to raise concerns about worker and public health and safety were often ruled out of order. Al Levin testified that Ms. Anderson's attempts to raise such issues under the agenda item "Individual Directors' Concerns" would very often result in the meeting being quickly terminated by Chairman Richard Plastino: "Very often the meeting would be adjourned. The gavel would come down. The meeting is adjourned." (TR 149, lines 9-11) Ms. Ferrari confirmed that Chairman Plastino had suddenly adjourned a Board meeting in response to Ms. Anderson's attempts to share

information concerning health and safety concerns.[15] (TR 128, line 22 - 129, line 2)

In March 2000, Ms. Anderson and the lab workers' union organized a news conference at Metro to publicize a legal action to seek an injunction against acceptance of potentially radioactive wastewater from the Lowry Landfill. (TR 204-205) A Metro security representative approached them and asked them to leave because they were not wearing hard hats or safety glasses. However, neither Metro employees, nor a group of nearby school children nor the reporters present were wearing hard hats or safety glasses, and they were not asked to leave. When this disparate treatment was pointed out to the Metro representative, he retreated to his truck and kept the group, including Ms. Anderson, under surveillance. (TR 206, lines 5-22) Union president Jed Gilman testified that this encounter was intimidating and "an attempt to make us feel that we were doing something wrong, and we weren't..." (TR 207, lines 3-14)

Ted Hackworth admitted that members of the public are not required to wear hard hats or safety goggles when going to the plant site, and that he does not wear such equipment. (TR 1454, lines 5-18) Steve Frank admitted that members of the public visiting the Metro property are not required to wear hard hats or safety goggles, and that he certainly does not wear such equipment at Metro. (TR 1454, lines 5-18) Even school children touring the Metro plant site are not required to wear hard hats or safety glasses. (TR 986, lines 1-13) Nevertheless, Mr. Frank admitted that, when he saw Ms. Anderson on Metro property later that same day, he "absolutely" approached her in an angry manner and ran her off. (TR 987, lines 1-10)

Robert Hite, in a July 22, 1997 Bylaws Committee meeting, advised all present that Ms. Anderson made an Open Records Act request, was charged 25 cents a copy[16], and "she's really sore about that." This comment was followed by laughter. (CX 96, July 22, 1997 tape recording of Bylaws Committee meeting) In a July 3, 1997 Operations Committee meeting, Ms. Anderson was sarcastically ordered to turn off her tape recorder by Committee Chairman Ted Hackworth. (CX 100, July 3, 1997 tape recording of

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[15]Other examples of disparate treatment.

[16]Another example of disparate treatment.

Operations Committee meeting)

Ted Hackworth's animus towards Ms. Anderson was especially obvious, and even preceded the confirmation of her appointment to the Board. Denver City Councilman Dennis Gallagher admitted that he had to defend Ms. Anderson's appointment to the Metro Board against attack by Councilman Ted Hackworth (TR 80, lines 6-10)

As noted above, the main source of this animus was Ms. Anderson's known association with the lab workers' union and her vigorous advocacy of environmental issues. Mr. Hackworth admitted that Metro Wastewater had a history of acrimony and bad blood with the union. (TR 1423, lines 2-11) Mr. Hackworth's animus towards the lab workers' union, and, in particular, towards Ms. Anderson as their representative on the Board, extended to others who associated with Ms. Anderson. Marilyn Ferrari testified that Mr. Hackworth voted against her reappointment to the Denver Women's Commission because she "had alliances with maverick members of the Metro Wastewater Board." (TR 117, lines 3-5) He was referring to Ms. Anderson. (TR 117, lines 7-11)

Marilyn Ferrari most credibly testified: "Mr. Hackworth was rarely very polite to Adrienne. He always spoke to her as less-than-person." (TR 117, lines 15-17) Al Levin testified that Mr. Hackworth ordered Ms. Anderson to shut off her tape recorder at an Operations' Committee meeting. (TR 154, line 20 - TR 155, line 7) Allison Laevey described her observations during a June 1996 Public Works Committee meeting:

> “I recall Ted Hackworth - Councilman Hackworth - was surprisingly - the word comes to mind? vicious towards Adrienne, and attacking her and her beliefs." (TR 87, lines 23 - 25)

Following this meeting, Ms. Laevey wrote to Ms. Anderson to express her concern over the "irresponsible comments" and "misstatements" made by Mr. Hackworth. (CX 10)

Ted Hackworth testified that other Board members complained to him about Ms. Anderson and the concerns she raised. He testified that other Board members said "we should never have let her on this board." (TR 1453, lines 10-15) He also cavalierly admitted that he hoped that Ms. Anderson would not be

reappointed to the Board, and communicated this hope to a member of the Mayor's staff, a continuation of the retaliation and adverse treatment. (TR 1454, lines 13-23)

The Metro Board's treatment of Ms. Anderson when she would raise worker and public health and safety issues clearly reflected their animus towards her as a result of raising such concerns:

> " In the beginning, they would kind of smile and smirk. The further we got into it and the longer she served, it was open hostility. At the end, it was very - a very hostile environment. These board meetings were terrible." (TR 110, lines 20-24)

Following informational picketing organized by the Metro lab workers' union at an August 1996 Board meeting to protest Metro's plan to accept wastewater from the Lowry Landfill, Board Chairman Richard Plastino contacted Ms. Anderson to express his concern over her association with the workers and its union. (TR 353-355) Chairman Plastino told Ms. Anderson that "he had been besieged with phone calls from Board members expressing a number of concerns..." (TR 353, lines 23-24) He informed Ms. Anderson that "Board members ... thought [Ms. Anderson] was a whacko." (TR 354, lines 5-6) Chairman Plastino expressed concerns over Ms. Anderson engaging in protected activities - specifically, her research into the history of the Lowry Landfill Superfund Site and her communications with Metro employees about the results of her research.[17] (TR 354-355)

When Chairman Plastino's efforts to discuss his "concerns" with Ms. Anderson did not result in the curtailment of her protected activities, Chairman Plastino resorted to more serious tactics. After Ms. Anderson spoke against Metro's plan to accept wastewater from the Lowry Landfill at an April 2, 1997 EPA meeting (RX 2), Chairman Plastino instructed her, via an April 16, 1997 letter, not to make any public statements without a specific disclaimer that she was not the official spokesperson for the Board. (RX 6) Chairman Plastino warned Ms. Anderson:

> **"If you continue to express your personal opinions**

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[17]As the Board considered the issue was closed by the June of 1996 vote.

> **related to the metro District without giving a disclaimer that you are not speaking on behalf of the District, there is a potential that the Board of Directors will censure YOU." (RX 6)** (Emphasis added)

Chairman Plastino gave Board member Al Levin, who also spoke against the Metro plan to accept Lowry wastewater at the April 2, 1997 EPA meeting, the same instruction and warning of censure. (RX 11) No other Board members were so specifically advised. In addition, although Chairman Plastino sent Al Levin's letter threatening censure to only the Executive Committee, he distributed Ms. Anderson's letter threatening censure to the full Metro Board of Directors. (TR 1054, line 22 -TR 1055, line 7)

This disclaimer requirement was clearly intended to curtail Ms. Anderson's protected activities. In contrast, Board member Ted Hackworth was subsequently permitted to make public comments about the Board's animus towards Ms. Anderson without receiving similar censure. An interview published in the July 24, 1997 issue of **Westword** contains derogatory descriptions of the Metro Board's attitude towards Ms. Anderson. Mr. Hackworth cavalierly explained how the Board felt about Ms. Anderson, and explained the Board's decision to accept wastewater from Lowry, without any attempt to make the requisite disclaimer:

> "...Anderson's militant stance has made her unpopular with fellow board-members. Denver City Councilman Ted Hackworth, who serves on the wastewater board, calls Anderson a troublemaker. 'She hurls charges without much validity,' he says. When they put the effluent in the system it will be monitored, and if it violates the standards, it won't be accepted. There's no threat to Metro or its workers or the people in eastern Colorado. She doesn't seem to understand that." (CX 66)

Mr. Hackworth clearly was speaking on behalf of the Metro Board of Directors in this interview. Metro Board Chairman Richard Plastino admitted that Board member Ted Hackworth did not make the requisite disclaimer during this **Westword** interview. Further, Chairman Plastino could not recall directing Mr. Hackworth to make such a disclaimer. (TR 1046, line 5 - TR 1047, line 2) Apparently, such a disclaimer requirement was only intended to apply to Ms. Anderson and Mr. Levin, or to any

other Board member who engaged in the protected activity of speaking out against Metro's plan to accept wastewater from Lowry.

Metro, in addition to imposing special rules on Ms. Anderson's public statements, launched a media campaign to isolate and discredit her. Metro's "Public information officer"[18] Steve Frank admitted sending Denver Post columnist Al Knight material for his column castigating Ms. Anderson. (TR 902-906, CX 103) In their exchange of "e-mails" concerning Ms. Anderson, Steve Frank and Al Knight made numerous caustic, derogatory remarks about Ms. Anderson and anyone associated with her. When Mr. Frank shared information about a threat to Ms. Anderson's teaching position at the University of Colorado, Al Knight responded, "What exciting news. There is actually a regent bright enough to want to raise university standards." (CX 103, p. 1) In a list of questions Mr. Frank prepared for a Colorado legislative joint committee to ask Ms. Anderson during her testimony about Metro's plan to accept Lowry wastewater, he specifically included questions about her academic "credentials," in an attempt to attack her credibility and professional reputation. (CX 104, p. 2; TR 906-909) In fact, Mr. Frank admitted, "It would be fair to say my entire intent was to question her credibility." (TR 909, lines 17-18)

In materials prepared for the Water Environment Federation (WEF) "Public Education" award, Mr. Frank included a description of Ms. Anderson as a "dissident" Board member. (CX 106) The same term was used in a March 4, 1998 press release concerning Ms. Anderson. (CX 107) When Mr. Knight's critical article about Ms. Anderson was published, Mr. Frank circulated it to all Metro employees. (CX 102; TR 897) As Metro's official spokesperson, Mr. Frank indicated that he was "tired" of Anderson but that she just would not "go away." (CX 105; TR 914)

Metro Public Relations Director Steve Frank accused Ms. Anderson of "not telling the truth" in a FAX about a CNN series sent to water quality professionals, as well as to a long list of others in the wastewater treatment field. (TR 926-928, CX 108A and 108B) Mr. Frank referred to Ms. Anderson's article on

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[18]Mr. Frank explained that his position was "roughly equivalent to a public relations director" in the private sector. (TR 874, lines 1-4)

Lowry as "garbage" and objected to her use of a public university's “e-mail” to publish her concerns about Metro's plan to accept wastewater from the Lowry Landfill. (CX 105, p. 2) The irony, of course, is that such personally offensive and demeaning “e-mails” were circulated by Mr. Frank on Metro's “e-mail” system, which, as a public entity, is also funded by taxpayer payers using Metro's “e-mail” system; thus, Mr. Frank's critical statements concerning Ms. Anderson were flung into the worldwide internet universe. It is impossible to trace how widely they have been disseminated.

When Joan Seeman from the Sierra Club approached Metro representatives Steve Frank and Steve Pearlman with concerns about accepting wastewater from the Lowry Landfill, they told her that she "had to have gotten her information from Adrienne Anderson, and that it was not valid information (TR 955-956) Ms. Seeman described her reaction to the Al Knight article:

> "I was quite horrified at that article. It was basically an attack on a personality ... I was very troubled that a newspaper would take on a personality and avoid the issue of facts on the subject." (TR 957, lines 3, 9-13)

After Ms. Anderson filed her whistleblower complaint in 1997, Mr. Hite testified that "the whole relationship [between Metro and Ms. Anderson) became very adversarial..." (TR 1417, lines 5-7) Clearly, this admittedly "adversarial relationship," and the resulting adverse treatment of Ms. Anderson, was a direct response to Ms. Anderson's protected activities of researching the background of, and speaking out against, Metro's plan to accept wastewater from the Lowry Landfill Superfund Site, and I so find and conclude.

V. ADRIENNE ANDERSON SUFFERED COMPENSABLE HARM AS A RESULT OF HER ADVERSE TREATMENT BY METRO WASTEWATER.

The environmental statues, by authorizing an award of compensatory damages, have created a "species of tort liability" in favor of persons who are the objects of unlawful retaliation. Compensatory damages are designed to compensate complainants not only for direct pecuniary loss, but also for such harm as impairment of reputation, personal humiliation, and mental anguish and suffering. **Martin v. Dep't of the Army**, ARB Case

No. 96-131, ALJ Case No. 96-131, ARB Dec. and Ord. (July 30, 1999) WL 702416 at *13, **citing Memphis Community Sch. Dist, v. Stachura**, 477 U.S. 299, 305-307 (1986).

Adrienne Anderson summarized the reaction by Metro Wastewater to her attempts to raise public and worker safety and healthy concerns as follows:

> "Open hostility. Defamatory remarks. They characterized me as a 'wacko' and a 'nut case' for believing that this could be true. Refusing to look at the documentary evidence I had obtained. Smirking. Laughing. Throwing things at me. Circulating false information to the public at large. Trying to isolate me as a -- you know -- the only person that had these concerns. They refused me access to the normal processes of the board to distribute information. They objected to my -- what I felt were violations of my First Amendment rights by trying to tell me how to say what I needed to say in a fashion that made me feel really demeaned and that they were treating me like a child. I felt that they were incredibly sexist and dismissive of me as a woman. They went to parties in the media that I think they had prior knowledge would be willing to engage in defamation on their behalf." (TR 537, line 11 - TR 538, line 1)

Ms. Anderson most credibly testified that Metro Wastewater "attempted to humiliate me and defame my character and they called me a liar... 11 (TR 539, lines 13-15) She testified that "[i]t was very distressing to be ridiculed and defamed to the general public for work that -I felt that I had the right to do for the people I was asked to represent." (TR 540, lines 19-21) Ms. Anderson described the chilling effect of this adverse treatment: "[I)t was very, very, very challenging to try to continue the research knowing that (for) each and every disclosure I would make I would be subjected to even higher levels of threat." (TR 543, lines 21-24) She explained:

> "... the more they escalated their attacks, the more difficult it was on me emotionally and it began to affect my health, which was already weakened ... I felt like I was in a weak position to be getting involved in this type of a scandal. And yet, the more their attacks escalated, the more I realized that

> there was something of tremendous importance to the workers and to the public at large that I couldn't no [sic] do." (TR 539, line 22 - TR 540, line 5)

Several witnesses also credibly testified concerning the harm caused to Ms. Anderson by Metro's adverse treatment. Marilyn Ferrari accompanied Ms. Anderson to Metro Board meetings. She testified that she was afraid for her safety and the safety of Ms. Anderson:

> "I can tell you that it was very hostile. I can tell you that I would tell my husband, if I'm not home by such and such time, I want you to call the police because something has happened to us. It became so hostile that I dreaded going to those board meetings." (TR 111, line 23 - TR 112, line 2)

Ms. Ferrari explained that she made a point of traveling to and from Metro Wastewater Board meetings with Ms. Anderson "because I was afraid for her and afraid for me." (TR 112, lines 7-8) Metro lab workers represented by the union reported to Ms. Ferrari that they were encouraged by Metro management not to attend Board meetings. (TR 133, line 16 TR 134, line 9)

Ms. Ferrari stated that, during trips home after attending Metro Wastewater Board meetings, Ms. Anderson "frequently was trembling." (TR 112, line 13) In the twenty years that Ms. Ferrari has known Ms. Anderson, she had never seen her react that way to confrontation before. (TR 113, lines 15-10) Ms. Ferrari explained:

> "I was very frightened of the Board, of what they were going to do. They appeared to be to me so out of control and there was so -- so much animosity. The hostility at those Board meetings -I can just honestly tell you, it had a real chilling effect on all of us." (TR lines 19 - 23)

Al Levin testified about the effect the Metro Board's animosity had on Ms. Anderson: "She really felt very badly and on a couple of occasions I saw her wiping her eyes with KleenEX" (TR 147, lines 14-15)

The 1999 Al Knight article (CX 88) had a particularly devastating effect on Ms. Anderson, both to her emotional health

and to her professional reputation. Dee Knapp testified that the date this article was published represented the high point of Ms. Anderson's emotional distress over the adverse actions she suffered by Metro Wastewater. (TR 858) The Al Knight article, which Ms. Knapp described as a "hatchet job," was devastating, humiliating, embarrassing, and damaged Ms. Anderson's relationships with other people. (TR 861, lines 15-21) Ms. Knapp explained:

> "This article came on the heels of this, what I would call a pattern of harassment, but this was really, I would say, the coup de gras (sic). This was devastating to her ... this was widely discussed among people I know, who read (TR 858, lines 12-18)

Ms. Knapp testified that "it was clear from other ... lawyers in the community whom I know, that this - this made them think less of Adrienne." (TR 859, lines 3-5) She described how the Board's attacks, the Al Knight article, "slamming her down," all threatened Ms. Anderson's "entire professional life at a time she was having increased personal problems, so it wasn't as if she could resort to ... feelings of support and safety and confidence in her professional life, because she was being smashed in her professional life at the same time she was having some of these personal problems." (TR 865, line 17 - TR 866, line 3) Ms. Knapp explained the extent of the damage Ms. Anderson suffered: "You know, she couldn't go to every person who might have read this and argue the merits about it." (TR 861, lines 21-23)

Ms. Anderson's close friend and neighbor Kathleen Lennon testified about the effect the Al Knight article had on her family's treatment of Adrienne. (TR 720-723) This article was published on Easter Sunday in 1999. Ms. Anderson and her daughters accompanied Ms. Lennon to her aunt's home for a holiday brunch. Ms. Lennon's family was clearly "taken aback" by the article, and although Ms. Anderson attempted to deflect their attitude with humor, she was upset. (TR 722-723) As a result of the stress that Ms. Anderson suffered due to Metro's adverse treatment of her, culminating in the 1999 Al Knight article, Ms. Anderson became distracted, sad and depressed. (TR 723-725)

Union president Jed Gilman testified that, during a union meeting following publication of the Al Knight article, a Metro

lab worker named Mark Uniak expressed his opinion that Ms. Anderson was "way off base" and "crazy." This opinion was based solely upon his reading of the Al Knight article, which had been circulated through the Metro lab. (TR 208, lines 1-9) Mr. Gilman described Metro's reaction to objections by the union and Ms. Anderson to Metro's plan to accept wastewater from the Lowry Landfill as "offensive." (TR 212, lines 1-5) He had reports of Metro posting "negative news articles" about the union and Ms. Anderson on the company bulletin board. (TR 212, lines 7-15)

Mr. Gilman described another incident demonstrating harm to Ms. Anderson's reputation. In January of 2000, Mr. Gilman talked to Mayor Webb's labor liaison, Roman Garcia. (TR 213, line 23 - TR 214, line 8) The lab workers' union requested a meeting with the Mayor's office to discuss the workers' concerns over the Lowry wastewater stream being accepted by Metro. Mr. Garcia responded that such a meeting could occur only if Ms. Anderson was not present. (TR 214, lines 10-24)

During the fall of 1997, former OCAW local president Don Holmstrom had a conversation with Denver Mayor Webb in which the Mayor expressed regret at appointing Ms. Anderson to the Metro Wastewater Board:

> **"...the first thing he mentioned was that he had appointed Adrienne Anderson to represent our interests.** He had been in conversation with Denver representatives to the Metro Wastewater Board, and he indicated that they had told him that Adrienne Anderson was crazy, and he was -- he regretted appointing her to the Metro Wastewater Board of Directors." (TR 1508, lines 10-16)(Emphasis added)

Although Ms. Anderson submitted the paperwork for reappointment, she was not reappointed to the Metro Board.[19] (TR 518)

Ms. Anderson most credibly explained the damage Metro's negative media campaign caused her reputation:

> “In the type of work I do, it's very important that I have professional credibility with the media and

[19]Unlike other Board members, who usually are routinely reappointed to the Board and who serve several terms.

> through their organized campaign to paint me as a less than truthful person with no skills and to attempt to marginalize me as the only person who had these concerns, they have clearly damaged me with the major papers in the town in which I've lived for the last 20 years." (TR 545, line 20 - TR 546, line 1)

Ms. Anderson again most credibly testified that she has been unable to obtain full time employment at the University of Colorado, where she teaches part time. (TR 546) Metro's attacks through the media have caused her problems not only with organizations and individuals with whom she has worked in the past, but has caused her personal embarrassment, for example, at events at her children's school. (TR 546-547) Ms. Anderson feels that, in addition to monetary compensation, she is "due an apology" (TR 551, line 8) in vindication.

VI. DAMAGES

The Secretary of Labor has held that an important criterion for determining whether an award of compensatory damages is reasonable is "whether the award is roughly comparable to awards made in similar cases." **Gaballa v. The Atlantic Group**, Case No. 94-ERA-9, Sec'y Dec., Jan. 18, 1996, slip op. at 6, **quoting EEOC v. AIC Security Investigations, Ltd.**, 55 F.3d 1276, 1285 (7th Cir. 1995). In **Gaballa** complainant had been blacklisted and testified that he felt his career had been destroyed by respondent's action. Complainant was awarded $35,000. **Id**., slip op. at 5. In **Van de Meer v. Western Kentucky University**, ARB Case No. 97-078, ALJ Case No. 95-ERA-38, ARB Dec., Apr. 20, 1998, complainant was awarded $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning complainant's mental competence. In **Leveville v. New York Air National Guard**, ARB No. 98-079, ALJ Nos. 1994- and 4 (ARB Oct. 25, 1999), respondent had placed adverse information concerning complainant in complainant's OPM file, which had been accessed by one potential employer. Although the presence of such information did not prevent complainant from obtaining other employment, the potential harm such adverse information could cause complainant was "Presumed," and complainant was awarded $25,000. **Id., slip op**. at 5.

In Ms. Anderson's case, numerous derogatory statements questioning her credibility were widely published through a

variety of media, including the world wide web, beginning during her tenure on the Metro Board and continuing even to the present day. These derogatory statements resulted, for example, in Ms. Anderson being excluded from a meeting between the lab workers' union and the Mayor's office, and ultimately in her failure to be reappointed to the Metro Board. The loss to Ms. Anderson's personal and professional reputation is immeasurable, and I so find and conclude.

It is well-settled that expert medical evidence is not necessary to award compensatory damages for emotional distress. A complainant's credible testimony by itself is sufficient for this judge to find and conclude that emotional distress has resulted from a persistent pattern of retaliatory action and to award damages. Therefor, **Jones v. EG&G Def. Materials Inc.**, ARB Case No. 97-129, ALJ Case No. 95-CAA-3 (ARB Sept. 29, 1998). In **Jones**, the testimony of the complainant alone was sufficient to sustain a $50,000 award for emotional distress. Similarly, complainant's testimony was sufficient to sustain a $20,000 emotional distress award in **Assist. Secretary of Labor for Occup. Safety & Healthy, Guaranteed Overnight Deliver** , ARB Case No. 96-108, ALJ Case No. 95-STA-37 (Sept. 5, 1996).

Not only Ms. Anderson, but a number of other witnesses testified about the emotional distress Ms. Anderson has suffered, and still suffers, as the result of adverse actions and the hostile environment created by Respondent. As a result of the embarrassment, humiliation and emotional distress Ms. Anderson suffered beginning with her appointment to the Metro Board in February 1996 through January 2000, she seeks a minimum damage award of $50,000 or "whatever the Judge feels is appropriate." (TR 552, lines 19-22) As a result of the damage to her reputation, including negative “e mail” communications about her cavalierly circulated throughout the internet by Metro Public Relations Director Steve Frank, beginning with her appointment to the Metro Board in February 1996 and continuing through the present, Ms. Anderson seeks an award of $500,000, or whatever the Judge feels is appropriate.

Ms. Anderson also seeks a public apology, and a promise not to retaliate against her or others in the future, for engaging in protected activities, to be published in the **Denver Post**, to be posted at all company bulletin boards at the Metro Wastewater facility, and to be circulated via internet to all contacts identified in Steve Frank's derogatory “e mails.” Finally, Ms.

Anderson seeks a retraction of the April 16, 1997 letter threatening censure for speaking out against Metro's plan to accept wastewater from the Lowry Landfill Superfund Site.

1. **Loss of Income**

The campaign of retaliation against Ms. Anderson for her protected activities constitutes a continuing violation of her rights under the employee protection provisions of applicable environmental statutes. Complainant requests that the Administrative Law Judge order Respondent to rescind its threatening April 16, 1997 letter, and issue a public apology and promise not to retaliate against her or others in the future. Complainant also asks this Judge to order Respondent to pay compensatory damages to her in the amount of $500,000 for damage to her professional reputation and loss of future income, and a minimum of $50,000 for the mental anguish and emotional distress caused by Metro's adverse and discriminatory actions.

Complainant also seeks recovery of all expenses incurred, including reasonable attorney fees for the prosecution of her complaint, as provided by applicable environmental statutes. The parties have agreed that this issue should be reserved until after a ruling on the merits.

On the other hand, Metro submits that Ms. Anderson has suffered no loss of income, that she has not met her burden of proof to establish a **prima facie** case, that Metro has set forth a legitimate non-discriminatory reason for its action and has proved that it would have taken the same action in the absence of protected activity (**e.g.,** the same warning letter was sent to Al Levin).

Respondent specifically posits that Anderson provided no credible evidence, at the hearing to support her claim for loss of income. (TR 546, l. 2 - 548 l. 18) She alleges that she was not offered a longer contract at CU, but supports it with nothing more than pure speculation. (TR 561, l. 18 - 564, l. 9; 566, l. 12 - 567, 1. 11) She also only provides speculative evidence to support her lost opportunities to work with public interest groups such as the Sierra Club (TR 564, l. 17 - 565, l. 7, 566, ll. 2 - 11) and with the OCAW (TR 567, l. 12 - 568, l. 21).

Respondent points out that the only credible evidence of her income history since 1996 are her tax returns. Anderson’s

wages with the University of Colorado have increased significantly every year since 1996. In 1996 she earned $4,100, 1997 - $8,000, 1998 - $13,185 and 1999 - $27,556. (RX 12 - 15) Her claim of lost income is not supported by the evidence presented and her evidence of lost opportunities is nothing more than speculation, and must be rejected. Anderson has failed to establish any lost income or lost opportunities, according to Respondent.

2. **Emotional Distress**

I advised the parties at the hearing (TR 1542, l 22 - 1546, l. 5), that Ms. Anderson was clearly suffering emotional distress from several stressors. The Metro District submits that emotional distress, if any, suffered by Anderson was caused entirely by stressors in her personal and professional life and none of it was caused by the Metro District. Her medical and psychologist records were void of any references to "employment related stress at Metro". (TR 1543, ll. 17 - 18)

Although Ms. Anderson and others testified that Metro's actions caused her some emotional distress, that evidence is not substantiated by her records. Moreover, it was her own actions, statements and behavior that thrust her into the limelight on Metro's Board and in public with respect to Lowry. She has brought on herself whatever stress she claims regarding Metro and Lowry. It is no wonder she was under stress with her personal life such as it was, and at the same time leading the life of a "double agent," according to the Respondent.

3. **Damage to Reputation**

Anderson's damage to reputation claim is, essentially, that Metro had the audacity to disagree publicly with her position regarding the POTW Treatment Option at Lowry. Apparently, Anderson believes that only she has a First Amendment right to espouse her position and that any comments which disagree with her constitute disparagement and damage to her reputation. Such a position is ludicrous.

When asked whether the essence of her damage to reputation claim was that Metro painted her as someone who has a minority viewpoint and doesn't have her facts right, Anderson replied, "Among other things, yes." (TR 556, ll. 20-24) The "other

things" alleged by Anderson were that 1) Metro has influenced reporters to not report on her cause, (TR 553, ll. 18 - 25 and 554, ll. 10 - 25), and 2) Metro's posting of a letter on its website which responded to a Christian Science Monitor article. The posting of the letter by Metro was in response to Anderson's earlier posting on Metro's website the link to the Christian Science Monitor article. (RX 50; TR 559 - 561)

However, when asked for specifics as to how her reputation had been damaged, Anderson could not provide any evidence of present damage to her reputation.

> Q. I don't think you provided an answer to your Counsel's question as to what damage has occurred to your reputation. Is that something you're incapable of doing?
>
> A. I don't think it can be quantified at this point because I suspect that it will, absent an apology, without an apology from Metro retracting their conduct, I suspect that it will continue to damage me in the future. (TR 561, ll. 11-17)

Once again, all of the evidence presented in her claim for damages to reputation is speculation. Anderson cannot point out even one concrete example of how her reputation has been damaged. In fact, looking solely at her income, it would appear that her status has been enhanced as she has had a nearly 700% increase in her income at CU since her first year on Metro's Board of Directors.

Much of Anderson's testimony regarding the alleged damage to her reputation related to a columnist from the Denver Post, Al Knight. Mr. Steve Frank, of Metro, acknowledged providing certain information to Mr. Knight for Metro's responses to Anderson's allegations regarding the alleged dangers of the POTW Treatment Option. The information provided to Mr. Knight by Mr. Frank was purely factual information regarding how the POTW Treatment Option works and was printed in Mr. Knight's column. (CX 88; TR 895 ll. 3-20) Nothing in the article even remotely suggests that Metro provided anything other than this factual material, according to Respondent's thesis.

With regard to the "e-mail" message of May 5, 1999 sent by Mr. Frank to Mr. Knight, CX 103, that "e-mail" was originally

forwarded to Steve Pearlman of Metro by Marc Herman of the EPA. (**See** CX 103 p. 1) Even in this "e-mail", Mr. Frank does nothing more than relay information regarding a hearing that Anderson attended, and express his opinion about the Colorado Daily newspaper. Personal opinions are protected by the First Amendments' guarantee of freedom of speech and are not actionable.[20]

Long before Anderson was appointed to the Metro Board, Mr. Knight was an outspoken critic of Anderson. (RX 26) Anderson has chosen to make herself a public figure. Despite that, Anderson believes that neither Mr. Knight nor anyone else has a right to criticize or express their opinions about her or about the issues that she champions. Nothing that Anderson has provided connecting Metro and Al Knight is relevant to her loss of reputation claim. If Anderson has a problem with Mr. Knight, she should take it up with him, according to Respondent.

Anderson's established reputation as an environmentalist and advocate on behalf of the public interest substantially preceded her appointment to Metro's Board. Metro submits that it has done nothing to damage her reputation. In fact, in order to establish damage to reputation one must first establish what that reputation is. Anderson has failed to meet her burden of proof of establishing her reputation. Without that first being established, it is impossible to determine if the "reputation" has been damaged. Anderson's claim of damage to her reputation fails for lack of evidence.

Respondent does not deny that Ms. Anderson engaged in protected activities. However, it attempts to avoid liability for its obvious adverse actions against Ms. Anderson by arguing that it had no idea that she was a representative of their employees. The assumption is that, without specific notice of Ms. Anderson's representative status, Metro Wastewater was free to take any adverse action against Ms. Anderson it wished. Such a creative defense has no basis in either the applicable statutes or case law, and I so find and conclude.

Even if such a position could be accepted as a legitimate defense, Metro's claim that it was unaware of Ms. Anderson's

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[20]It is not the province of this forum to determine whether Mr. Knight's columns are, in fact, libelous.

long-standing affiliation with the Metro lab workers' union is contrary to the evidence. The record is replete with admissions from Metro's own witnesses that they were well aware of Ms. Anderson's connection with this union. In fact, the evidence reflects that this known union affiliation was the prime motivation for Metro's adverse actions against Ms. Anderson. In fact, this union affiliation was so well known and her reputation had preceded her to such an extent that certain forces were set in motion against Ms. Anderson after her nomination to the Board and well before her confirmation hearing. Moreover, the record is replete with evidence that Ms. Anderson was acting hand-in-hand with the Metro lab workers to pursue health and safety issues arising from Metro's plan to accept wastewater from the Lowry Landfill Superfund Site, and I so find and conclude.

Metro also attempts to avoid liability for its adverse actions against Ms. Anderson by arguing that she did not have a reasonable belief that Metro's plan to accept wastewater from Metro violated federal environmental statutes. In fact, the evidence overwhelming demonstrates Ms. Anderson's reasonable belief in the illegality of this plan. This reasonable belief formed the basis for Ms. Anderson's protected activities, and I so find and conclude.

Respondent correctly points out that, once Complainant establishes that illegitimate reasons played a part in the employer's adverse action, the employer has the burden of proving by a preponderance of evidence that it would have taken the adverse action against Complainant for the legitimate reason alone. Respondent cites **Carroll v. Bechtel Power Corp.**, 91-ERA-46 (Sec'y February 15, 1995) in support of its proposition. Respondent admits that it cannot prevail unless it shows it would have reached the same decision in the absence of protected activity. In this regard, **see Young v. CBI Services, Inc.**, 88-ERA-8 (Sec'y Dec. 8, 1992), slip op. at 6.

However, I disagree and find and conclude that the Respondent has failed to make such a showing. In fact, as extensively summarized above, a number of witnesses credibly testified that Metro's actions against Ms. Anderson were specifically motivated by her protected activities. If it were not for the protected activity in which Complainant engaged, no discriminatory action would have occurred, and I so find and conclude, especially as the compliant Board members had no such

problems.

This Administrative Law Judge has already determined, in response to a motion to dismiss by Respondent following the presentation of Complainant's case in chief on November 14, 2000, that Complainant established a **prima facie** case requiring rebuttal by Respondent. (TR 1002) Respondent has failed to establish, however, that its adverse actions against Ms. Anderson were motivated by any credible legitimate reasons. Because Metro has failed to rebut Ms. Anderson's **prima facie** case, Ms. Anderson is entitled to relief under the applicable whistleblower statutes, and I so find and conclude.

Ms. Anderson had also worked openly with the union to make presentations to the Board about worker and public health and safety concerns. The union would assist Ms. Anderson in distributing materials prior to or during Board meetings. (TR 1374, line 8 - TR 1375, line 5) In March 2000, Ms. Anderson and the lab workers' union organized a news conference at Metro to publicize a legal action to seek an injunction against acceptance of potentially radioactive wastewater from the Lowry Landfill. (TR 204-205) Jed Gilman testified that Ms. Anderson attended this press conference “[a]s a spokesperson on behalf of the workers that are affected by this plan [to accept wastewater from Lowry]." (TR 205, lines 4-5)

I also find and conclude that right from the very beginning, and even before Anderson was on the Board, Mr. Hackworth regarded Ms. Anderson as having a pro-union bias and "also attacked the union." (TR 88, lines 2223) Metro Board Chairman Richard Plastino knew that Ms. Anderson was connected with the lab workers. (TR 1014, lines 24-25.) Metro District Manager Robert Hite testified that he became aware of Ms. Anderson's affiliation with the lab workers union during her tenure on the Board. (TR 1413, lines 4-7) Metro Public Relations Director Steve Frank was also well aware of Ms. Anderson's association and influence with the union: It was my understanding that she has worked with them all along. (TR 919, lines 11-12) Mr. Frank reported:

> "Anderson has also orchestrated union members handing out various printed materials to Metro district board members at board meetings and numerous mailings from OCAW and other labor groups to individual board members..." (CX 108B)

Steve Frank monitored Ms. Anderson's activities and public statements on behalf of Respondent. A number of newspaper articles appearing during Ms. Anderson's tenure on the Board identified her as the advocate or representative of Metro employees. An April 26, 1997 article in **In These Times** indicates that Mayor Webb "appointed Adrienne Anderson to serve on the Metro board as an advocate for sewer-district workers." (CX 51) Similarly, a May 22, 1997 article in the **Boulder Weekly** indicates that Ms. Anderson was **appointed to the Board "to represent the interests of the Oil, Chemical and Atomic Workers union workers who work with the sewage.** (CX 52 at 2) A June 26, 1997 article in the **Boulder Weekly** identifies Ms. Anderson as **"a Metro board member appointed by Denver Mayor Wellington Webb to represent the interests of OCAW workers."** (CX 64) On June 16, 1997, the Metro lab workers' union issued a press release which stated: **"Adrienne Anderson was appointed by Denver Mayor Wellington Webb to the Metro Wastewater Board in 1996 with a specific mandate of representing worker and union concerns."** (**See** CX 57) Apparently **all but the Metro Directors** knew about Complainant's relationship with the union workers, an inference that it is completely illogical and unreasonable.

The clearest evidence of Respondent's knowledge of Ms. Anderson's standing as a worker representative, however, is provided by Metro Manager Robert Hite. On May 15, 1997, Manager Hite distributed to the entire Metro Board of Directors, a transcript of Ms. Anderson's appearance on a radio talk show . (**See** CX 54) At the beginning of this appearance, Ms. Anderson stated that she "was put on that Board by the Mayor of Denver specifically to represent the workers at that plant." (CX 54, page 2) If for some reason any Metro Director was not previously aware of Ms. Anderson's representation of Metro employees on the Board, all Directors were placed on notice of Ms. Anderson's position as a worker representative upon receipt of this radio transcript from Manager Hite.[21]

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[21]Shortly after the distribution of this radio transcript, during the June 17, 1997 Metro Wastewater Board of Director's meeting, OCAW local union president Don Holmstrom informed the Board that Ms. Anderson represented the Metro workers. Ms. Anderson's subsequent attempts to raise issues concerning the acceptance of Lowry Landfill wastewater were attacked and blocked by other Board members, (**See** audiotape recording of June

In light of this overwhelming evidence, Respondent's claim that it was unaware that Ms. Anderson was engaging in protected activities on behalf of Metro lab workers is simply not credible, and I so find and conclude.

B. COMPLAINANT HAD A REASONABLE BELIEF THAT METRO'S PLAN TO ACCEPT WASTEWATER FROM THE LOWRY LANDFILL SUPERFUND SITE VIOLATED FEDERAL ENVIRONMENTAL STATUTES, AND SUCH REASONABLE BELIEF MOTIVATED HER PROTECTED ACTIVITIES.

Immediately upon her appointment to the Metro Board by Denver Mayor Wellington Webb on February 22, 1996, Ms. Anderson began researching the history of the Lowry Landfill through various public documents. She initially raised concerns to the Governor of Colorado about violations of "federal hazardous waste laws" following her discovery that the Lowry Bombing Range had been designated a "catastrophic risk zone." (CX 6) Ms. Anderson raised similar concerns about violations of federal environmental statutes during an appearance on a radio talk show on March 4 and 5, 1996. (CX 7, CX 8)

The union, following information specifically provided by Ms. Anderson to the Metro lab workers union concerning Metro's plan to accept wastewater from the Lowry Landfill Superfund Site, on August 20, 1996, sent a letter to the EPA insisting on the opportunity for public comment, as required by federal environmental statutes. (CX 41) Ms. Anderson raised the same issue, as well as public and worker safety concerns, in an April 26, 1997 article **In These Times** and in a May 22, 1997 article in the **Boulder Weekly** (CX 51, CX 52)

The EPA scheduled a public meeting to discuss Metro's plan to accept wastewater from the Lowry Landfill on April 2, 1997. At this meeting, Ms. Anderson raised concerns about the presence of plutonium and other radionuclides at the Lowry Landfill. (RX 2 at 36-38) Ms. Anderson cited an EPA contractor report she uncovered during her investigation of public documents which verified the presence of radioactive substances at the Lowry Landfill Superfund Site. (RX 2 at 37, lines 4-12. **See also** CX 11-38) Ms. Anderson's resulting concerns regarding the presence of plutonium and other radionuclides in the Lowry Landfill

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17, 1997 Board meeting included with Complainant's supplemental submissions on December 21, 2000.)

wastewater involves, **inter alia**, perceived violations of the Energy Reorganization Act and the Clean Water Act.

Ms. Anderson raised similar concerns about Metro's plan to accept wastewater from the Lowry Landfill both directly to the Metro Board, as well as through public interviews. For example, Ms. Anderson raised concerns about the violation of federal environmental statutes during a radio appearance on May 14, 1997. (**See** CX 54) Ms. Anderson also raises public and worker health and safety concerns in a June 26, 1997 article in the **Boulder Weekly**. (CX 64)

Respondent argues, perhaps tongue-in-cheek, that Ms. Anderson is not entitled to recover herein for its adverse actions against her because she did not have a "reasonable belief" that Metro's plan to accept wastewater from the Lowry Landfill Superfund Site potentially violated federal environmental laws. However, on July 31, 2000, the EPA Ombudsman issued a report which concluded that the "weight of evidence supports" citizens' claims that “uncertainty" exists concerning radioactive contamination of the Lowry Landfill Superfund Site. As a result, the Ombudsman recommends "further sampling and the development of sampling protocols to address the issue of the presence of radioactive material at the Lowry Landfill Superfund Site." (CX 94) Clearly, the government agency set up to protect the environment has found such concerns to be "reasonable" enough to require further testing at this Superfund Site. Thus, Complainant’s opinions herein on this issue are reasonable, and I so find and conclude.

It is now well-settled that raising complaints about worker health and safety "constitutes activity protected by the environmental acts when such complaints touch on the concerns for the environment and public health and safety that are addressed by those statutes." **Melendez v. Exxon Chemicals Americas, supra** at p. 10. **See also Jones v. ED&G Defense Materials, Inc., supra** at p. 8, **citing Scerbo v. Consolidated Edison Co.**, Case No. 86-ERA-2, Sec’y **Dec. and Ord.**, Nov. 13, 1992, slip op. at 4-5. Because Ms. Anderson made repeated complaints concerning not only worker, but also public, health and safety issues covered by the federal environmental statues, these complaints constitute activities protected by the federal whistleblower laws, and I so find and conclude.

C. RESPONDENT'S ADVERSE ACTIONS AGAINST MS. ANDERSON WERE CLEARLY MOTIVATED BY ANIMUS CONCERNING HER PROTECTED ACTIVITIES.

Metro Director Ted Hackworth testified that, as a Director, Ms. Anderson raised issues about worker safety resulting from Metro's plan to accept wastewater from the Lowry Landfill. (TR 1440, lines 20-22) Mr. Hackworth did not feel it was appropriate for Ms. Anderson to be raising such issues when the Board had already approved the Lowry settlement prior to Ms. Anderson's arrival. (TR 1441, lines 10-25) Mr. Hackworth also testified that Ms. Anderson, in raising such issues concerning Lowry, "was harming the Denver position" on the Metro Board. (TR 1445, lines 12-13) For this reason, he testified rather animatedly before me that he did not want her to be reappointed to the Board. (TR 1445, lines 10-13) He admitted that Denver owns the Lowry Landfill. (TR 1445, line 21 - TR 1446, line 1) However, Mr. Hackworth did not believe that his representation of the interests of the Lowry Landfill on the Metro Board created any conflict of interest. (TR 1446, lines 2-8)

Mr. Hackworth testified that, in response to the issues raised by Ms. Anderson concerning the Lowry Landfill, other Board members commented: "we never should have let her on this Board..." (TR 1453, lines 14-15) Mr. Hackworth admitted telling "the individual that does the appointing" of Metro Directors that he "would hope that he didn't reappoint Adrienne Anderson." (TR 1454, lines 15-23)
23)

After Ms. Anderson filed her whistleblower complaint in 1997, Mr. Hite testified that "the whole relationship [between Metro and Ms. Anderson] became very adversarial..." (TR 1417, lines 5-7) Clearly, this admittedly "adversarial relationship," and the resulting adverse treatment of Ms. Anderson, was a direct response to Ms. Anderson's protected activities of researching the background of, and speaking out against, Metro's plan to accept wastewater from the Lowry Landfill Superfund Site. The evidence clearly establishes that the adverse actions against Ms. Anderson, culminating in the denial of her reappointment to the Metro Board of Directors by the Mayor's office, were directly motivated by Ms. Anderson's protected activities on behalf of the Metro workers, and I so find and conclude.

In summary, the evidence in this closed record conclusively establishes that Respondent was well aware of Adrienne Anderson's obvious affiliation with the Metro lab workers union. The evidence also establishes that Ms. Anderson's affiliation with the Metro lab workers union, and her protected activities on behalf of such workers, prompted a campaign of retaliation against Ms. Anderson. These protected activities were clearly undertaken as the result of a good faith belief that Metro's plan to accept wastewater from the Lowry Landfill violated federal environmental statutes.

The totality of this closed record, including the logical inferences to be drawn therefrom, leads ineluctably to the conclusion that Respondent has failed to advance any legitimate reasons for its adverse actions against Ms. Anderson. Therefore, Ms. Anderson is entitled to relief for the harm she has suffered as a result of Metro's adverse, disparate and discriminatory actions against her.

Complainant requests that the Administrative Law Judge order Respondent to rescind its threatening April 16, 1997 letter, issue a public apology and promise not to retaliate against her or others in the future. Complainant also asks the Judge to order Respondent to pay compensatory damages to her in the amount of $500,000 for damage to her professional reputation and loss of future income, and a minimum of $50,000 for the mental anguish and emotional distress caused by Metro's adverse actions.

Complainant also intends to seek recovery of all expenses incurred, including reasonable attorney fees for the prosecution of her complaint, as provided by applicable environmental statutes.

Respondent posits, perhaps "tongue in cheek," "**The adversarial relationship between Anderson and the Board was the natural result of the filing of this lawsuit.**" I disagree completely with that statement for the basic reason that this lawsuit was not filed until May 2, 1997 and that the demonstrated animosity towards the Complainant began almost immediately after Mayor Webb appointed her to the Metro Board on February 22, 1996, well over one year prior to filing her Whistleblower complaint. Mr. Hackworth was well aware of Anderson's union and environmental activities and set in motion the process to discredit Ms. Anderson. While Respondent cites a

lack of legal and formal notification from Ms. Anderson that she was the authorized representative of the Metro lab workers, the Board was well aware of her union activities, as extensively summarized above.

I also note that OCAW sent a check in the amount of $5,000.00 (CX 71) to assist her with her litigation expenses in recognition of her efforts in the union's behalf as a Metro Board member. All connected with this case knew about Anderson's labor-friendly activities and her constant efforts on behalf of OCAW, especially as the prior collective bargaining agreement between Metro and OCAW had expired in 1993.

Respondent cites **Occam's Razor** in support of its position that Ms. Anderson is not an authorized representative of OCAW. I disagree. The simplest explanation is that Respondent not only knew that Ms. Anderson was labor-friendly but also that she was the authorized representative of OCAW as she was put on the Board to represent the interests of the union members, and I so find and conclude.

Respondent further submits that in order for an activity to be protected under the whistleblower statutes, the person must have an actual belief in a violation of the statute and that belief must be reasonable. Moreover, a belief that the environment may be negatively impacted by an employer's conduct is not sufficient to invoke the whistleblower provisions of environmental laws. Respondent concludes, "**But not once does she allege any of the environmental laws at issue.**" (Emphasis added)

I disagree completely. This entire case is about a dedicated, conscientious and public-spirited citizen who, in following in the tradition of Karen Silkwood, Erin Brockovitch, A. Ernest Fitzgerald, Casey Ruud and others, has spent her entire adult life in pursuing union and environmental activities and in attempting to correct perceived wrongs and problems in society. Complainant's beliefs, in my judgment, are reasonable and well-founded, based upon her years of research into the problems and remedial action taken with reference to the so-called Superfund Sites by the federal and state governments. That some in authority disagree with her interpretations and opinions do not render her beliefs unreasonable, and I so find and conclude, especially as the basis of those disagreements are, for the most part, personality conflicts.

On the basis of the totality of this closed record and having observed the demeanor and having heard the testimony of a most credible and obviously distressed and depressed Complainant, I make the following:

D. FINDINGS OF FACT

1.) Complainant Adrienne Anderson was appointed to the Metro Wastewater Reclamation District Board of Directors by Denver Mayor Wellington Webb on February 22, 1996.

2.) Prior to this appointment, Ms. Anderson's name and resume were submitted to the Mayor's office by the Metro lab workers' union, the Oil, Chemical and Atomic Workers ("OCAW").

3.) OCAW had asked, and was granted, the opportunity to nominate a candidate to serve on the Metro Wastewater Board to represent the Metro workers' interests.

4.) Ms. Anderson had an initial confirmation hearing before the Denver City Council's Public Works Committee in May 1996.

5.) Because Denver City Councilman and Metro Board member Ted Hackworth did not attend the May Public Works Committee meeting, he asked that Ms. Anderson be brought back to a second Public Works Committee meeting on June 4, 1996, so that he could personally question her.

6.) During both the May and June 1996 Public Works Committee meetings, Ms. Anderson indicated that she was appointed by Mayor Webb to the Metro Board to represent the Metro employees.

7.) In June, 1996, while Ms. Anderson's confirmation by the Denver City Council was delayed, the Metro Board approved, as part of a proposed settlement of pending litigation concerning clean-up of the Lowry Landfill Superfund Site, a plan to accept wastewater from that Superfund Site for processing and distribution through the Metro Wastewater system.

8.) Adrienne Anderson's appointment to the Metro Board was confirmed by the Denver City Council in June 1996.

9.) As a member of the Metro Board of Directors and as a representative of Metro workers, Complainant Adrienne Anderson raised concerns about the safety, legality and potential hazards of Respondent's planned participation in the clean-up of the Lowry Landfill Superfund Site - specifically, the acceptance of hazardous waste from this Superfund Site for processing and distribution.

10.) Complainant established that she engaged in the following protected activities:

a.) researching the history of the Lowry Landfill since her appointment by Mayor Webb on February 22, 1996;

b.) attempting to raise her concerns about Metro's plan to accept wastewater from the Lowry Landfill during Board and Committee meetings;

c.) speaking out against Metro's plan to accept wastewater from the Lowry Landfill to public officials and to the public through the media;

d.) speaking out against Metro's plan to accept wastewater from the Lowry Landfill in an EPA public hearing held on April 2, 1997;

e.) participating in Congressional investigations into the Lowry Landfill;

f.) requesting, on June 25, 1997, a special Board meeting to investigate public and worker health and safety concerns raised by Metro employees;

g.) sharing the results of her research, and her concerns about Metro's plan to accept wastewater from the Lowry Landfill, with Metro employees and the Metro lab workers union; and

h.) organizing employee and public opposition to Metro's plan to accept wastewater from the Lowry Landfill.

11.) Complainant's protected activities resulted in Respondent engaging in the following adverse actions:

(a) cutting her off or ruling her out of order during

Board meetings;

(b) keeping her from voting on the Lowry settlement by delaying her confirmation by the City Council until June 1996;

(c) ordering her off Metro property in March 2000 when she appeared for a press conference to voice her concerns about the Lowry settlement;

(d) denying her requests to distribute material concerning the Lowry Landfill to the Metro Board or to put this issue on the Metro Board agenda;

(e) denying her June 25, 1997 request for a special Board meeting to investigate public and worker health and safety concerns raised by Metro employees;

(f) forcing her to make Open Records Act requests for information, and then charging her for such information;

(g) monitoring her activities and public statements;

(h)circulating derogatory e-mails and other communications about her;

(i) subjecting her, via an April 16, 1997 letter, to a special disclaimer requirement which was not imposed on other Board members, specifically Ted Hackworth; and

(j) communicating its desire to the Denver Mayor's office that she not be reappointed to the Metro Board, which resulted in her failure to be reappointed.

12.) On May 2, 1997, Complainant filed a **pro se** complaint with the U.S. Department of Labor alleging that Respondent Metro Wastewater Reclamation District violated the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9610, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §6971, the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1367, and the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851.

E. CONCLUSIONS OF LAW

1.) Complainant Adrienne Anderson's whistleblower complaint lies within the jurisdiction of the Energy Reorganization Act, 42 U.S.C. §5851(l)(a).

2.) Complainant Adrienne Anderson is an "authorized representative of employees" under the applicable language of the employee protection provisions of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. §9610, the Solid Waste Disposal Act ("SWDA"), 42 U.S.C. §6971, and the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. §1367.

3.) Complainant is a "person acting pursuant to [employees'] request" under the Energy Reorganization Act ("ERA"), 42 U.S.C. §5851.

4.) From her initial appointment to the Board of Directors of the Metro Wastewater Reclamation District, Ms. Anderson engaged in activities protected under the whistleblower statutes applicable to her complaint.

5.) Respondent Metro Wastewater Reclamation District was fully aware of, and in fact specifically monitored, Complainant's protected activities.

6.) Complainant suffered adverse actions by Respondent.

7.) Complainant established, and many of Respondent's witnesses even admitted, a causal link between Respondent's adverse actions against Complainant, and Complainant's protected activities.

8.) Respondent failed to establish any reasons for its adverse actions against Complainant, other than her protected activities.

9.) Complainant is entitled to compensatory damages, as well as to affirmative relief, and this relief will be discussed below.

I shall now discuss the two (2) complaints filed by the Complainant post-hearing.

B. COMPLAINANT'S COMPLAINTS OF DECEMBER 15, 2000 AND JANUARY 15, 2001

1. BACKGROUND AND ETIOLOGY

As part of pre-hearing discovery, Respondent's public relations officer, Steve Frank, was served with a subpoena duces tecum requiring him to produce memoranda, e mails and other documents in which Adrienne Anderson's name was mentioned. In response to this subpoena, Mr. Frank produced a number of e mails which contained critical remarks concerning Ms. Anderson, and which had been widely disseminated over the world wide web. (CX 102-108)

Ms. Anderson, upon learning during the course of the hearing of Metro's concerted covert efforts to discredit her, has suffered great emotional distress:

> **"During the rest of the hearing as a result of learning this, I was nauseous, dizzy, developed severe headaches, suffered from severe insomnia requiring medication, and suffered an exacerbation of a TMJ disorder, worsened during periods of distress over Metro's discriminatory and retaliatory actions." (February 5, 2001 Affidavit of Adrienne Anderson, p. 3, par. 19)**

During the November 2000 hearing, Steve Frank testified that he applied for and received a public relations award from the Water Environment Federation (WEF), a national lobbying group promoting, **inter alia**, the use of industrial sewage sludge as fertilizer. However, Mr. Frank denied that these materials contained any reference to Ms. Anderson. (February 5, 2001 Affidavit of Adrienne Anderson, p. 3, par. 20.) When subsequently confronted with unequivocal documents to the contrary uncovered by Ms. Anderson through her CORA requests, Mr. Frank admitted that he "inadvertently and unintentionally" misstated the facts concerning this package. (May 14, 2001 Affidavit of Steve Frank, p. 5, par. 19)

Following the November 2000 hearing, Ms. Anderson submitted a Colorado Open Records Act (CORA) request to Metro on December 6, 2000. Ms. Anderson asked to review any and all documents related to Steve Frank's nomination and receipt of a public relations award. Ms. Anderson submitted a companion CORA request

to review documents related to Metro's suspension of the Lowry Landfill hazardous and radioactive discharge. (February 5, 2001 Affidavit of Adrienne Anderson, p. 3, par. 23)

On December 11, 2000, Metro informed Ms. Anderson that it could not respond to her CORA requests within the requisite three day time period because of unspecified "extenuating circumstances." (**See** EX 11 to February 5, 2001 Affidavit of Adrienne Anderson.) Ms. Anderson also learned that, once the requested documents were made available by Metro, she would not be permitted to bring in any means of recording the documents, such as a computer, scanner and tape recorder, as she had in the past. Finally, Metro quintupled the cost of photocopies from 25 cents per page to $1.25 per page. This increase was apparently implemented two weeks after Ms. Anderson's prior CORA request in May 1999. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, pars. 26-27, and attached Exhibits 12, 13)

Following Ms. Anderson's CORA document review in May 1999, Metro also restricted CORA document reviews to Tuesdays and Thursdays - the precise days during which Ms. Anderson is usually in Boulder teaching her classes at the University of Colorado. (**See** EX 12 to February 5, 2001 Affidavit of Adrienne Anderson.) These actions constitute additional retaliation against Ms. Anderson's protected activities, and I so find and conclude.

Despite the unreasonable restrictions placed upon Ms. Anderson's review of requested documents, she was able to easily locate a number of critical items which had not been disclosed by Metro Wastewater in response to the subpoena served on Steve Frank. (February 5, 2001 Affidavit of Adrienne Anderson, pp. 4-5, pars. 34-36, and attached EXS. 16-19) As the result of the new evidence she discovered through her post-hearing CORA requests, as well as the unreasonable restrictions placed upon her access to documents requested via CORA, Complainant filed additional complaints against Respondent Metro Wastewater Reclamation District on December 15, 2000 and January 5, 2001. These complaints were filed under the Energy Reorganization Act of 1974, 42 U.S.C. 5851; Safe Drinking Water Act, 42 U.S.C. 300j-9(i); Superfund (CERCLA), 42 U.S.C. 9610; Water Pollution Control Act, 33 U.S.C. 1367; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; and Toxic Substances Control Act, 15 U.S.C. 2622.

These additional complaints have now been consolidated with the instant action. The parties engaged in discovery, submitted additional evidence via affidavit and deposition, and have filed supplemental and final reply briefs. To remedy these additional retaliatory actions, Complainant seeks declaratory and affirmative relief, compensatory damages for emotional distress and damage to her reputation, and punitive or exemplary damages.

2. THE UNREASONABLE RESTRICTIONS PLACED ON MS. ANDERSON'S ABILITY TO REVIEW DOCUMENTS REQUESTED UNDER CORA IN DECEMBER 2000 AND JANUARY 2001 CONSTITUTE RETALIATION AGAINST MS. ANDERSON FOR HER PROTECTED ACTIVITIES.

Research and the gathering of evidence in support of a whistleblower complaint is a type of activity that has been held to be covered by the employee protection provisions referenced at 29 C.F.R. §24.1(a). **Melendez v. Exxon Chemicals Americas**, ARB No. 96-051, ALJ No. 1993-ERA-6 (ARB July 14, 2000), **slip op**. at p. 10. Ms. Anderson's December 2000 and January 2001 CORA document requests to Respondent clearly constitute protected activities, and I so find and conclude.

To prevail on a whistleblower complaint, a complainant must establish that the respondent took adverse and discriminatory employment action because she engaged in protected activity. A complainant initially may show that a protected activity likely motivated the adverse action. A complainant meets this burden by proving (1) that she engaged in protected activity, (2) that the respondent was aware of the activity, (3) that she suffered adverse and disparate employment action, and (4) the existence of a causal link or nexus, **e.g.**, that the adverse action followed the protected activity so closely in time as to justify an inference of retaliatory motive. **Jones v. ED&G Defense Materials, Inc.**, 95-CAA-3 (ARB Sept. 29, 1998), slip op. at p. 7, citing **Kahn v. United States Sec'y of Labor**,64 F.3d 261, 277 (7th Cir. 1994).

The restrictions imposed by the Respondent on CORA document requests were imposed by Respondent a mere two weeks after Ms. Anderson's May 1999 document request. Respondent admits that its review of its CORA document production policy occurred in early 1998 - after Ms. Anderson had filed her original complaint against Respondent and had engaged in some CORA document reviews at Metro. (May 3, 2001 Affidavit of Betty Ann Trampe, p. 2,

par. 4.) Respondent further cavalierly admits that its decision to disallow the reproduction of documents by reviewees was "in direct response to" Ms. Anderson's May 1999 records review - and thus was directly motivated by Ms. Anderson's protected activity. (May 3, 2001 Affidavit of Betty Ann Trampe, p. 2, par. 10.) These adverse actions so closely follow Ms. Anderson protected research and evidence gathering activities that a retaliatory motive may be inferred, and I so find and conclude. **Jones v. ED&G Defense Materials, Inc., supra.**

Ms. Anderson has conducted an estimated 30-50 reviews of various municipal, state or federal public records using the Freedom of Information Act, Colorado Open Records Act or parallel acts in other states. She has never before been asked to pay $1.25 per page for copies, or been prohibited from bringing recording devices or computers with her to assist in such review. Metro now charges seven times more for copies of public records than the Colorado Department of Health and Environment, which charges only 18 cents per page. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 28, and attached EX 14)

Metro has offered no rational explanation or justification for this increase in photocopy fees, or for the restriction in availability of records to the only two days of the week Ms. Anderson teaches - Tuesdays and Thursdays. Metro was well aware of Ms. Anderson's teaching schedule at the time it made these changes. (**See** May 25, 2001 Supplemental Affidavit of Adrienne Anderson, page 1, par. 1.) In contrast, the Colorado Health Department provides public access to its records Monday through Friday. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 29, and attached Exhibits 12, 14, 15)

Because of the restrictive schedule set by Metro to review the documents requested by Ms. Anderson, she was forced to arrange for such review immediately after administering an exam in Boulder on Tuesday December 19th. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 31.) In fearful anticipation of what she would discover during this document review, Ms. Anderson developed a severe headache with neck and jaw spasms on the morning of the 19th. She sought treatment for the headache and spasms over the lunch hour, and then proceeded to Metro to conduct the document review. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 32)

Ms. Anderson, upon arriving at Metro, was escorted to a room and was placed under constant personal surveillance while she reviewed the requested documents. Ms. Anderson has never been subjected to such intimidating treatment during any prior document review at any public agency. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 33.) Respondent also admits that its surveillance of Ms. Anderson's review of the requested documents was unique to Ms. Anderson. (Affidavit of Trampe.) Despite this intimidating surveillance, Ms. Anderson was able to easily locate a number of critical items which had not been disclosed by Metro in response to the subpoena served on Steve Frank. (February 5, 2001 Affidavit of Adrienne Anderson, pp. 4-5, pars. 34-36, and attached EXs. 16-19)

Clearly, Ms. Anderson has established a **prima facie** case that these unique and unreasonable restrictions on CORA document requests constituted retaliatory actions intended to impede her future requests for such documents, and I so find and conclude.

3. THE EVIDENCE DISCOVERED BY MS. ANDERSON DEMONSTRATES THE UNRELIABILITY OF STEVE FRANK'S TESTIMONY.

During the November 2000 hearing, in addition to failing to disclose a number of defamatory “e mails” and memoranda which had been subpoenaed, Steve Frank testified under oath that Metro had never hired an outside public relations agent. (Tr. 926, lines 4-6.) Documents subsequently obtained by Ms. Anderson constitute clear evidence to the contrary.

These documents reveal that Mr. Frank had personally arranged for Metro's retention of outside public relations agents from 1997 through 2000. Mr. Frank personally received the public agents' memos and reports on their activities. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 37, and attached EX 21-33.) Mr. Frank also personally received, and authorized payment of, invoices for such public relations agents' services. (February 5, 2001 Affidavit of Adrienne Anderson, p. 4, par. 37, and attached EXs. 34-48.) At the very least, these documents render the testimony of Mr. Frank completely untrustworthy and unreliable, and I so find and conclude.

4. THE UNDISCLOSED E MAILS AND WEF AWARD DOCUMENTS CONSTITUTE ADDITIONAL EVIDENCE OF DEFAMATION AND DAMAGE TO MS. ANDERSON'S REPUTATION WHICH CAUSED MS. ANDERSON

ADDITIONAL EMOTIONAL DISTRESS.

During the course of the hearing held before this Administrative Law Judge in November 2000, Ms. Anderson learned that, in addition to the retaliatory acts about which she originally complained, Metro had "engaged in a behind-the-scenes campaign of defamation to destroy " her "personal credibility and professional reputation. " (**See** February 5, 2001 Affidavit of Adrienne Anderson, par. 15.) As noted above, following this hearing, Ms. Anderson submitted requests for documents under the Colorado Open Records Act.

During a CORA document review on December 19, 2000, Ms. Anderson was able to locate easily a number of defamatory items which had not been disclosed by Metro in response to the subpoena served on Steve Frank. (February 5, 2001 Affidavit of Adrienne Anderson, pp. 4-5, pars. 34-36, and attached EXs. 16-19) One of these items was a June 27, 2000 “e mail” from Steve Frank to Robert Adamski in which Mr. Frank describes Ms. Anderson's term on the Metro Wastewater Board of Directors as "two years wreaking havoc." When asked by Mr. Adamski whether his defamatory remarks concerning Ms. Anderson could be passed on to others, Mr. Frank responded, "Be my guest." (EX 16 to February 5, 2001 Affidavit of Adrienne Anderson, page 1)

In a July 6, 2000 “e mail” to Robert Adamski, Mr. Frank further comments:

> **"Let's face it. There are, I believe, some people who just don't know how to tell the whole truth. And there are others who want to believe people like us and the EPA are lying to them. ..... Who (sic) are you going to trust? If they choose to trust Adrienne Anderson after she has been proven wrong in every instance when her side's information was subjected to a truth test in the courts, I can't help that." (EX 17 to February 5, 2001 Affidavit of Adrienne Anderson)** (Emphasis added)

In an April 6, 1999 letter to the Managing Editor of a Windsor newspaper, **The Fence Post**, Mr. Frank referenced and enclosed the critical column written by the **Denver Post's** Al Knight. (EX 18 to February 5, 2001 Affidavit of Adrienne

Anderson) This column was also sent to the **Commerce City Beacon** by Metro in response to questions from that newspaper about worker health and safety concerns over the Lowry discharge. (February 5, 2001 Affidavit of Adrienne Anderson, par. 62)

On December 21, 1999, Ms. Anderson conducted an additional document review at Metro Wastewater. During this review, she discovered that, contrary to Mr. Frank's testimony during the November 1999 hearing, a major section of the materials submitted for a public relations award involved Metro's smear campaign against Ms. Anderson:

> **"I was astonished and outraged to find that one entire section of the binder was devoted to the Lowry controversy, with references to characterizing me as a dissident board member who has lied about the presence of radioactive material at Lowry. Metro's Steve Frank had submitted this defamation and disinformation campaign against me for a national PR award from this sludge industry promotion group in 1998 while I was still seated on the Metro Board as the workers' representative." (February 5, 2001 Affidavit of Adrienne Anderson, par. 53 and attached EXs. 65, 66)** (Emphasis added)

In his affidavit prepared in response to Ms. Anderson's additional complaints, Mr. Frank cavalierly admits that he placed Ms. Anderson's credibility at issue. (May 14, 2001 Affidavit of Steve Frank, page 4, par. 16.) These common tactics of defamation and character assassination are further illustrated by Mr. Frank's self-described "attack" on Dr. Ron Forthofer, a scientist who also dared to criticize the Lowry wastewater plan. (**See** May 25, 2001 Supplemental Affidavit of Adrienne Anderson, page 16, par. 57 and attached exhibits 117-119)

The discovery of these additional defamatory materials on December 21, 1999 caused Ms. Anderson great emotional distress:

> **"While I attempted to control my personal reactions during the records review at Metro, I could not control my stressreactions when Metro asked that we break for lunch. As I went out to my car in the Metro parking lot, I was overcome with sobs of outrage and disgust, which I expressed in a cell phone call while**

> **still in Metro's parking lot to a friend, who was watching my children ... I went to my friend's home for a sandwich, briefly played with my children, and then drove back to Metro Wastewater to continue the review. I was still so upset over what I had learned during the morning session - that Metro would even lie to a federal judge to cover up what they had done to destroy me professionally - I had to pull over as I neared the plant, and threw up my lunch. After regaining my composure, I continued the review from 1-4 pm, during which time I saw still further upsetting documents. I went home with a severe headache, continued nausea, knots in my stomach, and in a state of disbelief at what I had seen." (February 5, 2001 Affidavit of Adrienne Anderson, p. 8, par. 57)** (Emphasis added)

Ms. Anderson summarized the emotional distress she has suffered as a result of Metro's retaliatory actions against her:

> **"I must acknowledge that I have suffered tremendously from Metro's attacks on me - physically, emotionally, financially and spiritually - with unwarranted distress and disruption to my family, as well. I have suffered severe insomnia, hives, abdominal distress, skin disorders ... and other stress-related physical reactions that have been exacerbated during periods of MRD's heightened attacks, and worsened further in the last two months since learning the scale of Metro's outrageous action, requiring more aggressive treatment." (February 5, 2001 Affidavit of Adrienne Anderson, p. 10 , par. 64)** (Emphasis added)

These undisclosed “e mails” and WEF award documents constitute additional evidence of defamation and damage to Ms. Anderson's reputation justifying an additional award of damages to Ms. Anderson for emotional distress, and I so find and conclude. Ms. Anderson seeks an additional $150,000 in compensatory damages for the additional harm she discovered to her professional reputation from November 2000 though January 2001 - as addressed through her second and third retaliation complaints - and for the resulting extensive emotional distress she has suffered, and continues to suffer to this day as a result of this persistent pattern of retaliatory treatment by the Respondent, especially during the pendency of these

proceedings when the parties usually attempt to preserve the **status quo** until the matter is resolved.

The overwhelming evidence presented in this case establishes that Respondent's five-year history of illegal and retaliatory actions against Adrienne Anderson have adversely impacted her professional reputation and employment, perhaps irreparably. Despite her stellar career as an educator at the University of Colorado at Boulder since 1992 (Anderson Affidavit, EX 1), Ms. Anderson is now unemployed. During her employment with the University of Colorado, Ms. Anderson consistently ranked in the top 5% among faculty for her excellence in teaching and quality of courses offered over the last seven years. (Anderson Affidavit EXs.104-106 and 127) She received a University environmental leadership award in 1999, where the University's President acknowledged her "commitment to excellence in higher education." (Anderson Affidavit EX 127.) Nevertheless, Ms. Anderson's teaching contract, which expired in May 2001, has not been renewed by the University's administration, despite a request for renewal. (Anderson's April 20, 2001 deposition, Tr 4, line 18 - Tr. 6, line 24)

The preponderance of the evidence establishes that Metro's multi-year campaign of defamation and other discriminatory and retaliatory actions have caused extensive damage to Ms. Anderson's reputation and professional life, and future potential employment. Metro openly waged its illegal and discriminatory adverse actions in public during board meetings (often attended by public officials, members of the media, **etc**.) (**See** Anderson Affidavit EX 90), and secretly waged a defamation campaign based on false information behind-the-scenes to state legislators (CX 104), the media (Anderson Affidavit EX 69, Steve Frank's April 6, 1999 letter to **The Fence Post** publication), state regulators and others in Colorado and around the nation.

Metro hired outside PR agents for its Lowry damage control campaign, despite a published history of surreptitious actions (Anderson Affidavit EX 50-51) by these same firms and agents on behalf of various Lowry polluters to undermine Anderson's employment and thwart her public disclosures of their illegal activity. Metro also set up third party agents, including columnist Al Knight, to puppet their opinions for recirculation and republication to Metro's employees, media interested in the Lowry matter (Anderson Affidavit, ¶ 62) and others. That Metro's motive was to destroy Anderson's career for her protected

activities is apparent in Steve Frank's chummy “e-mail” to Al Knight, who showed his close personal familiarity with Knight by informally addressing him as "Dear Al," and closing with "Hope you're well." In the “e-mail”, Frank offers up damaging information suggesting Anderson's job was at risk, in clear hopes it would be published to discredit Anderson (CX 103) for Metro's purposes of retaliation and to blunt the impact of Anderson's public disclosures about their Lowry agreement and subsequent discharge permit.

In **Van Der Meer v. Western Kentucky University**, ARB Case No. 97-078, ALJ Case No. 95-ERA-38 (ARB Dec. Apr. 20, 1998), the complainant suffered little out-of-pocket loss, lost no salary, and other losses were non-quantifiable. The complainant was awarded, however, $40,000 in compensatory damages because the respondent took extraordinary and very public action against the complainant which surely had a negative impact on complainant's reputation among the students, faculty and staff at the school, and more generally in the local community; complainant was subjected to additional stress by the respondent's actions, and complainant testified that he felt humiliated. The ARB approved the award to Van der Meer of $40,000 because he suffered public humiliation and the respondent made a statement to a local newspaper questioning Van der Meer's mental competence.

In this case, Anderson has clearly suffered damages to her professional reputation spanning at least a five year period and such retaliation continues to this date. During that time, she was subjected to virtually monthly public humiliation in board and committee meetings for the two years that Anderson served on Respondent's Board from 1996 through 1998 in front of other professionals, news reporters and others in the community where Anderson lives and in which she works. Additional damages have been suffered from Metro's widely distributed false information about Anderson and her professional career history to parties she has never met. Metro has made remarks questioning Anderson's mental competence and honesty and has maligned her entire professional credibility and history, and I so find and conclude.

A compensable injury may be "intangible" and "need not be financial or physical." **Stallworth v. Shuler**, 777 F.2d 1431, 1435 (11th Cir. 1985). In **Doyle v. Hydro Nuclear Services**, ARB Nos. 99-041, 99-042, and 00-012, ALJ No. 1989-ERA-22 (ARB May 17, 2000), the ARB approved an award to that complainant of

additional compensatory damages for the harm he suffered during the several years of a remand proceeding following an earlier order awarding damages. Comparing the circumstances of Complainant's situation with a similar situation in **Leveille v. New York Air National Guard**, ARB No. 98-079, ALJ Nos. 1994-TSC-3 and 4 (ARB Oct. 25, 1999), the ARB awarded an additional $40,000, that when combined with the earlier ordered damages totaled $80,000 in compensatory damages. Ms. Anderson similarly seeks an additional award of compensatory damages, for damage to her reputation and emotional distress she has suffered as a result of Metro's retaliatory actions.

A total award of $150,000 for emotional distress has been upheld as not excessive. **Moody v. Pepsi-Cola**, 915 F.2d 201 (6th Cir. 1990). An award of $350,000 for mental anguish in a discrimination case has been similarly upheld. **Lilley v. BTM Corp.**, 958 F.2d 746, 754 (6th Cir. 1992). The nature, scale and clear malicious intent evident in the undisclosed, defamatory “e-mails” and WEF PR Award documents provided in support of Anderson's second and third complaints for retaliation constitute additional evidence of damage to Ms. Anderson's reputation. This damage to Ms. Anderson's reputation, and the additional emotional distress she suffered as a result, warrant an additional award of compensatory damages in the supplemental amount requested of $150,000, according to Complainant.

5. AFFIRMATIVE RELIEF IS ESSENTIAL TO REMEDY THE WIDESPREAD DEFAMATION AND DAMAGE CAUSED BY METRO TO MS. ANDERSON'S REPUTATION.

To remedy defamatory statements concerning whistleblowers, employers have been ordered to issue public retractions of statements adverse to complainants, which had been released to the news media. **See** e.g. **Simmons v. Florida Power Corp.**, 81-ERA-28/29, R. D&O of ALJ at 20 (December 13, 1989). Ms. Anderson similarly seeks a public apology, and a promise not to retaliate against her or others in the future for engaging in protected activity, to be published in the **Denver Post**, to be posted at all company bulletin boards at the Metro Wastewater facility, and to be circulated via the internet to all contacts identified in Steve Frank's derogatory “e mails.”

Specifically, Ms. Anderson seeks a Cease and Desist Order

prohibiting Metro's Board, employees, agents or contractors from distributing any Al Knight column (past or future) containing her name or referring to her in any way, or engaging in any future actions to malign Adrienne Anderson in any way to anyone, and I find and conclude that such relief is reasonable and necessary herein to remedy the wrong done to Complainant.

In **Van Der Meer v. Western Kentucky University**, 95-ERA-38 (ARB April 8, 1997), the ALJ found in favor of the complainant and recommended various forms of affirmative relief, including expungement of any reference to the adverse action against the complainant from all University files, and posting of the ALJ's recommended decision and order on all appropriate bulletin boards for a period of not less than sixty (60) days. In the instant case, Ms. Anderson has suffered a much more widespread and egregious campaign of defamation. She requests a similar order for affirmative relief to remedy the damage to her reputation she has suffered as the result of Respondent's concerted campaign of defamation, and I find and conclude that such relief is also reasonable and necessary herein.

6. THE ARROGANT AND CAVALIER TREATMENT OF MS. ANDERSON'S CORA REQUESTS, AS WELL AS THE EGREGIOUS DISSEMINATION OF DEROGATORY INFORMATION CONCERNING MS. ANDERSON, BY METRO ENTITLES HER NOT ONLY TO COMPENSATORY, BUT ALSO TO PUNITIVE DAMAGES.

Two of the environmental statutes under which Ms. Anderson's additional complaints arise - the Toxic Substances Act, 15 U.S.C. §2622(b), and the Safe Drinking Water Act, 42 U.S.C. §300j-9(i)(2)(B)(ii) - explicitly permit "where appropriate, exemplary damages." Punitive damages may be awarded to punish "unlawful conduct" and to deter its "repetition." **BMW v. Gore**, 517 U.S. 559, 568 (1996). The Secretary of Labor has held that exemplary damages are appropriate under certain environmental whistleblower statutes in order to punish an employee for wanton or reckless conduct and to deter such conduct in the future. **Johnson v. Old Dominion Security**, 86-CAA-3/4/5, (Sec'y May 29, 1991). The Secretary explained:

"The threshold inquiry centers on the wrongdoer's state of mind: did the wrongdoer demonstrate reckless or callous indifference to the legally protected rights of others, and did the wrongdoer engage in conscious action in deliberate disregard of those

rights? The 'state of mind' thus is comprised both of intent and the resolve actually to take action to effect harm. If this state of mind is present, the inquiry proceeds to whether an award is necessary for deterrence." **Id**. at 29, citing the Restatement (Second) of Torts, §908 (1979). **Accord, Pogue v. United States Dept. of the Navy**, 87-ERA-21, (**D&O on Remand Sec'y** April 14, 1994).

An award of punitive damages is appropriate where "the defendant's conduct is shown to be motivated by evil motive or intent, or when it involves reckless or callous indifference to the federally protected rights of others." **Smith v. Wade**, 461 U.S. 30, 56 (1983). Once the requisite state of mind has been found, the "trier of fact has the discretion to determine whether punitive damages are necessary, 'to punish [the defendant] for his outrageous conduct and to deter him and others like him from similar conduct in the future.'" **Rowlett v. Anheuser-Busch, Inc.**, 832 F.2d 194, 205 (1st Cir. 1987). The appropriate standard to use in determining the amount of exemplary damages is the amount necessary to punish and deter the reprehensible conduct. **CEH, Inc. v. F/V Seafarer**, 70 F.3d 694, 705-6 (1st Cir. 1995); **Ruud v. Westinghouse Hanford Co**., 88-ERA-33 (ALJ Mar. 15, 1996).

Here, the nature and scale of Respondent's outrageous actions against Anderson and before this Court - as evidenced by documents obtained by Anderson under unduly stressful conditions, previously withheld illegally from her and this Court during the November 2000 hearing - shocks the conscience:

* Charging her more than 5 times the cost to obtain public records after May 1999 than she had paid previously, restricting her access for records' review at Metro to the very days Metro's management and key board members know she normally teaches in Boulder. (Anderson Affidavit par. 26-30; Supplemental Affidavit of Adrienne Anderson, par. 1; and compare CX 74 to Anderson Affidavit EX 11)

* Failing to provide several e-mails in response to the subpoena which bolstered Anderson's claims of retaliation and defamation. (Anderson Affidavit par. 34-36, and attached EXS 16-19)

* Steve Frank's denial that Metro had retained outside PR agents; and when found to have made false statements under oath,

strained the bounds of credulity by claiming that the PR agent's work had nothing to do with Lowry, and I so find and conclude. (Anderson Affidavit, par. 37-40 and attached EXs. 21-48; Frank Affidavit at par. 10; Anderson Supplemental Affidavit, pars. 36 and 42, and exhibits cited therein)

* WEF's PR award, in which Metro submitted its hostile campaign against Ms. Anderson in support of a national award by this lobbying group while Ms. Anderson was still a sitting board member. After Ms. Anderson was removed from the Board, Frank enjoyed a trip to Orlando, Florida, where he was presented with a "Public Education" award for his outrageous actions. (Anderson EX 67)

* Metro management showing that it not only condoned Steve Frank's defamatory campaign against Anderson, but applauded his receiving an award for it by commenting "Way to go, Steve!" and publicizing it to all employees through the agency's internal newsletter. The endorsement of Frank's activities by management is further evidenced by Frank's statement: "I consider this to be the District's award, and I thank everyone here for their efforts." (Anderson Affidavit, par. 55 and EX 67)

* Attempting to further isolate Anderson by defaming those who have supported her in seeking remedy to reverse the Lowry discharge permit. In one outrageous example, Steve Frank associates a Boulder scientist and Congressional candidate urging caution over Metro's Lowry discharge plan as a "Nazi propagandist" in a communication to his boss, Steve Pearlman. Mr. Pearlman's tolerance for such outrageous behavior by his underling against citizen critics of Metro's permit for Lowry is apparent, as Steve Frank continues to be employed by this agency to date. (Anderson Supplemental Affidavit, EXS 117-119)

* Claiming that Anderson was "living a life as a double agent" (Metro's Response to Complainant's Post-Hearing Brief, p. 23, lines 5-6), without evidence and in the face of incontrovertible evidence that Anderson's actions on behalf of the workers have been consistently above board and known to Metro from the beginning and throughout Anderson's board tenure and to the present, and I so find and conclude. (Anderson Supplemental Affidavit EX 90 and 113; Anderson Affidavit EX 72)

The record is replete with evidence of outrageous, hostile, disparate, discriminatory and egregious behavior by Metro

against Ms. Anderson, with continuing and even escalating retaliation and other violations of law while on express notice of the illegality of their actions, especially after the filing of the May 2, 1997 complaint herein and the ARB's decision. Such clear evidence of defamatory and discriminatory conduct, and Respondent's evident cavalier attitude towards its conduct, justifies an award of exemplary damages, and I so find and conclude.

Contrary to Respondent's arguments, Complainant's protected activities were undertaken pursuant to the requests of the employees of Metro, thereby affording Complainant the protection of the federal whistleblower statutes that she cited in her second and third complaints. In this regard, **see Goldstein v. Ebasco Constructors, Inc.,** 86-ERA-36 (Sec'y, April 7, 1992). **Accord, Passaic Valley Sewerage Commissioners v. Department of Labor**, 992 F.2d 474, 479 (3d Cir. 1993).

In addition to this Congressional intent, the Department of Labor has administered and interpreted all seven environmental whistleblower laws through a single uniform body of law and regulation, 29 C.F.R. Part 24. The overwhelming conclusion is that the language of the various whistleblower statutes concerning "employees" must be interpreted consistently with this uniform intent and implementation.

Because the other whistleblower statutes provide that claims may be made by "authorized representatives," the language of SDWA, 42 U.S.C. §300j-9(i)(l); CAA, 42 U.S.C. §7622(a); TSCA, 15 U.S.C. §2622(a); and the ERA, 42 U.S.C. §5851(a)(1) which address "any person acting pursuant to a request of the employee" should be interpreted to allow claims made by employee representatives. Such an interpretation is entirely consistent with Congressional intent, legislative history and the implementing regulations, and I so find and conclude.

As a result of the hearing on the original complaint, I have already found and concluded that Ms. Anderson presented a **prima facie** case that she was an authorized representative of workers employed at Metro Wastewater. Respondent now argues that Ms. Anderson does not have standing to file her second and third complaints, citing the PACE Union's decertification in December 2000. Of course, this decertification occurred well after the majority of Ms. Anderson's protected activities occurred. Clearly, the December 2000 decertification is

irrelevant to the issue of standing, and I so find and conclude.

In addition to requests by the employees' union, several lab workers personally regard Ms. Anderson as their representative, including Mr. Goddard (EX 72) and Melissa Reyes (EX 63, and pictured in EX 67). Former Metro employee Tony Broncucia testified that he approached Ms. Anderson because he was "concerned for the workers and the health risks going on." (TR 821, lines 10-11.) Former Metro employee Delwin Andrews contacted Ms. Anderson in May or June 1997 and asked for her assistance in getting his job back because he "knew that she represented the workers on the Board at Metro." (TR 234, lines 5-17.) He heard from other Metro employees "that she was representing the employees ... on the Metro Board." (TR 235, lines 3-4.) Decertification of the PACE union cannot possibly served to nullify such individual employees' requests for assistance. Certainly no requirement exists in the federal whistleblower laws that workers must remain unionized in order to ask someone to represent them on issues of environmental concern and public safety, and I so find and conclude.

The ARB's ruling in the instant case concerning the issue of an "authorized representative" clearly indicates that this term "encompasses any person requested by any employee or group of employees to speak or act for the employee or group of employees in matters within the coverage of the environmental whistleblower statutes." (March 30, 2000 Decision and Remand Order, ARB Case No. 98-087, pp. 7-8.) In its original brief in support of its motion for summary judgment, Respondent conceded that, if Ms. Anderson is found to be an "authorized representative" of employees under the other whistleblower statutes under which she has filed, she is also a "person acting pursuant to a request of the employee" under the ERA. (Respondent's Brief, p. 3.) Because Ms. Anderson has readily established a **prima facie** case that she was an "authorized representative" of Respondent's employees, she clearly has standing to pursue her second and third complaints under the SDWA, 42 U.S.C. §300j-9(i)(l); CAA, 42 U.S.C. §7622(a); TSCA, 15 U.S.C. §2622(a); and the ERA, 42 U.S.C. §5851(a)(1).

Moreover, Complainant’s second and third complaints are timely.

Contrary to Respondent's arguments, Ms. Anderson's second complaint was primarily prompted by the testimony of Ted

Hackworth on November 16, 2000. On November 16, 2000, Ted Hackworth testified that other Board members complained to him about Ms. Anderson and the concerns she raised. He testified that other Board members said "we should never have let her on this board." (TR 1453, lines 10-15.) He also cavalierly admitted that he hoped that Ms. Anderson would not be reappointed to the Board, and communicated this hope to a member of the Mayor's staff. (TR 1454, lines 13-23)

Ms. Anderson timely filed her second complaint within 30 days of Mr. Hackworth's testimony - on or about December 15, 2000. Therefore, this complaint is timely. Likewise, the third complaint is also timely with reference to the disparate treatment that prompted that complaint.

Moreover, that Complainant may be a public figure is irrelevant and constitutes no defense to her whistleblower complaint. Respondent cannot use a claim of public status as a shield of immunity against responsibility for its public defamation and humiliation of Ms. Anderson. Even if Ms. Anderson should be declared in another forum a public figure, such public status would not excuse Respondent's campaign of retaliation for which it is liable under the federal whistleblower statutes.

C. RELIEF ORDERED

Accordingly, in view of the foregoing Findings of Fact and Conclusions of Law and keeping in mind the continuing egregious, disparate and discriminatory treatment of the Complainant by the Respondent, especially the events after completion of the formal hearings on November 16, 2000, and while the initial complaint was under advisement by this Administrative Law Judge, I find and conclude that the Complainant is entitled to the following relief and that such relief is reasonable and necessary to remedy the wrongs done to Complainant by Respondent through its agents, representatives and employees:

1. The Respondent shall immediately expunge and delete from Complainant’s personnel file any and all negative references, including deletion of that highly threatening letter from Respondent to the Complainant.

2. The Respondent shall pay to Complainant the amount of $150,000.00 as compensatory damages for the injury to her professional reputation and loss of future income caused by the

Respondent's continuing egregious, disparate and discriminatory treatment.

3. The Respondent shall also pay to the Complainant the amount of $150,000.00 as exemplary or punitive damages because of the Respondent's willful, wanton and reckless conduct, and to serve as a deterrent to Respondent and others in the future.

4. The Respondent shall also pay to the Complainant the amount of $125,000.00 for the mental anguish, emotional distress and severe depression caused by Respondent's continued egregious, discriminatory and disparate retaliation against Complainant for the past five years at least.

5. The amounts awarded herein shall be paid to the Complainant within twenty (20) days of issuance of this decision and interest on any unpaid amounts thereafter shall be subject to interest at the appropriate rate specified in 26 U.S.C. § 6621 (1988). In this regard, **see Van Beck v. Daniel Construction Co.,** 86-ERA-26 (Sec'y Aug. 3, 1993).

6. The Respondent shall immediately cease and desist from retaliating against the Complainant and its other employees because of their protected activity.

7. The Respondent shall also provide a copy of this **ORDER** without comment, via first class mail, to each of the following within 14 days of the date of the ruling:

* All Metro board members serving at any time from June 1, 1996 to the present;

* Mayors of all Metro member municipalities;

* All county commissioners in Adams, Arapahoe, Elbert and Jefferson Counties;

* All members of the Denver City Council;

* Metro's entire list of print and electronic media contacts in Colorado, including eastern Colorado rural publications (**I-70 Scout** and **Fence Post**), the **Colorado Daily, Boulder Weekly, Westword, Denver Post/Rocky Mountain News, Colorado Labor Advocate**, KOA Radio, TV Channels 2,4,6,9, 12 and 31;

* The Colorado Governor, all Colorado state legislators, and

the Colorado U.S. Congressional and Senate Delegation;

* Al Knight and each of the editorial board members of the **Denver Post**;

* Metro's mailing list receiving the "Dear Neighbor" letter;

* The Water Environment Federation;

* EPA Administrator Christie Whitman, Region VIII Acting Administrator Jack McGraw and National Ombudsman, Robert J. Martin;

* Colorado Department of Public Health and Environment Director Jane Norton;

* Editor, **Christian Science Monitor**;

* Lou Dobbs, CNN's "Money Line";

* The Water Environment Federation's Executive Director, Public Relations Director Nancy Blatt, and all members of the Board of Directors;

* President Elizabeth Hoffman and all the Regents of the University of Colorado at Boulder;

* Colorado AFL-CIO;

* PACE 5-477; and

* Operating Engineers Union Local 1.

8. The Respondent shall also provide, by notarized statement, a complete listing to Adrienne Anderson, through her attorney, by certified mail, of all individuals receiving the above, and certifying the date upon which they were sent, and identifying the party complying with this requirement.

9. The Respondent shall also provide a copy of the Order, via electronic mail, to each of the following within 14 days of the date of this **ORDER**.

* Metro's District Post Office for all employees, with a "cc"

to Adrienne Anderson at the e-mail andersa@mho.com; and

* All recipients of any e-mail of Steve Frank's marked as an exhibit in this case, with a "cc" to Anderson.

10. The Respondent shall also prominently post the **ORDER** in all common areas in buildings frequented by Metro employees, and post it on all bulletin boards for 90 days, within 14 days of the date of the **Order**, along with a notice of employees' protected rights to speak about worker safety concerns without fear of reprisal or retaliation.

11. The Respondent shall also, within 14 days of this **ORDER,** take out a full page paid ad in the news section of the **Denver Post**, for publication in its Sunday edition, issuing a letter of apology to Adrienne Anderson for its illegal and retaliatory acts on behalf of workers' safety and health concerns over the Lowry Landfill Superfund Site discharge permit, which includes plutonium and other radioactive material, co-signed by Metro Manager Robert Hite, Chairman of the Board Richard Walker, and Ted Hackworth, Chairman of the Operations Committee, with the content provided to Anderson's counsel for approval thereof prior to publication, and also stating that Metro will not continue discriminatory and illegal actions against workers or their representatives for having engaged in protected activity, and referring readers to the DOL
website where readers may read the entire decision.

12. The Respondent, within fourteen (14) days of this **ORDER,** shall prominently post the **Order** and letter of apology to Anderson on Metro's website at www.metrowastewater.com under both the "New" and "Hot Topics" sections to appear consecutively for the following 120 days.

13. Complainant’s attorney, within thirty (30) days of receipt of this decision, shall file a fully itemized fee petition relating to the legal services rendered and litigation costs incurred in her representation of Complainant herein. A copy of the petition must be sent to Respondent’s counsel who shall then have fourteen (14) days to comment thereon. Complainant’s counsel shall then have ten (10) days to file a response.

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DAVID W. DI NARDI

DISTRICT CHIEF JUDGE

Boston, MA
DWD:dr