

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE REVIEW BOARD

DAVID L. LEWIS,	)	
	)	
Complainant,	)	
	)	ARB Case No. 04-117
v.	)	
	)	ALJ Case Nos. 2003-CAA-6
ENVIRONMENTAL PROTECTION	)	2003-CAA-5
AGENCY,	)	
	)	Date: October 15, 2004
Respondent.	)	
	)	

**COMPLAINANT'S EXCEPTIONS TO THE FACTUAL FINDINGS OF THE ALJ**

In accordance with 5 U.S.C. 557(2), Complainant Dr. David Lewis hereby submits his "exceptions" to the factual findings set forth in the Recommended Decision and Order (RDO) issued by the Administrative Law Judge (ALJ) in this matter. For the convenience of the ARB, the following is an index to the contents of this brief:

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Also, Appendix A, "Instances of Hostile Work Environment by the EPA," is provided to help guide the ARB to portions of the record regarding the extensive evidence of Dr. Lewis' hostile work environment, which the RDO failed to address or cite to.

Flawed Scientific Peer-Review

1. The ALJ correctly cited to the misconduct of John Walker in holding that the peer review was "flawed." However, he failed to cite to numerous other aspects of the review process that rendered the entire process improper, discriminatory based on Dr. Lewis's protected activities, and highly damaging to his reputation and career. The following material "flaws" existed with the peer review process, but were not cited to by the ALJ when he evaluated the merits of the peer review comments:

- To begin with, the very recommendation that a formal peer review be conducted on Dr. Lewis's article was flawed. The EPA only ordered this formal internal peer review, which is rarely ever conducted on a scholarly article submitted to a reputable scientific journal for independent review (CX 145, p. 54), after Dr. Smith identified his concerns about Dr. Lewis being a

whistleblower (TR 1226-27; TR 1288; TR 1273).  
Based on Dr. Smith's concerns, which directly related to the fact that Dr. Lewis had engaged in protected activity, EPA ordered the formal peer-review at issue in this case (TR 1273; TR 1288). However, under the formal peer-review rules, the fact that an article may be controversial actually counsels *against* EPA conducting an internal review (TR 1287).

- Dr. Smith and the EPA violated numerous mandatory conflict of interest requirements designed to ensure public release of information about the quality of a scientist's work would be fair, accurate, objective, and unbiased. These violations not only included the inclusion of Dr. Walker in the peer review, but also included the participation of the other reviewers. The individuals selected for the Lewis peer review were appointed and approved in violation of the most basic EPA rules regarding conflicts of interest and the requirement that peer reviewers "represent a balanced range of technically legitimate points of view" (CX 145, pp. 68, 70). EPA also requires that peer-review coordinators,

such as Dr. Smith, avoid "experts who have made public pronouncements on an issue (e.g., those who have clearly 'taken sides')" (CX 145, p. 70). Not only was the selection of Dr. Walker improper because of his involvement with, and outspoken public support for, the 503 Rule (TR 1121), but EPA's appointment of each of the other reviewers (Robert Bastian, Robert Brobst) was also improper for the same reasons (TR 1118; TR 1121). "EPA should always make every effort to use peer reviewers who do not have any real or perceived bias or conflict of interest and who are completely independent" (CX 145, p. 67)

- Dr. Smith, the Peer Review Leader, recognized that when a formal peer review is conducted, certain forms and procedures need to be followed. (TR 1274). He also admitted that the peer review policy regards the selection of independent peer reviewers as "crucial to an effective peer review" (TR 1281; CX 145, p. 67).
- "Before finalizing the selection of reviewers, the Peer Review Leader should ascertain whether each potential peer reviewer's involvement in certain activities could pose a conflict of

interest ("COI") or create the appearance that the peer reviewer lacks impartiality" (CX 145, p. 71). The Peer Review Leader must use the Peer Review Conflict of Interest Inquiry form in evaluating COI for each reviewer (CX 145, p. 159). In evaluating COI, the Leader must address the following potential COIS: 1) employment, 2) personal benefits; 3) previous involvement with the issue; and 4) financial interests. (CX 145, pp. 71, 159). A conflict of interest arises when "the significance of their principal area of work might be affected by the outcome of the peer review" (CX 145, p. 70). "The Peer Review Leader needs to ensure that the peer review COI inquiry took place and this appears in the peer review record" (CX 145, pp. 72, 88). Dr. Smith admitted that peer review procedures, including performing conflict-of-interest evaluations and keeping a record of the evaluations in the formal peer review record, were not followed in the peer review performed on Dr. Lewis' article. (TR 1286). EPA policy requires that the Peer Reviewer Leader evaluate credibility of the peer-review comments: "The validity and objectivity of

the comments need to be evaluated." CX 145, p. 86.

- The selection of Bastian for the peer review was improper and in violation of the peer review rules. Since the 1970's, Bastian was a key Office of Water official involved with the development of EPA's sludge regulations criticized in Dr. Lewis' scholarly paper; and he was a promoter of the regulations (TR 1118; TR 1223-24).
- Bastian was also a participant in the grant making process for the National Biosolids Acceptance Campaign, which funded a public relations effort attempting to convince the public that sludge was safe. Tr. 825; CX 129, p. 21.
- The selection of Brobst was in violation of the peer review rules. Brobst was EPA's Regional Coordinator for its biosolids programs (TR 1224). Both Bastian and Brobst were assigned by EPA to work with the City of Augusta, Georgia - the defendant in a lawsuit in which Dr. Lewis was providing expert testimony as a private citizen against the EPA (TR 1042-44; TR 1152-53). They

were also members of EPA's "swat team" for investigating allegations of land applied sewage sludge harming public health or the environment, and both publicly supported the 503 Rule (TR 1042; TR 1121). EPA policy prohibits individuals from serving as peer-reviewers when their principal area of work could be affected by the outcome of the peer-review (CX 145, p. 70).

Walker, who worked closely with Bastian and Brobst, funded the Water Environment Federation to dispel allegations of adverse effects from exposure to sewage sludge, such as those made in Dr. Lewis' article, because they are "an important weapon of groups that are opposed to the use of biosolids" and stand in the way of public acceptance of EPA's policies (CX 129, p. 61). Moreover, Brobst, according to internal EPA documents, was biased in favor of the City of Augusta and against the plaintiffs' attorney who was relying on Dr. Lewis (CX 115, p.1).

- The peer review panel was not balanced. Dr. Smith, who expressed his concerns about Dr. Lewis' whistleblowing to his supervisors, chose not to include even one individual on his panel

who was supportive of the types of scientific concerns raised by Dr. Lewis. This violated the peer review rules regarding the composition of a peer review panel. A review panel should be "balanced" to allow "all views to be expressed and discussed" (CX 145, p. 70). Dr. Smith admitted that "[a] clear peer review process was not followed, and no attempt was made to make sure all disciplines were represented in doing that review." (TR 1287).

2. The ALJ failed to discuss the public nature of the formal peer review process that EPA instructed Dr. James Smith to carry out. That review process created a highly biased and extremely damaging analysis of Dr. Lewis' work for public viewing (CX 145, p. 87). While the RDO cited to parts of the record dealing with how Synagro and/or the Water Environment Federation may have obtained access to the contents of the flawed peer review for public distribution (RDO,p.38), his discussion completely missed the point. The EPA peer review process is in and of itself expressly a *public process* (CX 145, p.89). Unlike informal comments from scientists' peers, formal peer review comments become part of an official permanent record concerning the quality and accuracy of a



scientist's work, which is open to public inspection. EPA's peer-review rules are designed to ensure objectivity and balance whenever the Agency uses this process to formally evaluate a scientist and his or her work for the public. Gross failure to follow the Agency's peer-review rules, as happened in Dr. Lewis' case, creates a permanent, false, misleading, and extremely damaging public record, which can severely impact his reputation and career.

3. Dr. Smith's failure to assemble a fair and balanced panel of reviewers resulted when NERL Director Gary Foley and Deputy Director Jewel Morris instructed Dr. Lewis' Research Director (Holm) on June 14, 2001 to have his paper reviewed by the Office of Water (the program office that promulgated the regulation criticized in his paper (CX 86)).<sup>1</sup> Holm testified that this was the first time to his knowledge that NERL ever required an article which would be submitted to an independent, peer-reviewed

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<sup>1</sup> The ALJ inferred that Dr. Lewis initiated the peer-review process prior to Morris' directive when he asked Smith for his informal comments on May 31, 2001 (RDO, p. 20, CX 84). Smith understood that Dr. Lewis did not want others to review it (TR 1231, 1233). According to EPA policy, this informal process, called "peer input," is not the same as "Peer Review" (CX 145 p. 24), and is not part of the public peer-review record (CX 145, p. 60). Smith testified that he did not decide to let others see the paper until his supervisors instructed him to conduct a formal Peer Review and Holm, after receiving the Foley/Morris directive, told him to have the paper peer reviewed (TR 1231-34).

journal also be reviewed by a program office, and NERL policy did not require such a review (TR 633-34).

4. Walker, (primarily because he lacked competence in microbiology - TR 1135-36), asked Pat Millner at USDA to provide him with technical comments concerning Dr. Lewis' paper, which Walker then submitted essentially verbatim as his peer-review (without identifying Millner as the source). The RDO relied on Millner's comments, concluding that there was no reason to believe she was in any way prejudiced against Dr. Lewis (RDO p. 57, para. 3). Millner, however, was anything but an independent, unbiased reviewer. She was Walker's co-researcher (TR 760-61) whom he funded through interagency grants (TR 1106). In fact, she had done a lot of work for Walker over the years (TR 1113) and was being funded by him specifically to conduct research on issues raised by Dr. Lewis (TR 1106-07). Because individuals financially tied to EPA cannot be considered objective and unbiased, EPA's peer-review policy requires that experts be avoided when there is "a Federal grant or contract to the potential peer reviewer or his/her employer that relates to the matter under review" (CX 145, p.72). Similarly, when Morris was questioned, she testified as follows:

Q When EPA conducts a review of its own of

publications, are you aware of anything to do with conflicts of interest?

A Yes, I am.

Q And what are the conflict of interest rules?

A Basically what it means is if you're doing business with EPA ... you should not be one of our peer reviewers (TR 1005).

Walker had already asked a regulated party (Synagro) to help with his peer-review (CX 106, CX 107, which is a violation of peer-review rules. "Peer reviewers should maintain the confidentiality of the product" (CX 145, p. 34). Furthermore, "when experts have a material stake in the outcome of the peer review (such as a regulated party). . . those experts' reviews may not qualify as unbiased" CX 145, p. 24). It is highly unlikely that, in choosing Millner to help as well, Walker selected someone with an unbiased view of Complainant and his work.

5. EPA's failure to have Millner respond to conflict of interest questions as required of all peer-reviewers, and to independently screen her as a potential participant in the peer review process, mandates that the ALJ not use her informal review for deciding the merits of Dr. Lewis' work - regardless of whether Walker acted improperly by asking her to conduct a review (CX 145, pp. 71, 72, 88

159).

6. Finally, there is nothing on the record to suggest that Millner actually performed a formal peer review of Dr. Lewis' article. Millner's evaluation was not completed on an official peer review analysis form, and nothing in the record even suggests that Millner understood that her comments would become part of a public peer-review record. Her comments simply constituted informal peer input, which EPA is supposed to exclude from the official peer-review public record (CX 145, p. 60). Any opinion as to what Millner would have said concerning Dr. Lewis' work had she understood that her comments were part of a formal peer review process is strictly speculation.
7. The RDO concluded that Complainant presented no evidence of tangible job consequence from the flawed peer-review (RDO p. 57, para. 3). However, the peer review comments became official agency records and were subject to release to members of the public (CX 145, pp. 87, 89). Because peer review is the process by which a scientist's work is formally recognized as accepted or rejected by the scientific community, evaluations are extremely important and have a significant impact on a scientist's career and employment.
8. The RDO erroneously stated that Complainant admits

*Lancet's* rejection was not impacted by EPA's flawed peer-review (RDO p. 57, para. 3). To the contrary, Complainant testified, without contradiction, that he and his co-authors discussed the fact that Walker was talking with Synagro about the paper and what had happened with the flawed peer-review process at EPA (TR 241-243).

Complainant explained the concern that once the contents of a paper become disseminated or publicly attacked prior to publication, scientific journals would not consider the paper for publication. Therefore, the authors collectively decided to shrink the paper down to a short article and submit it to an online publication for rapid publication, rather than revise it and resubmit it to *Lancet* (TR 242). Nevertheless, the RDO rejected Complainant's contention that the flawed peer-review had anything to do with his submitting the paper to an online journal. The RDO based this conclusion on the fact that Complainant was already concerned about public dissemination of the paper when he asked for an expedited internal EPA review (TR 318-21) and disseminated the paper himself to Simms, Harrison, the NAS panel, and a CDC scientist without marking the paper "confidential." Also, he had turned it over to Synagro in discovery. The ALJ ignored the fact that the scientific community has

certain standards concerning unpublished manuscripts in that they forbid sharing them with people who have conflicts of interest (TR 324 325). He did not normally mark papers "confidential" and only did so when sending it to Smith because he feared that, from there, it may be inappropriately distributed (i.e., fall into the hands of someone such as Walker) (TR 326). Those fears proved to be justified. There was no need for Complainant to fear that the paper would be inappropriately disseminated by Simms, the record keeper at EPA-Athens, or Harrison at the National Academy of Sciences, or the CDC. The ALJ noted that Complainant turned the paper over in discovery in the *Marshall* case on June 4, 2001 (TR 319, RX 196) under a protective order prohibiting Synagro from distributing it. He also pointed out that Complainant was concerned about public dissemination of the paper by Synagro when he submitted it for clearance to his immediate supervisor (Stancil) on May 1, 2001 (TR 318, RX 73). He failed to acknowledge, however, that when Complainant and his co-authors discussed whether to revise the paper with additional data and resubmit to *Lancet*, Complainant had learned that Walker had discussed the paper with Synagro to get their input into the (flawed) peer-review on in July 2001 (CX 81, p. 6; CX

106, CX 107) and that Walker's peer-review was being publicly distributed by Synagro and the Water Environment Federation (CX 12, CX 102). Whatever potential fears Complainant had about Synagro inappropriately disseminating the content of the paper when he first submitted it for EPA clearance surely paled in comparison with what Complainant feared after Morris required that OW review the paper and Walker involved Synagro in the peer-review process. It is not surprising at all that, considering what had developed with Synagro as a result of EPA's flawed peer review, the authors decided it would be best to submit a shortened version of the *Lancet* paper for rapid publication in a less-prestigious online journal (*BMC-Public Health* CX 110) rather than waiting to get additional data and resubmit it to *Lancet*.

Complainant's Science was "Significantly flawed"

9. The RDO issued a finding regarding the technical merits of Complainant's scientific research regarding whether EPA's 503 Sludge Rule adequately protects public health. To do so, he chose to selectively base his finding on negative comments from highly prejudicial individuals involved in promulgating and promoting the Rule, while disregarding supportive comments from scientists who were

favorable toward Complainant's research. To bolster this finding, the ALJ pointed out that *Lancet* "refused to publish" his Adverse Interactions paper and questioned, based on his own understanding of the science of epidemiology, Complainant's testimony that *Lancet* may have accepted his revised Adverse Interactions paper, which was accepted by another medical journal (*BMC-Public Health*) (RDO, p. 26, para. 3; p. 38, para. 2).

10. Specifically, the RDO concluded that Dr. Lewis may be right that land applied sewage sludge presents a significant threat to public health, "But, as the peer-reviews indicate, he has not provided credible scientific evidence to back up his belief" (RDO p.66, para.1, line 3).

11. In support of this finding, the RDO stated: "Finally, all of the EPA reviewers had serious problems with the article (see RX 50, 51, 54)" (RDO p. 38, para. 2). This statement is simply false. Dr. Russo strongly objected when this same position was taken by Synagro in a letter to the EPA Administrator (CX 1, p. 74; CX 12, p. 4, last bullet). Russo testified that reviewers at EPA's Office of Research & Development (ORD) (which has oversight responsibilities over Program Offices regarding EPA's peer-review process and had direct supervisory



responsibility over Dr. Lewis (CX 145, p. 36)) thought the paper was "excellent" (CX 1, p.69, 73-75). The *only* EPA reviewers who had serious problems with the article were the three highly prejudicial reviewers selected by James Smith, who were directly involved in publicly promoting land application of sewage sludge. Even Smith, who oversaw those reviewers, testified that Complainant did a good job of addressing their concerns in the revised paper he submitted to *BMC-Public Health* (TR 667).

12. The witnesses to the proceeding, including Respondent's own witnesses, strongly commended and praised Dr. Lewis' research and writing on the sludge issue. These included the uncontested testimony of the following witnesses:

- The Research Director of the Ecosystems Research Division in Athens, GA, Dr. Harvey Holm, testified that Dr. Lewis' work was "High quality" (Tr. 646), and that he was "Innovative, creative, productive" and "Truthful" (Tr. 646). Concerning his research on biosolids, Dr. Holm stated: "I think that Dr. Lewis would bring [an] inquiring mind to the problem. I think he would bring innovative approaches to addressing the complex problems that are associated ... with this

program. I think he would be a good contributor overall" (Tr. 686);

- The Director of the Ecosystems Research Division, Dr. Rosemarie Russo testified that the overall quality of Dr. Lewis' work was "excellent and superb" (CX 1, Tr. 10), the quality of his research publications were "Excellent. He has published in prestigious journals" (CX 1, Tr. 10). "I think he is the only researcher who has had articles in *Nature*, which is very, very prestigious and very difficult to publish in. (Id.) I don't think anyone else has published in *Lancet*, to my recollections" (Id., Tr. 11), "He's amongst our most productive researchers in terms of publications" (CX 1, Tr. 10), "He's amongst our most productive researchers in terms of ... applicability of his work to the Agency's mission." (CX 1, Tr. 10), "His work has been very ... important, very front-line, very advancing the state of the art, very applicable and relevant to the mission of the agency." His professionalism is "Very high-quality. He's always truly professional, he's collegial, he's courteous. He listens to other people's ideas, as

well as ... presenting his own. [He] carries on very good discourses with other scientists, which...we always like" (CX 1, Tr. 12). Regarding the impact of his research, Dr. Russo stated "...partly, I'm sure, as a result of his publications and his writings [the] National Academy of Sciences was asked to review the Sludge Rule, and the IG's office, I believe, also reviewed the Sludge Rule. And, as a result ..., ORD is currently preparing a research plan ... which ... has been funded" (CX 1, Tr. 106-107).

- The Chairman of the Peer Review Committee which reviewed Dr. Lewis work testified that, when Dr. Lewis asked him to be a co-author on one of his research papers: "I was frankly flattered by the invitation because I think he is doing some pretty interesting things." (Tr. 1244);
- A member of the National Academy of Sciences panel which reviewed the EPA Sludge Rule, Ellen Harrison, testified that Dr. Lewis conducted himself at meetings of biosolids scientists with "poise" and a "professional" manner "despite the incredible flack he was getting." She said he "put forward reasonable scientific theories ...

to suggest that there were plausible routes of exposure and that in fact illness might be resulting." Dr. Lewis "was a hero in this regard... turning the whole issue around." Without his involvement, Harrison said, "we wouldn't be at all where we are today in terms of looking at the issues of safety anew." He "gave legitimacy to the allegations that has made it impossible to ignore alleged health issues." Otherwise, she said, "EPA's position would still be that nobody has gotten sick and biosolids are safe. He has been the most important player in all this" (CX 141)

13. It is clear from some of the ALJ's other findings in this case that he was unable to properly access or evaluate the scientific merits of Dr. Lewis' work. This is understandable, as a DOL ALJ is not trained access the merits of scientific opinions or articles regarding interactions of pathogens (disease-causing microorganisms) and chemical pollutants found in processed sewage sludge (biosolids). For example, the ALJ questioned why Complainant believed the prestigious British medical journal *Lancet*, which has published his research in the past, would accept his revised study of

processed sewage sludge when it still lacked an epidemiological study with and unexposed control group (RDO, p. 26, para. 3). The ALJ apparently did not understand or consider the fact that the revised study, which was accepted by the British medical journal *BMC-Public Health* with unanimous approval from the three international experts who served as independent peer-reviewers, included dose-response data. These data covered a wide range of exposure conditions and were considered more reliable than data taken just from an unexposed group. Similarly, the ALJ concluded that Walker, who had to have someone else review Dr. Lewis' paper because he lacked technical expertise in microbiology, was actually the originator of the very microbiological theories he was not competent to review (RDO, p.14, last para; p. 62, No. 7. See Failure of Walker and other EPA officials to Credit/Support Complainant's Work). Unfortunately, the ALJ did not understand the differences between Dr. Lewis' research and the issues Walker and others had dealt with previously.

14. Even if the ALJ were technically qualified to assess the scientific basis of Dr. Lewis' microbiological research (as, for example, editors at scientific journals

do), he relied on a scientific peer-review process that he himself recognized was seriously "flawed" in reaching his conclusion about Dr. Lewis. For example, he stated: "Walker blatantly violated several aspects of [the peer-review] policy, including sharing the article with third parties for input to write his peer-review (TR 229-30, 759-60, 809, 1126; RX 52), submitting another's review as his own (TR 1129, 1139, 1154-55; compare CX 55 with CX 53) and failing to submit the sources that he used (CX 106-07; TR 771-73, 1158-59, 1168, 1171-73, 1175)." (RDO 57, para. 2.). Again, as set forth in the RDO: "The record contains ample evidence that when EPA conducts an "internal" peer review the peer reviews should not have any conflicts of interest, should have a relevant technical background, should maintain an accurate peer review journal of all materials used during the peer review, should write the peer review and should not share their peer review comments with third parties (CX 145, at 57, 67-68; TR 325, 361, 528-29, 649-51, 1006-08, 1126-29, 1277, 1282; see TR 1275-76, 1291). Walker blatantly violated several aspects of this policy, including sharing the article with third parties for input to write his own peer review (TR 229-30, 759-60, 809, 1126; RX 52), submitting another's review as his own (TR 1129,

1139, 1154-55; compare CX 55 with CX 53) and failing to submit the sources that he used (CX 106-07; TR 771-73, 1158-59, 1168, 1171-73, 1175).” (TR 57, No. 3). It is also apparent that Smith did not use his best judgment when he included Walker in the peer review because of Walker’s potential conflict of interest due to his involvement with Rule 503” (RDO, p. 57) (See Flawed Scientific Peer-Review). Thus, the ALJ clearly knew that his source of information regarding the quality of Dr. Lewis’ science lacked credibility and was significantly flawed.

15. The peer-reviews cited by the RDO as the basis for concluding that Dr. Lewis had failed to “back up his belief” were comments provided by Smith’s panel of highly prejudicial EPA officials (Walker, Brobst, Bastian). Each of them publicly defended and promoted land application of sewage sludge as a safe practice and were unqualified to serve as peer-reviewers (according to EPA’s own peer-review policies) because of conflicts of interest and other issues. (See Flawed Scientific Peer-Review).

16. The RDO also based his conclusion on peer-review comments provided by Pat Millner, a USDA employee whom Walker funded through interagency grants to do research on the issues raised by Dr. Lewis. She also failed to

meet EPA's most basic requirements that peer-reviewers be free from conflicts of interest so that their reviews will be fair and credible. (See Flawed Scientific Peer-Review).

17. Based on the reviews submitted by Dr. Smith's extremely biased panel, and Millner, the ALJ stated that Complainant's Adverse Interactions article was "severely criticized by virtually everyone who reviewed it" (RDO p. 38, para 2). He completely disregarded the fact that the entire panel failed to meet EPA's most basic requirements to ensure that peer-reviewers are objective, impartial, and free of conflicts of interest so that their reviews are, in the words of EPA's peer-review policies, "fair and credible" (CX 145, p.67, 70).

18. By neglecting to consider the nature of Smith's peer-review panel, and the procedural flaws surrounding the creation of that panel, the RDO also failed to connect the relationship between EPA's violation of its peer review rules to the creation of the numerous negative peer review comments.

19. In addition to ignoring the fact that Dr. Smith's panel was composed *only* of highly biased peer-reviewers, the RDO mischaracterized an editorial decision by *Lancet* as severe criticism. All the editor decided was that the



Adverse Interactions paper was more suitable for a specialty journal (e.g., one dealing specifically with environmental health) (TR 542).<sup>2</sup> Similarly, the RDO failed to acknowledge that *Lancet* editors reject over 95% of the papers submitted to them based on a lack of interest in the subject matter (TR 537, CX 84).

20. The RDO concluded *Lancet* found that Dr. Lewis's paper needed an epidemiological study with an unexposed control group to be scientifically sound. Moreover, the ALJ surmised that *Lancet* would have rejected the paper had Complainant revised it and resubmitted it as he testified that he wanted to do. He further concluded that Complainant's argument that the authors submitted the revised paper to a quick-turnaround electronic journal due to Walker and Synagro publicly distributing criticisms of the work was a "rationalization." (RDO, p. 26, para.3, p. 38, para. 2, p. 57, No.3) The RDO, however, failed to point out that the issue of an unexposed control group was resolved by the authors by including dose-response data when the article was submitted to *BMC-Public Health*. Dose-response data cover

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<sup>2</sup> He also ignored the fact that EPA scientists almost never publish in *Lancet*. *Lancet* is a medical journal, and the only EPA scientist known to have published in that journal was Dr. Lewis (CX 1, p. 16) - an accomplishment that the ALJ failed to note.

a range of exposures instead of just a single exposed group compared with one unexposed group. (Go to BMC website in CX61, p. 3 [www.biomedcentral.com/1471-2458/2/11], "Pre-publication History," "Resubmission-Version 2, Authors' comments, 24 May 2002").

21. In response to the peer review comments, Dr. Lewis revised the manuscript. To correct the lack of an unexposed control group, Dr. Lewis included a dose-response relationship, which considered a range of exposures (See "Figure 2" in CX 110, p. 6). After revising his paper in response to the critical peer review comments, the record in regard to whether Dr. Lewis' properly published paper provided "credible scientific evidence to back up his [beliefs]" is uncontested.
22. The ALJ had no basis for questioning whether *Lancet* would have likewise accepted the dose-response data if the manuscript had been revised and resubmitted to its editors. Additionally, given the fact that no EPA scientists, other than Lewis, have ever been published in the *Lancet*, (TR p. 59), the ALJ's discussion as to the relevance of the *Lancet* review is clearly overblown.
23. Dr. Smith, the peer-review coordinator in charge of the very peer review process for which the ALJ relied

upon in his opinion, agreed that Dr. Lewis had addressed the criticisms well (TR 667). Thus, although the initial draft paper subjected to an admittedly flawed EPA peer review process was subject to extensive criticism by scientists strongly supportive of the EPA sludge rule, the draft paper was revised, and the final paper addressed the appropriate scientific issues which the peer review commentators had identified. EPA, as an institution, concurred that the paper had passed the Agency's peer-review process and approved it for publication as an official ORD research paper (TR 168, 172, 669, RX 5, p.3).

24. The revised EPA-approved paper was submitted to the peer-reviewed British medical journal *BMC-Public Health* (TR 1246). Reviewers at the journal agreed that the lack of an unexposed control group, and that all other deficiencies discovered in the peer-review process, were satisfactorily addressed. (See CX61, p. 3 website [[www.biomedcentral.com/1471-2458/2/11](http://www.biomedcentral.com/1471-2458/2/11)], "Pre-publication History," "Resubmission- Version 2, Authors' comments, 24 May 2002"). The paper was published with unanimous support from the three internationally recognized experts who served as the peer-reviewers (CX 110, see BMC website in CX61, p. 3, for published reviewer comments).

25. Additionally, a peer-reviewed commentary of the data in the Adverse Interactions paper was submitted to *Environmental Science and Technology (ES&T)*, the journal of the American Chemical Society. (TR 292) (Lewis). *ES&T* is a highly respected journal. (CX 1, p.11) (Russo) (*ES&T* is "considered quite prestigious"). The paper was independently peer reviewed again and published. (TR 391, 418; CX 91). See Lewis, D.L. & D. K. Gattie. 2002. Pathogen risks from applying sewage sludge to land. *Environmental Science & Technology* 36: 286A-293A, admitted into evidence as CX 91.
26. Not only was the *ES&T* paper fully approved through a formal EPA peer review process, the paper was highly regarded within the EPA scientific community and was nominated for a Scientific & Technological Achievement Award (CX 1, p.76-78) (Russo).

#### EPA Liability for Actions of Walker

27. The ALJ concluded that the EPA could not be held responsible for Walker's actions because he had no supervisory responsibility over Dr. Lewis; he was employed by a different EPA program office (Office of Water, not Office of Research and Development) and was a GS-14 level employee compared with Dr. Lewis' GS-15 level

(RDO, p. 58). To the contrary, the ALJ failed to properly reference those parts of the record which clearly established that all of Dr. Walker's actions were performed in his official capacity, that one of his express job assignments was to publicly represent the EPA on matters related to biosolids, and that one of his primary responsibilities was to oversee and fund research on biosolids conducted by the Office of Research and Development.

28. Walker testified that his communications with Southern Waste about Dr. Lewis, including his distribution of the White Paper, were performed as part of his official duties. TR 804

29. In his official capacity, Walker "Identifies research and development needs. Works with the Office of Research and Development to develop and implement research and development programs which will satisfy identified needs. Serves as consultant or project officer for Office of Research and Development on resulting projects" (CX 150, p.4).

30. His performance description authorized him to make statements on behalf of the EPA about biosolids, which would include public statements on behalf of the agency regarding Dr. Lewis's science as it related to biosolids.

For example, his official position description stated he "provides interpretations of regulations, guidelines and other documents published by the Branch [and] comments on work of other EPA organizational elements and non-EPA agencies, organizations and individuals" (CX 150, p.4).

31. Part of his job duties was to fund and encourage public information favorable to EPA policies on land application of sewage sludge (CX 150, CX 129, CX 137).
32. He funded research specifically addressing the issues Dr. Lewis raised in his research articles (CX 140, p. 27).
33. Walker was well known publicly as the EPA's chief spokesperson on biosolids. (CX 140, pp. 15-16).
34. Others reasonably relied upon his actions regarding Dr. Lewis as representative of the EPA (CX 113).
35. The ALJ concluded that Walker could not impact the terms and conditions of Complainant's employment (RDO p. 58, para. 2; p. 59, para. 2). Moreover, Complainant's research director (Holm) testified that Walker's Office (OW) could affect Complainant's research funding (TR 666). Furthermore, EPA placed Walker directly in the approval process for Complainant's work product by selecting him as a formal peer-reviewer of Dr. Lewis' work (TR 1234-35, CX 85).

36. Additionally, Walker was charged with organizing scientific conferences, workshops, and seminars on biosolids issues (CX 150, p.4). Complainant's duties under his IPA required that he participate in such activities to successfully perform his job (CX 10, p. 6). Walker testified that he would have involved Complainant in these activities were it not for his having filed whistleblower complaints (TR 857, 1108-12).

#### Walker's Distribution of Synagro White Paper

37. Walker distributed the Synagro White Paper under official EPA letterhead to a public meeting Complainant spoke at in Georgia, which was attended by UGA faculty. This incident caused questions to arise at UGA concerning whether Dr. Lewis was permitted to work on sewage sludge and whether his presence at UGA, so far as working on this issue, was legal (CX 29, p. 12-20). Concerns about EPA not supporting Dr. Lewis' work projects at UGA led in part, to a souring of the relationship between UGA and Dr. Lewis and impacted the decision of UGA not to offer Complainant a Full Professorship as they had intended (CX 24 p. 32-35, 40, 47-48).

38. The RDO concluded that since Walker was just one non-supervisory employee, his distribution of Synagro's White

Paper using official EPA letterhead (CX 95) "is hardly an endorsement of the 'White Paper'" by EPA (RDO p. 31, para. 3). The RDO did not apply this position equally when Synagro alleged to the EPA Administrator that Complainant (who was also just one, non-supervisory employee) implied Agency endorsement by using EPA letterhead. On p.36, para. 2 of his Decision, The RDO opined concerning Complainant: "there is little doubt that he understands that using EPA letterhead implies that EPA has given its imprimatur". Similarly, on p. 37, para. 2 of the RDO, the ALJ states: "Morris emphasized the importance of the disclaimer because the disseminated fact sheet was on EPA letterhead, giving the impression that EPA approved it (RX 90; RDO 899)." The RDO, therefore, excused Walker's use of letterhead as not inferring Agency endorsement while, at the same time, supporting Morris on the basis that Dr. Lewis's use of letterhead inferred such endorsement. The ALJ also gave no weight to Dr. Russo's testimony that she had, in fact, approved Dr. Lewis's fact sheets (CX 1, p. ); therefore, Complainant reasonably assumed that his fact sheets had been approved by the Agency. The RDO also gave no weight to Dr. Russo's testimony that the unique restrictions Morris placed on Dr. Lewis in response to complaints from



Synagro were discriminatory and based on his protected activities. This included, for example, not using letterhead for fact sheets, including disclaimers on fact sheets and abstracts, and giving oral disclaimers when on official EPA business. She testified: "Well, in my opinion, he's treated differently because he dared to publish research that shows the sludge rule to have technical flaws" (CX 1, p. 104).

39. Moreover, Alfred Lindsey, Deputy Director of the Office of Waste Water Management, concluded, without contradiction or rebuttal of any sort, that Walker's distribution of the White Paper to outside parties could be interpreted as an EPA endorsement of the White Paper. The RDO stated: "Further, Lindsey found that Walker should not have forwarded the 'White Paper' to outside parties because that action could be interpreted as an EPA endorsement of that paper. (RX 174)". Other witnesses agreed with Lindsey's un-impeached opinion (e.g., CX 29, p. 14).

40. The RDO concluded that there was no evidence Walker's supervisors knew or should have known of Walker's intended distribution of Synagro's White Paper, therefore EPA could not be held responsible for his actions (RDO p. 58, para. 2). However, when NAS committee member Greg

Kester e-mailed the White Paper to Walker and asked whether Synagro's allegations against Dr. Lewis were true, Walker's supervisors (Alfred Lindsey, Charles Gross) were included on the e-mail (CX 119, RDO p. 5). Notwithstanding, Walker was the principal EPA employee delegated with the official responsibility for communicating with members of the public on matters related to sludge (TR 797). Walker had the discretion, on behalf of the EPA, to circulate the White Paper to whomever he chose (CX 150, p. 4. Walker Reviews and comments on work of other EPA organizational elements ... and individuals which are related to assigned program area."). Walker engaged in numerous public communications regarding sludge. (CX 140, pp. 15-16). Thus, not only was there no need for Walker to seek approval from his management to distribute the White Paper, there is nothing on the record of this case which even mildly indicates that Walker ever sought specific EPA approval for the contents of his hundreds of public communications about sludge.

41. The RDO stated that the individual who contacted EPA officials about the White Paper asking whether they agreed with its contents (CX 119), worked for EPA. (RDO, p. 30). This individual, Greg Kester, works for the State

of Wisconsin and was a member of the National Academy of Sciences committee investigating the scientific basis of EPA's 503 Sludge Rule (CX 90, p. 4). Significantly, EPA never responded in any manner whatsoever to this email. Under EPA policy, the decision regarding how to respond to Kester should have been forwarded to Dr. Lewis' laboratory director (Joint Stipulation Nos. 14, 21; CX 1, pp. 57-58). EPA stipulated that it did not adhere to its normal reference policy in regard to responding to outside inquiries related to Dr. Lewis due to the "litigious atmosphere" (Joint Stipulation No. 12). This atmosphere related directly to Dr. Lewis' protected activity (Joint Stipulation 13).

42. The RDO stated that Synagro's White Paper never directly refers to Complainant's IPA activities and EPA's endorsement, or lack thereof, of his IPA (RDO p.29 para 2.). The ALJ based this conclusion on Complainant's testimony about a single statement on page 3 of the White Paper: "EPA has also directed Complainant to make clear that this work is not endorsed by the Agency" (TR 426-27). The RDO failed to acknowledge the two immediately preceding sentences on p. 3 and their citations, which specifically describe Complainant's IPA agreement and cite to the IPA agreement (CX 93, p. 20, reference 11).

Additionally, the Executive Summary of the White Paper states as follows: "Dr. Lewis' activities regarding biosolids are not sponsored by the EPA, and he has misrepresented the development of regulations governing land application of biosolids, 40 CFR Part 503." (CX 93, p.1). In fact, Dr. Lewis' work on biosolids at UGA was "sponsored" and paid for by EPA, and EPA stipulated that his work on biosolids at EPA was within the scope of his IPA. Joint Stipulation 11.

43. The RDO stated that Synagro's White Paper (CX 93), which is an analysis of Complainant's expert reports in the *Marshall* case, does not refer to the Adverse Interactions article or its negative peer reviews (RDO p. 29, para. 2). The failure of the White Paper to cite to the Adverse Interactions article is simply happenstance. The record is extremely clear that at the time the White Paper was written, a protective order prohibited Synagro from directly discussing that paper (TR 202; 331-32, RX 196). However, the very theory that adverse interactions can occur between chemicals and pathogens in sewage sludge, which lay at the heart of that paper, was the primary subject matter of the White Paper. Additionally, the White Paper cites to Complainant's presentation at the University of Maryland (CX 93 p.25, ref. 84) and his

expert reports (CX 93, p.23, ref. 44; p. 24, ref. 58). These public documents present and explain the scientific theory which was later discussed in the adverse interactions article (CX 140, p. 27; RX 195). Thus, the primary focus of the White Paper was to attack the basic health and safety concern raised by Dr. Lewis. This concern was first raised in his two expert reports in the *Marshall* case, then published to the scientific community for the first time at the University of Maryland meeting, and was finally presented in the adverse interactions article, which was published approximately nine months after Synagro published its White Paper (Compare CX 93 published September 2001 with CX 110 published June 2002).

44. Additionally, the RDO ignored the testimony of NAS panel member Ellen Harrison concerning the animus within the pro-sludge community regarding Dr. Lewis' theory concerning the adverse interactions between human health and sludge (CX 140, p. 27-28).

45. The RDO failed to acknowledge that the White Paper falsely claimed that Complainant's theory on "irritant chemicals and pathogens" (CX 93, p.7) had never been peer-reviewed (CX 93, p.1). The theory had been the subject of a flawed EPA peer review. Moreover, despite

the radical flaws in the peer review process, Dr. Lewis professionally participated in the flawed process and obtained formal approval for publishing his paper in accordance with the peer review process. (CX 9).

Moreover, at the time Walker distributed the White Paper, he knew that Dr. Lewis's scientific theory regarding health and safety concerns in sludge had been peer reviewed and had been approved to submit for publication (See CX 85, where Walker's and other's peer reviews were submitted on 7/11/01 (White Paper was published in September 2001) Also, Walker notes on 7/11:

"Unfortunately this paper has received an OK for publication by Mr. Lewis's supervisor and has already been submitted to the Lancet journal for publication.").

46. The ALJ ignored the evidence that Walker knew, at the time he circulated the White Paper, that the White Paper was a problematic and biased document (TR 805).

New England Biosolids and Residuals Association (NEBRA)

47. The RDO concluded that Walker did not collaborate with the New England Biosolids and Residuals Association (NEBRA) to criticize Complainant (RDO p. 64, para. 4). The ALJ based this conclusion on the fact that NEBRA's website (RX 186-87) included a link to Complainant's

website and a disclaimer regarding the fact that the website was funded by Walker at EPA's Office of Water (CX 137). The RDO failed to acknowledge that Walker was distributing Synagro's White Paper in 2001 and, at the same time, funding NEBRA's website (CX 137), which (like the White Paper) questioned Complainant's scientific credentials and authority to conduct research on sewage sludge (TR 604-05). At the time EPA distributed the White Paper to Southern Waste, the NEBRA website stated that it was funded by the EPA Office of Water and it did not include a disclaimer (TR 595-99, TR 791, CX 97, RX 187). The fact that Walker asked NEBRA to include a disclaimer on the website on August 13, 2002 (CX 137 p. 102-03), after being deposed about the matter in this case (TR 788-89), is not a basis for concluding that Walker had not been collaborating with NEBRA to help discredit Complainant and other opponents of EPA's current policies on sewage sludge at the time the White Paper was distributed by EPA and at the time he provided funding to NEBRA in order to increase public support for the pro-sludge position. In fact, the NEBRA projects funded by EPA (which Walker approved and oversaw) specifically included funding related to rebutting the concerns being raised regarding sludge safety (CX 137).

Failure Credit/Support Complainant's Work

48. The RDO concluded that Walker and his co-workers in the Office of Waste Water Management (OWWM), and not Complainant, came up with the theory on interactions of pathogens and chemicals, which Lewis published in *BMC-Public Health* (RDO, p.14, last para; p. 62, No. 7) The ALJ based this finding on Walker's testimony (TR 1104-1106) that he had recommended research on odor and pathogen issues at a conference held at Duke University in 1998. Specifically, Walker stated: "...in my review of Complainant's paper, I said that I thought that he raised some good issues that were worthy of further consideration but we had already -- but I mean I'm just saying, it's not that we weren't continuing looking at issue, we continue to look at issues." (TR 1105-1106). The ALJ misinterpreted these remarks. Walker was just pointing out that he often supports research on new issues raised by people such as Complainant. The Synagro White Paper distributed by Walker (CX 93) even contains a whole section (VI, Part B. p.13-14) describing how that the odors conference held by Walker and others had nothing to do with Complainant's theories. As noted by Synagro (CX 93, p.14), all of the references cited in



Walker's odor conference article refer to studies on animal wastes and wastewater. It "contains no reference to studies on alleged health effects of odors from Class B biosolids." Obviously, Walker should have cited to Complainant's work when mentioning alleged health effects from biosolids, but he chose not to do so. Walker, in fact, testified that he and others discussed involving Complainant in conferences and other research activities, but decided not to because he had filed whistleblower complaints (TR 857; TR 1109; TR 1111-12).

49. The ALJ also failed to point out that NAS committee member Ellen Harrison credited Complainant with being the first scientist to come up with the theory on chemical-pathogen interactions (CX 141). Ms. Harrison, the Director of the Cornell University Waste Management Institute and a leading member of the National Academy of Sciences panel which reviewed the EPA sludge rule, testified, without contradiction, both the originality and importance of Dr. Lewis' scientific research. In relevant part Ms. Harrison testified as follows:

Until David [Lewis] stepped in, stepped up and put forward some of the science, the people claiming illnesses were being blown off completely. . . . [Supporters of sludge] continued to make statements about nobody's ever gotten sick. . . . [T]here were no . . . serious scientific investigations of any of those health complaints. . . . [I]n my book David was a hero. . . . Despite the incredible flack he was getting, put

forward reasonable scientific theories, backed by some research to suggest that there were plausible routes of exposure and that in fact illnesses might be resulting. He . . . **turned the whole thing around.** And [now] I have not heard anybody at EPA saying probably in the last year nobody's gotten sick. I'm in fact hearing people say we need to look and see. And I'm not hearing anybody say the research is done . . . I'm hearing people say we need to do some comprehensive looking at these things. . . . David was pretty much responsible for turning that around.

CX 140, TR 34-35. (emphasis added).

I think without David's involvement we wouldn't be at all where we are today in terms of looking at the issues of safety anew. . . . David gave a legitimacy to the allegations . . . [H]e has made it impossible to ignore the alleged health issues. . . . [W]ithout David we would still be seeing EPA saying nobody's gotten sick and its safe. . . . David has been probably **the most important player** . . .

CX 140, TR 77. (emphasis added).

50. Dr. Lewis' scientific concerns over sludge also helped frame the NAS' review of the EPA sludge rule. As explained, without contradiction, by Ms. Harrison: "David is the only scientist that had raised the scientific issues that might lead to exposure and disease and so David's ideas in that regard, I think, were important to sort of framing the National Academy panel's report in recognizing that, gee, there are a lot of gaps here, and are plausible routes of exposure that we haven't accessed." (CX 141, TR 34).

51. The ALJ also failed to cite to the unimpeached testimony of Dr. Lewis' laboratory director regarding the importance of his contributions on the sludge rule. Dr. Russo testified: "In fact, I think David's efforts

probably helped bring [EPA's new research efforts on sludge] about ... I'm sure, as a result of his publications and his writings - National Academy of Sciences was asked to review the sludge rule and the IG's office, I believe, also reviewed the sludge rule.. And as a result... ORD is currently preparing a research plan to conduct research on the various issues, which I heard only last week has been funded, as a matter of fact." (CX 1, p. 106-107).

52. The ALJ failed to point out that Complainant had already been assigned to the University of Georgia for two years (since December, 1998) to apply his infection control work to interactions of pathogens and chemicals associated with sewage sludge (CX 8). Furthermore, Complainant had already presented his pathogen-chemical interaction theory at various other public meetings prior to Walker's odor conference, e.g., at EPA Headquarters on January 28, 1998 (CX 61, p.9). This presentation was attended by Alan Rubin (CX 49, p. 36, 79, 80, 168, 196), who worked closely with Walker on biosolids issues (CX 49, p. 66) and was familiar with the *Marshall* case (CX 49, pp. 26, 227). Walker never claimed to be the originator of Complainant's theory on pathogen-chemical interactions. Instead, he attacked it as scientifically unsupportable (RDO p. 30, para. 2, Walker TR 1186-87). It

is simply preposterous for the ALJ to claim that Walker, who had to find someone else to review Dr. Lewis' paper because he lacked technical competence, was actually the originator of the very ideas he was not competent to review.

53. The RDO concluded Complainant should not be credited with contributing to the findings of the National Academy of Sciences because the NAS was unaware of Complainant's work. Specifically, the NAS found that EPA needed to investigate pathogen-chemical interactions, track and study anecdotal reports of illnesses, study the effects of dusts blowing from treated fields into residential areas, conduct epidemiological studies, and other issues that were raised by Complainant at scientific meetings and in his published articles (CX 90). The ALJ based his finding on NAS committee member Ellen Harrison's testimony that the NAS did not have a copy of Complainant's *Adverse Interactions* paper. (p. 27, para. 2, p. 28, para. 2). Harrison, however, was only referring to the final published versions of his articles. The RDO failed to point out that Harrison e-mailed Complainant on Sept. 25, 2001, telling him that that the NAS committee had copies of his expert reports in the *Marshall* case and the draft of his article

published in BMC-Public Health. (RX 157). The RDO also failed to point out that Harrison provided the NRC with his presentations at Boston University and the University of Maryland (CX 140, p. 39), and that these papers presented his theory on adverse interactions of pathogens and irritant chemicals in processed sewage sludge (RX 195; CX 61, p. 8). She testified regarding Complainant's adverse interactions theory: "And I made the committee familiar with David's thoughts on this" (CX 140, p. 27).

54. The ALJ also failed to discuss or evaluate the undisputed testimony of Ms. Harrison that Dr. Lewis was the first person to articulate the adverse interactions theory, and that his postulation of this theory was groundbreaking: "[Dr. Lewis] put forward reasonable scientific theories ... to suggest that there were plausible routes of exposure and that in fact illness might be resulting. [He] was a hero in this regard... turning the whole issue around. [Without his involvement,] we wouldn't be at all where we are today in terms of looking at the issues of safety anew. [He] gave legitimacy to the allegations that has made it impossible to ignore alleged health issues. [Otherwise,] EPA's position would still be that nobody has gotten sick and biosolids are safe. He has been the most important player

in all this." (CX 140).

55. The RDO found that Walker did not have to cite Complainant's published works when he published a number of Complainant's ideas in the *Federal Register* as EPA's response to recommendations in the NAS report (RDO p. 62, last para.). The ALJ based this finding on Harrison's testimony that "seemed to indicate" that "a portion of the information in Complainant's research was common knowledge" and that ORD has always had concerns about the 503 Rule. "Obviously, this research was not a novel concept" (RDO p. 62, last para). While drawing upon what Harrison, a member of the National Academy of Sciences panel, "seemed" to indicate" about "a portion" of Complainant's research, he completely ignored her explicit, undisputed testimony that Dr. Lewis "put forward reasonable scientific theories ... to suggest that there were plausible routes of exposure and that in fact illness might be resulting." Dr. Lewis "was a hero in this regard... turning the whole issue around." Without his involvement, she testified, "we wouldn't be at all where we are today in terms of looking at the issues of safety anew." He "gave legitimacy to the allegations that has made it impossible to ignore alleged health issues." Otherwise, she said, "EPA's position

would still be that nobody has gotten sick and biosolids are safe. He has been the most important player in all this." (CX 140).

56. RDO states "Further, the record does not support the contention that Complainant first developed several ideas that NAS and EPA published in the *Federal Register*" (RDO p. 62, last para.). To the contrary, the entire record revolves around Dr. Lewis's theory that low levels of certain chemicals found in sewage sludge, when inhaled or in contact with skin and mucus membranes, can cause chronic irritation and thus render exposed individuals living near land application sites to be more susceptible to infection. He concluded that this effect was similar to what happens when people inhale chlorine gas, which burns the lungs, making them more susceptible to respiratory infections. In the Adverse Interactions paper, he and his co-researchers at UGA evaluated the medical records of people living near ten land application sites and complaining of chronic irritation of the skin and lungs and found that a fourth were experiencing recurring *Staphylococcus aureus* infections, a microorganism that tends to invade damaged tissues. The record consistently refers to these conclusions as Complainant's theory. The White Paper is titled "Analysis

of David Lewis' Theories Regarding Biosolids." Its various sections credit Complainant and no one else with these ideas. For example, it has a section headed "Dr. Lewis' Low-Level Chemical and Pathogen Exposure Theory is Contrary to What is Known," and another titled "Dr. Lewis' Heightened Susceptibility Theory is Outside His Area of Expertise and Ignores Decisive Evidence" (CX 93, p. 12). Harrison testified that Complainant "put forward reasonable scientific theories" (CX 140). Complainant's summary of his work published by the *Journal of Environmental Science and Technology* states: "In our own study, we found that 25% found that 25% of 48 individuals living near land application sites who complained of chemical irritation had evidence of serious *Staphylococcus aureus* infections, which contributed to two deaths (3)." (CX 91, p. 5.). To reach his finding, the ALJ relied on Holm - who was not an expert on biosolids. He testified that he did not know whether Complainant's theory was novel (RDO, p. 62, last para). At the same time, the ALJ ignored Harrison - who was an expert in the area selected by the National Academy of Sciences - when she explicitly stated that Dr. Lewis was the scientist who put forth the theory explaining how chemicals and pathogens could interact in sludge to cause



the kinds of illnesses reported by residents near land application sites.

57. The record is clear regarding whether Walker should have cited Dr. Lewis's published works when he appropriated ideas, methodologies, and recommendations from those works for EPA's response to the NAS, which was published in the Federal Register. Independent scientists who reviewed the draft document inserted notes to Dr. Walker that he should credit Dr. Lewis as the source of information on pathogen-chemical interactions increasing risks of infection (CX 156, p. 4, last para.; p. 12, para. 2; p. 25, para. 5). Walker chose not to credit Lewis, but did cite to his own published works, such as his Duke University odor conference (CX 157, p. 42, last para.).

58. For the ALJ to conclude that Complainant's research "obviously was not novel" based on what Harrison seemed to be saying about a portion of Dr. Lewis's work and the fact that ORD had always been concerned about the sludge rule, reflected more than just disregarding extensive, explicit and undisputed testimony to the contrary.

59. The RDO concluded that EPA did not keep Complainant from participating in activities due to whistleblowing (RDO, p. 63, para. 1). The RDO disregarded Walker's

testimony, where Walker testified that he and others at EPA did not involve Complainant in research activities because Complainant had filed whistleblower complaints (TR 857, 1108-12).

60. Mari Hollingworth confirmed that Walker badmouthed Dr. Lewis and informed her that Lewis' studies could not be used due to "litigation." Dr. Walker also informed Ms. Hollingworth that Dr. Lewis could not participate in a conference due to his "litigation" activities. Tr. 580-84; CX 98

61. There was also undisputed testimony that Walker did not include Lewis in speaking activities related to sludge because of Lewis's protected activities (TR 857; TR 1109; TR 1111-12). One of Walker's primary responsibilities was to oversee research on biosolids in the Office of Research & Development where Complainant worked (CX 150, p. 4); and, Complainant's research director (Holm) testified that Walker's Office (OW) was in a position to affect Complainant's research funding (TR 666). He also testified that EPA provided Complainant with no funding whatsoever for his work after Complainant returned to EPA from the University of Georgia (TR 693), and that he (Holm) and Complainant's Assistant Laboratory Director (Burns) had discussed the fact that Complainant

was not being included in research activities because of his whistleblowing activities (TR 687-89). Holm testified of the overall situation concerning the way EPA treated Complainant, that the Agency was using its vast resources to limit debate on its sludge policies (TR 654-55).

62. The ALJ also ignored the testimony of Dr. Lewis' laboratory director concerning the need for EPA to properly utilize Dr. Lewis' expertise and the fact that EPA had discriminatory animus toward Dr. Lewis based on his sludge-related whistleblowing. CX 1 (See, entire testimony of Dr. Russo.)

63. The RDO concluded that Complainant's tangible job consequences suffered when EPA did not fund his research at EPA after returning from his IPA were unrelated to Complainant's whistleblowing (RDO p. 64, No. 10). Specifically, the ALJ ruled that Complainant "presented no evidence linking [the lack of funding for his University of Maryland/Egypt research on endoscopes] to his Rule 503 research." The ALJ failed to acknowledge that Complainant's local laboratory management fully approved this research as an extension of his IPA research (CX 155) in which he applied his research on medical devices to EPA's mission by applying it to pathogens in land applied sewage sludge under the 503

Rule (CX 10). Dr. Russo testified concerning the relationship of Dr. Lewis' IPA research on dental/medical devices: "It relates to biosilds, sewage sludge." (CX 1, p. 43); "I mean, it's the same science - it's the same science, really." CX 1, p. 46-47). Complainant's IPA Assignment Agreement specifically states that this research would connect the University of Maryland project and his research on sewage sludge (CX 10, p. 5-6). EPA management at every level understood that Complainant's research on medical devices was directly and necessarily tied to his research on pathogens in sewage sludge (Rule 503 issues) (CX 9, Joint Stipulation No. 11). EPA's refusal to fund Dr. Lewis to do his job at EPA was especially egregious because, even if EPA's overall research budget was tight, ORD - in response to Dr. Lewis' publications while on his IPA - had approved new funding specifically for the issues he raised in his papers (CX 1, p. 107). Yet, ORD would not fund his research when he returned to EPA even though his local managers approved his research plan and request for funding to continue his IPA-related research (TR 692-93).

#### Special Disclaimers

64. The RDO stated Complainant apparently objected to telling the truth in his disclaimers (RDO p. 41, next to

last para.).

65. The ALJ failed to acknowledge that Complainant objected to being singled out with special disclaimers because of his protected activities (RX 96) and his division director (Russo) and research director Holm agreed that he was indeed being singled out ( RX 96; TR 648; TR 674-75; TR 677-8; TR 681-82; TR 707-08; TR 715; TR 725; TR 906; JX 1, p. 87-90, 93-94, 98; CX 1, p. 95-96), and that Morris' disclaimers indicated that EPA did not support the science in Complainant's research papers (TR 678, 725). Complainant's Research Director testified that Complainant is truthful (TR 646); the ALJ has no basis for finding that Complainant has ever objected to telling the truth.
66. The issue of special disclaimers did not center around the final content of the disclaimers, but involved EPA's conduct in requesting Dr. Lewis to attach unique disclaimers to his writings because they were not required under the EPA guidelines. Dr. Lewis and his research director (Holm) also objected to using disclaimers which were not accurate - i.e. disclaimers designed for publications that were not funded by the EPA (TR 640-42), and because of strict space requirements editors/publishers impose on abstracts and journal

articles (TR 54-55).

EPA Non-Response to Inquiries by Synagro

67. The RDO rejected Complainant's assertion that EPA's decision not to respond to various Synagro attacks on Dr. Lewis harmed his reputation (RDO p. 29, para 4; p. 31, para 3; p. 36, para. 3).
68. The ALJ failed to properly analyze the fact that EPA had a policy to respond to such inquiries. The fact that EPA had a policy to respond to such inquiries was supported by the undisputed testimony of Dr. Russo and was also the subject to a stipulation by EPA (CX 1, p.59-60 ; Joint Stipulation No. 30).
69. The ALJ failed to properly analyze *why* EPA had a policy to respond to such inquiries and failed to analyze the impact of Joint Stipulations 12-14, in which EPA admitted that its failure to respond to the Synagro inquiry was based primarily on the fact that Dr. Lewis had engaged in protected activity.
70. EPA also stipulated to the fact that the reason it failed to adhere to its reference policy regarding responding to inquiries groups like Synagro made concerning EPA employees was based solely on Dr. Lewis protected activity (Joint Stipulations No. 12-14).

71. The fact that it would be *reasonable* to conclude that EPA should have responded to Synagro's letters was the subject of undisputed testimony by Ms. Harrison, who explained the importance of an academic/research laboratory's response to such letters, especially in regard to protecting the reputation of an employee. CX 140.
72. Additionally, the undisputed testimony of Dr. Russo also confirmed that EPA had a policy of responding to such inquiries, and that EPA both should have responded to the Synagro inquiries and failed to properly respond to the UGA inquiry. (CX 1, pp. 56-60).
73. Dr. Russo also provided undisputed testimony that EPA improperly provided information to OSHA, which is now part of the public record, regarding the nature and scope of Dr. Lewis' employment while working under the IPA agreement at UGA (Compare CX 9, CX 14, JS 24-26).
74. Dr. Hodson provided *undisputed testimony* documenting the specific need for EPA to have responded to Synagro's letters, and the negative impact EPA's failure to do so had on Dr. Lewis' reputation and employability at the University of Georgia (CX 24, pp. 31-40).
75. The ALJ also failed to weigh the impact Walker's distribution of the White Paper had on Dr. Lewis'

reputation within UGA. Again, the fact that UGA employees were present when Southern Waste accurately reported that it had obtained the White Paper from EPA was not disputed in the record. Likewise, the negative impact Walker's distribution of the White Paper was the subject of *undisputed* testimony confirming its adverse impact at UGA (CX 29, p. 12-20).

76. Regardless of what prompted Synagro to publish the White Paper, EPA was obligated to respond because the Agency's national spokesperson on the issue had officially distributed Synagro's false allegations about Complainant's positions and work at EPA in a public proceeding (attended not only by UGA employees, but various public officials).

77. The RDO stated that Complainant failed to provide any evidence that EPA affected the NAS committee's view of his research by not responding to committee member Greg Kester's request (CX 119) for EPA's position on the accuracy of the White Paper allegations (RDO p. 29, para. 3). The RDO failed to consider the undisputed expert testimony of former Assistant Attorney General of the State of Georgia, F. Edwin Hallman, who specifically addressed the issue of EPA choosing not to respond as to whether Synagro's allegations were factual. Mr. Hallman



testified: "Therefore it's true if they never responded, and under the laws of many states, there's some case law in Georgia that says if you don't respond to a statement of factual legal application, that you are concurring with that statement. Synagro's White paper argued that Complainant's research documenting illnesses from exposure to sewage sludge applied under the 503 sludge rule was never peer-reviewed and it was not endorsed by the EPA (CX 93, p.1). Synagro distributed the White Paper to the NAS committee, which was considering the merits of Dr. Lewis's work (RX 157, CX 140, p. 39). EPA distributed to the White Paper to Southern Waste, which thereafter placed the Paper on the public record and distributed it to various officials. Greg Kester was a member of the NAS committee (CX 90, p. 4); and, he sent an inquiry to numerous EPA officials, including Robert Bastian, John Walker, Bob Brobst, and James Smith who had served as official EPA peer-reviewers of Complainant's Adverse Interactions paper (TR 1231-34). Dr. Smith, the peer-review coordinator, agreed that Complainant had addressed the criticisms of peer-reviewers well (TR 667) and EPA concurred that the paper had passed the Agency's peer-review process and approved it for publication as an official ORD research paper (TR 168, 172, 669, RX5, p.3).

Mr. Kester stated that he found Synagro's White Paper to provide "compelling refutations" of Complainant's documentation of adverse health effects (CX 119), and specifically asked Smith, Brobst, Walker, and Bastian whether they disagreed with any of Synagro's material. The full record, which the ALJ failed to consider, clearly demonstrates that the NAS gave EPA an opportunity to inform the committee that Complainant's research documenting adverse health effects had been officially peer-reviewed and approved for publication by EPA contrary to what Synagro stated.

#### Other

78. The RDO concluded that Complainant provided no evidence that EPA provided Synagro with a basis for building a case against him involving criminal wrongdoing, and that he "greatly overreacted" regarding his concerns that Synagro's allegations over misuse of the IPA could result in criminal prosecution. (RDO p. 31, para. 3; p. 35, para. 2). The RDO failed to acknowledge that the Labor Department had ruled in Complainant's favor in a previous case in which EPA suggested that Dr. Lewis' protected activities could have violated the Hatch Act, which is a criminal law (CX 71; TR 112-115). The ALJ also failed to acknowledge the significance of the fact

that EPA, in concert with the Justice Department, had in fact criminally prosecuted a scientist employed at Complainant's research laboratory for allegedly misusing his IPA (TR 106-108). Far from being speculative, Dr. Lewis had direct knowledge that the EPA and DOJ had in fact taken misuse of funds during an IPA extremely seriously and had actually indicted and prosecuted a scientist employed in the Athens lab. Thus, Dr. Lewis' fear that unrebutted allegations that he misused his IPA funding and improperly used federal funds to support his work on sludge could have criminal implications was not far fetched.

79. Moreover, the ALJ failed to acknowledge that Synagro brought up Fifth Amendment issues when deposing Complainant and refused to say whether they were gathering information to pursue allegations of criminal misconduct against him (CX 146). The RDO failed to acknowledge the significance of the fact that EPA stated to OSHA, erroneously, that the scope of Complainant's IPA did not permit him to work on sewage sludge (CX 14 p. 7, last para.).

80. The RDO concluded that Complainant probably improperly added policy-related information on sludge rule to his *Nature* article after his division director

(Russo) cleared it as not having policy implications (p. 13, para. 2). This finding is based on pure speculation and is inaccurate. The ALJ failed to point out that Research Director Robert Swank was the EPA official who cleared this paper as not having policy implications (CX 39, p. 67), that the information on the sludge rule was added in response to reviewer/editor suggestions (CX 39, p. 66), and that Dr. Swank did not believe the paper had policy implications according to their guidance from the Office of Research & Development even with these final changes (CX 39, p.53-63). The ALJ, therefore, improperly ignored Dr. Swank's unimpeached testimony.

81. The RDO concluded Complainant was insincere regarding whether a group that Mari Hollingsworth was anti-sludge. The ALJ stated that Complainant is "well aware" that a group that was in favor of land application of sludge would never ask him to speak at a meeting (RDO p. 39, footnote 37). The RDO failed to acknowledge that Complainant had indeed been invited to speak at meetings sponsored by organizations supportive of land application. For example, he was an invited speaker at a Biosolids Conference at the University of Maryland where he endured "incredible flack" with "poise" (CX 140, p. 35). He even accepted an invitation to speak at a

national meeting of the Water Environment Federation organized by Synagro (TR 192-93). The RDO also failed to acknowledge that Complainant was unfamiliar with the organization that Hollingsworth said was sponsoring the meeting, and could not remember its name or whether it was associated with a university or whatever (TR 407-408). Given these facts, it is perfectly understandable that he would not know the organization's position on land application, nor would their position have any bearing on whether he participated in the meeting.

82. The RDO stated that Complainant maintained a website (RX 34, 166) that "aggressively campaigned against the land application of biosolids" (RDO p. 46, para. 3). Complainant's recommendations on his web page and in his research articles (CX 91, 100) to improve pathogen treatment and reduce exposure to irritant chemicals in land applied sewage sludge can no more be characterized as an aggressive campaign against land application any more than the recent NIOSH guidelines, which support the same measures to protect workers from exposure to Class B biosolids (CX 126). However, EPA has never maintained that anything on Dr. Lewis' personal web site was improper or in violation of EPA policies. EPA never accused Dr. Lewis of violating the disclaimer policy on

his web site or of publishing anything on his web site that was not true. Moreover, the record demonstrates that EPA sponsored web sites which actively promoted the land application of sludge (TR 798, 848). Additionally, EPA paid for a web site that published the Synagro White Paper allegations (TR 604-05). The fact Dr. Lewis had a web site is completely immaterial to the legal issues in this proceeding and in fact constituted protected activity.

Dr. Lewis' Contributions and Request for Remedy

83. The RDO stated that Complainant "serious believes that EPA should have acknowledged his research with a gold medal" (RDO p. 44, last para.). The RDO failed to cite to NAS committee member Ellen Harrison agreed that EPA should recognize Complainant because he "was a hero in this regard... turning the whole issue around." [Without Complainant] "We wouldn't be at all where we are today in terms of looking at the issues of safety anew." He "gave legitimacy to the allegations that has made it impossible to ignore alleged health issues." (CX 140).

84. The ALJ ignored all of the other testimony which fully documented Dr. Lewis significant contributions on sludge safety. (CX 140). In addition, Dr. Lewis provided

unimpeached testimony regarding his contributions to the rule (TR 141, 158, 159, 180, 187, 212). There is nothing on-the-record which calls into question the veracity of Dr. Lewis' testimony on this matter. EPA did not cross examine Dr. Lewis on this testimony and did not call any witness to rebut this testimony. Moreover, Dr. Lewis' testimony is completely supported by the *unimpeached testimony* of NAS panel member Harrison.

85. The ALJ's failure to weigh the validity of Dr. Lewis's request that EPA properly acknowledge his contributions toward advancing the public safety on the sludge issue is based on his failure to acknowledge the *unrebutted and extensive* testimony documenting his contributions toward sludge safety. In addition to Ms. Harrison's unrebutted testimony concerning these contributions, the following other evidence was submitted at the hearing documenting Dr. Lewis contributions:

- Complainant's work on infection control, which was the basis for his EPA-sponsored IPA to the University of Georgia, was published by the prestigious medical journals *Lancet* and *Nature Medicine* (*Nature Medicine* is a specialty journal for important medical discoveries). Changes in infection control guidelines by the CDC and FDA

as well as public health organizations throughout the world directly resulted from Complainant's findings published in these papers. Complainant was the only EPA scientist to ever have his research published in *Lancet* and *Nature* and the head of ORD nominated him for a prestigious national award for these accomplishments (CX 1; 3; 61; 77-79; 128; 136; 138).

- The prestigious journal *Nature* also published Complainant's two-page commentary on how science in EPA regulations could be improved to better protect public health and the environment (CX 67; CX 61). This commentary was covered by the *Washington Post* and other major news organizations and was praised by Dr. Bernard Goldberg, former head of ORD, who invited Complainant to speak at a meeting on global environmental issues at the United Nations (CX 62; 61; 68).
- Complainant also published his conclusions on the 503 Sludge Rule in the prestigious journal *Nature*, in a research article co-authored by Dr. Jerry Melillo, Associate Director of the White House Office of Science & Technology Policy. This



paper was awarded the Administrator's Science Achievement Award and ORD's Science & Technology Achievement Award. Again, Complainant is the only EPA scientist ever to have his work published by *Nature* even once. (CX 1; 67; 65; 61). *Nature* has published Complainant's work in widely difference areas multiple times, an extraordinary and unparalleled accomplishment at EPA.

- Complainant's work prompted an Inspector General audit, which concluded that -because important scientific studies were not done and the practice is no adequately monitored - EPA cannot assure the public that land application of sewage sludge is safe. (CX 140).
- Complainant's work at EPA prompted two hearings on the 503 Rule by the full Committee on Science in the U.S. House of Representatives. (TR 148-162; CX 59; 60; 61); (CX p. 29).
- As a result of these hearings, the EPA called on the National Academy of Sciences (NAS) to review the science behind the 503 Rule. Complainant's work at EPA served as the framework for many of the issues addressed by the NAS in their report and their findings echoed much of what

Complainant had been saying (CX 140, p. 29; 90; 61).

### Remedy

86. The RDO stated Complainant is asking to be reinstated in a homeland security position (RDO p. 49, para.1). The ALJ appears to state that Complainant is asking to be reinstated in a homeland security position as part of a remedy in this case, which is untrue. He only asked, as one potential option, to be reinstated for a minimum of 2 years to restore the time lost on his IPA and EPA's refusal to fund his research when he returned from his IPA due to the hostile work environment. He did offer to accept a homeland security position part of the relief requested in the present case when he wrote a memo to his local laboratory director Dr. Russo (RX 105), who testified that he has virtually unique skills related to homeland security and she needed him to work on those issues (CX 1). The ALJ failed to point out that U.S. Senator James Inhofe, Chairman of the Environment and Public Works Committee, and Senator Charles Grassley, Chairman of the Finance Committee, both wrote to EPA Administrator Whitman asking that she intervene on behalf of Complainant, in part, because he was needed at EPA to work on homeland security (CX 117), but that this

position was not part of the remedy requested by  
Complainant.

Respectfully submitted,

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Dated: October 15, 2004

UNITED STATES OF AMERICA  
BEFORE THE DEPARTMENT OF LABOR  
OFFICE OF ADMINISTRATIVE REVIEW BOARD

DAVID L. LEWIS,	)	
	)	
Complainant,	)	
	)	ARB Case No. 04-117
v.	)	
	)	ALJ Case Nos. 2003-CAA-6
ENVIRONMENTAL PROTECTION AGENCY,	)	2003-CAA-5
	)	Date: October 15, 2004
Respondent.	)	
	)	

**COMPLAINANT DAVID L. LEWIS' BRIEF-IN-CHIEF**

Complainant Dr. David Lewis hereby files his Brief in Chief appealing the Recommended Decision & Order ("RDO") issued by the Administrative Law Judge ("ALJ") on June 9, 2004.<sup>1</sup> This appeal seeks a *de novo* review of the entire record regarding the complaints against the Respondent, the Environmental Protection Agency ("EPA"), pursuant to 29 C.F.R. Part 24.<sup>2</sup> Dr. Lewis has also filed exceptions to the factual findings of the ALJ.

**STATEMENT OF THE CASE AND RELEVANT FACTS**

Dr. Lewis was an internationally respected research microbiologist<sup>3</sup> employed at the EPA for over 31 years. RDO 3, CX 61 at 1-4. While at EPA he was promoted to the position of GS-15

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<sup>1</sup> Dr. Lewis' Post-Hearing Findings of Fact ("FOF") and Conclusions of Law ("COL"), which set forth a comprehensive summary of the factual record, are incorporated by reference.

<sup>2</sup> See 5 U.S.C. 557(b); Berkman v. U.S. Coast Guard, 97-CAA-2/9, D&O of ARB, p. 15 (Feb. 29, 2000; Bechtel Const. Co. v. Secretary of Labor, 50 F.3d 926, 933 (11th Cir. 1995) (when there are disagreements between the Secretary of Labor and the ALJ, deference is given to the Secretary of Labor).

<sup>3</sup> CX 24 at 7-8.

Research Scientist, one of the highest non-supervisory scientific positions within the agency. TR 40-43. As a condition of qualifying for this position, Dr. Lewis demonstrated that he had a strong international reputation in his area of expertise. TR 52-54.<sup>4</sup> Dr. Lewis' work ratings and reputation as an internationally respected microbiologist was well documented on-the-record and not contested. FOF 28-48.

In 1996, Dr. Lewis began researching whether land application of sewage sludge could harm human health and the environment. TR 78-79. He explained, for the first time, how low levels of toxic chemicals mixed with disease-causing microorganisms (pathogens) in processed sewage sludge (biosolids) could be responsible for environmental damage and a growing number of anecdotal cases of illnesses and deaths associated with exposure to sludge. CX 140, TR 34-35.

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<sup>4</sup> As evidence of his exceptionally strong international reputation, Dr. Lewis was the only EPA scientist ever to be the lead author on research articles published in the medical and science journals *Lancet* and *Nature*. TR 59. These journals are considered by many scientists to be most prestigious scientific peer-reviewed journals in the world. TR 70, 77. Moreover, before his involvement with controversy over health effects of sewage sludge, Dr. Lewis was the first scientist in the world to demonstrate that the AIDS virus could survive outside the human body for up to several days and be transmitted by certain dental devices. TR 63-66. This discovery directly led the FDA, CDC and American Dental Association to change federal policies on sterilization of hand-held dental equipment. TR 66-67. Dr. Lewis' groundbreaking research in this area was published in *Lancet* and *Nature Medicine*. TR 71. EPA nominated Dr. Lewis for the prestigious Maxwell Award based on this work, which he performed in his adjunct capacity at the University of Georgia (UGA). CX 128, TR 75-76.

Ms. Ellen Harrison, Director of the Cornell University Waste Management Institute and a leading member of the National Academy of Sciences ("NAS") panel which reviewed the sludge rule, summarized the importance of Dr. Lewis' research on sludge:

[I]n my book [Dr. Lewis] was a hero. . . Despite the incredible flack he was getting, [he] put forward reasonable scientific theories, backed by some research to suggest that there were plausible routes of exposure and that in fact illnesses might be resulting. He . . . **turned the whole thing around** CX 140, TR 34-35. (emphasis added).

I think without David's involvement we wouldn't be at all where we are today in terms of looking at the issues of safety anew. . . . David gave a legitimacy to the allegations . . . [H]e has made it impossible to ignore the alleged health issues. . . . [W]ithout David we would still be seeing EPA saying nobody's gotten sick and it's safe. . . . David has been probably **the most important player** . . . CX 140, TR 77. (emphasis added).

Ms. Harrison explained, without contradiction:

"David is the only scientist that had raised the scientific issues that might lead to exposure and disease and so David's ideas. . . were important to sort of framing the National Academy panel's report in recognizing that, gee, there are a lot of gaps here, and are plausible routes of exposure that we haven't assessed." CX 141, TR 34.

Dr. Lewis' job researching sludge directly collided with the "official" scientific position taken by EPA. TR 237-38. EPA had a formal policy advocating land application of sewage sludge, which held that EPA's rule on sludge (known as the "503" rule) was protective of public health. TR 1248. EPA also worked directly with trade organizations to advocate sewage sludge as a fertilizer. TR 146. EPA even funded a public relations campaign to encourage states and local municipalities to accept sewage sludge into their communities. EPA formally tasked one of its

scientists with the duty of publicly promoting sludge. The individual assigned by EPA to promote its sludge rule publicly (Dr. John Walker TR 186-87, 237), was also involved in awarding grants to organizations which promoted sludge. TR 237.

The record contains extensive, credible evidence of Dr. Lewis' numerous protected activities (COL p. 3-26), and overwhelming, uncontested evidence of animus and discrimination on the part of EPA. RX 96; TR 648; TR 674-75; TR 677-8; TR 681-82; TR 707-08; TR 715; TR 725; TR 906; JX 1, p. 87-90, 93-94, 98; CX 1, p. 95-96. Dr. Lewis' laboratory director (Dr. Russo) testified: **"Well, in my opinion, he's treated differently because he dared to publish research that shows the sludge rule to have technical flaws."** (CX 1, p. 104)(emphasis added). Similarly, his research director (Dr. Holm) testified that EPA provided Dr. Lewis with no funding for his work after he returned from the University of Georgia ("UGA") (TR 693) and that he was, in fact, left out in "the cold" (TR 687-689). Another former manager at Dr. Lewis' laboratory testified that upper management at EPA had requested that Lewis' lab "muzzle" Dr. Lewis. CX 39, Tr. 52. In fact, EPA even stipulated that it did not follow its standard reference practice due to Dr. Lewis' protected activities. Joint Stipulations ("JS") 12-14.

The conflict between EPA's sludge advocacy and Dr. Lewis' scientific position became so pronounced that in March, 2000 Congressman James Sensenbrenner held hearings of the full House

Science Committee to explore how EPA improperly attempted to impeach or silence critics of the EPA sludge rule. TR 147-51; CX 59 (hearing transcript). Dr. Lewis played an instrumental role in arranging for these hearings, and his counsel was invited to provide testimony about his treatment by the EPA. TR 147-51; CX 140 (Harrison).

In response to the strong criticism by leading Republicans and Democrats on the Science Committee, EPA funded a review of the sludge rule by the National Academy of Sciences ("NAS"). TR 160; CX 140 (Harrison). Dr. Lewis played an important role in bringing about the NAS review. TR 161; CX 140 (Harrison)

In addition to EPA's pro-sludge position, private corporations profiting from sludge (Synagro Technologies, Inc.) and pro-sludge trade organizations [Water Environment Federation ("WEF")] initiated an all-out attack on Dr. Lewis. They directly attacked his ability to serve as an expert witness and work at EPA and UGA, where he was assigned under an IPA agreement. For example, Synagro communicated with EPA and UGA officials in an attempt to have these institutions stop Dr. Lewis' research. Synagro also published a 28-page "White Paper" attacking Dr. Lewis. TR 173. The White Paper portrayed Dr. Lewis as scientifically incompetent and raised issues concerning his authority to conduct research on sludge at EPA and UGA. It also specifically stated that Dr. Lewis' work was not supported by EPA. TR 173.



Synagro, Southern Waste and the trade organizations which promoted sludge had extensive interactions with Dr. Walker, EPA's designated spokesperson advocating sludge. These interactions were part of Walker's official job duties and all of his actions in this case were performed in his official capacity. Walker had strong personal associations with individuals employed by Synagro, TR 186; he was a leading national figure regarding land application of sludge, TR 228; he was very active in WEF, communicated directly with Synagro and Southern Waste about Dr. Lewis, TR 247; and he oversaw grants to trade groups whose specific purpose was to advocate sludge application and debunk allegations that sludge was not safe.

In his official capacity, Dr. Walker engaged in conduct which undermined Dr. Lewis' reputation, interfered with his employment and publication practices, and undermined his ability to be employed as an expert witness on sludge matters. Dr. Walker circulated Synagro's White Paper attack on Dr. Lewis, TR 247, wrote derogatory "peer review" comments for the public record, which were provided to Synagro (and made public), TR 233, and informed his colleagues (and outside citizens) that Dr. Lewis would not be allowed to participate in EPA-funded conferences because he had filed whistleblower complaints. TR 583.

In addition to Walker's aggressive pro-sludge public campaign, EPA violated its own reference policy by refusing to respond to letters filed with EPA by Synagro. JS 12-14. Given Synagro's actions, EPA's failure to follow its procedures in this

matter was extremely prejudicial to Dr. Lewis. As explained by NAS panel member Harrison, EPA's failure to adhere to its policy in this regard was particularly "destructive" to Dr. Lewis' reputation and ability to perform his job:

Q: . . . In terms of a professional work environment like a university or a research institution like the Office of Research and Development, and given a scientist in a position like Dr. Lewis is in . . . is credibility an important commodity?

A: Of course, your **reputation is extremely important.**

Q: . . . In terms of an employee who's relying on their reputation in the way that a research scientist in Dr. Lewis' position as a GS-15 has to, what is the impact of these types of questions [i.e. those in Synagro's 2/6 letter] being asked to a host institution . . . ?

A: . . . I think it would be **destructive** . . .  
\* \* \*

Q: . . . based upon your knowledge . . . [of Synagro's] public advocacy reputation . . . would that in some way add to your evaluation . . . .

A: Absolutely...If it's raised by an entity that [is] trying to discredit. . . Lewis, and a knowledge that they will use whatever information they have, spending whatever money it takes to get that information out and around, then it has **tremendous reverberations**, then it really affects reputation, it's just not a single little letter. TR 65-68. (emphasis added).

Dr. Robert Hodson, who during the relevant time period served as the chairman of the Marine Sciences Department at UGA, provided unimpeached testimony concerning the harm caused by EPA's failure to comply with its reference policy. He testified that EPA's failure to respond to Synagro's allegations harmed Dr. Lewis' reputation and thwarted his ability to obtain a professorship at UGA and collaborate with others at UGA. CX 24.

In addition to Walker's sludge-promotional activities and EPA's failure to adhere to its reference policy, the record also supports, without contradiction, that EPA established a "flawed" peer review process to review Dr. Lewis' sludge research.

Although the ALJ properly found that the peer review was flawed, he failed to review the entire record or fully understand how flawed the review was, and the extent to which it negatively impacted Dr. Lewis' career and ability to obtain employment.<sup>5</sup>

The record in the case also documented a series of retaliatory actions which interfered with Dr. Lewis' work. Dr. Lewis' research was not funded, TR 693, CX 155, RDO p. 64, No. 10, his ability to collaborate with fellow scientists was directly interfered with, RDO, p. 18, footnote 18, and EPA

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<sup>5</sup> In the peer-review, EPA completely failed to implement its conflict of interest rules regarding the selection of peer-reviewers. Not only did EPA improperly name Walker to the peer review (in violation of the EPA's conflict of interest requirements), other reviewers should have been excluded for the same reason. In fact, EPA's own witness, the chairman of the peer review panel, admitted under oath that he did not follow numerous peer review requirements, TR 1286, and failed to properly screen participants for conflicts of interest, TR 1281, 1286. In fact, the chairman himself expressed concern over Dr. Lewis' protected activities and admitted that he should have been screened for a potential conflict but was not. TR 1288. The failure to adhere to the peer review rules resulted not only in Walker's improper participation in the review, but other individuals with strong conflicts of interest were also made part of the review. FOF 226.

The ALJ also ignored the fact that the flawed peer review comments were *public* documents and available to outside groups under FOIA. These documents were highly improper evaluations of Dr. Lewis' work as a scientist, which were effectively used by proponents of sewage sludge to impeach his credibility.

directly interfered with Dr. Lewis' ability to participate in research projects and conferences.

In commenting on EPA's conduct toward Dr. Lewis, his second line supervisor and laboratory director, Dr. Russo, testified (without contradiction) that she did not know of any other scientist whose "conduct," "the kind of work he's doing," "who he collaborates with" was subjected to "so much" "jerking around." CX 1, Tr. 162. *Accord.*, CX 1, Tr. 163.

#### **ARGUMENT**

##### **I. THE ALJ'S ANALYSIS OF WHETHER EPA TOOK ADVERSE EMPLOYMENT ACTION AGAINST DR. LEWIS WAS ERRONEOUS.**

The ALJ's analysis of what constitutes adverse action was erroneous. The ALJ applied an overly narrow "tangible job consequence" test to determine whether EPA's conduct constituted adverse action. RDO 54. In his Post-Hearing Brief, Complainant extensively briefed the issues of badmouthing, hostile work environment, and actions "reasonably likely to deter" protected activities, along with other well established case law which contains the precedent on evaluating adverse action in the factual context of this case. The ALJ incorrectly ignored much of this case law in conducting his analysis.

"Whether an action is sufficient to constitute an adverse action for purposes of a retaliation claim must be determined on a case-by-case basis, using both a subjective and an objective standard." Gupta v. Florida Board of Regents, 212 F.3d 571, 587 (11th Cir. 2000) (citations omitted). There is a circuit split

on the issue of what acts constitute adverse employment actions for the purposes of a retaliation claim. The ALJ did not recognize the split in the circuits and his analysis is inconsistent with the Eleventh Circuit line of cases on adverse action.

As explained by the Eleventh Circuit:

While the Eighth Circuit has sided with the Fifth Circuit, see Ledergerber v. Stangler, 122 F.3d 1142, 1144 (8th Cir. 1997) (only adverse employment actions that "rise to the level of an ultimate employment decision [are] intended to be actionable under Title VII."), the First, Ninth, and Tenth Circuits have all held that Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions. Wideman v. Wal-Mart Stores, Inc., 141 F.3d 1453, 1456 (11th Cir. 1998).<sup>6</sup>

In Wideman, the Eleventh Circuit joined the First, Ninth, and Tenth circuits in holding that "Title VII's protection against retaliatory discrimination extends to adverse actions which fall short of ultimate employment decisions," although employer conduct must reach "some threshold level of substantiality" to be cognizable under the anti-retaliation clause. 141 F.3d at 1456. Rather than applying a narrow definition of a "tangible employment action" to determine if an adverse action exists, as did the ALJ, the term adverse action, in the 11<sup>th</sup> Circuit, should be defined "more liberally." Hilliq v. Rumsfeld, 381 F.3d 1028,

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<sup>6</sup> See Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (actions other than discharge, such as unwarranted negative job evaluations, are covered by Title VII's anti-retaliation provision); Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987) (non-ultimate employment decisions, such as undeserved performance ratings, constitute adverse action under Title VII).

1033 (10th Cir. 2004). As will be set forth below, regardless of the circuit split, EPA clearly took an adverse employment action against Dr. Lewis.

**A. EPA'S FLAWED PEER REVIEW OF DR. LEWIS' ARTICLE, ITS FAILURE TO REMOVE SUCH FROM THE PUBLIC RECORD, AND DISTRIBUTION OF THE WHITE PAPER CONSTITUTE BADMOUTHING AND REPRESENT AN ADVERSE ACTION.**

The ALJ ignored Complainant's discussion of the "badmouthing" line of cases, an entire category of adverse action cognizable under the environmental whistleblower laws and applicable to Dr. Lewis' case. See Complainant's Conclusions of Law, p. 31. The Department of Labor ("DOL") adopted a "prophylactic rule" in the "badmouthing" line of cases, which prohibits negative references or statements about an employee even if those statements do not result in the loss of the employee's job. Earwood v. Dart Container Corp., 93-STA-16, D&O of SOL (Dec. 7, 1994); Leveille v. New York Air National Guard, Case No. 94-TSC-3/4, D&O of SOL (Dec. 11, 1995).

Consistent with the DOL's badmouthing line of cases, other courts have held that "A term or condition of employment may be said to have been affected if there is a 'demonstrable adverse impact on future employment opportunities or performances.'" Merriweather v. Alabama Department of Public Safety, 17 F. Supp. 2d 1260, 1274 (M.D. Ala. Northern Division 1998)(internal citations omitted). See also Howze v. Virginia Polytechnic, 901 F. Supp. 1091, 1098 (W.D. Va. 1995) (finding that adverse employment actions includes "actions that would adversely affect

one's professional reputation or ability to gain future employment, whether or not there was an ultimate employment decision." ).

Significantly, the Ninth and Tenth Circuits have addressed the issue of whether a bad reference without a resulting job loss is an adverse action and have concluded that it is. See Hillig v. Rumsfeld, 381 F.3d 1028, 1033 (10th Cir. 2004); Hashimoto v. Dalton, 118 F.3d 671 (9th Cir. 1997).

The Tenth Circuit found that an adverse employment action is "not limited to those situations where a plaintiff can show loss of an actual job, but also as encompassing those acts that carry a 'significant risk of humiliation, damage to reputation, and a concomitant harm to future employment prospects.'" Berry v. Stevinson Chevrolet, 74 F.3d 980, 986-87 (10<sup>th</sup> Cir. 1996). An employer's action that goes beyond "de minimis harm" to the future employment prospects of an employee can be considered adverse action "even where plaintiff does not show the act precluded a particular employment prospect." Hillig, 381 F.3d at 1033 *quoting* Berry, 74 F.3d at 986-87. Instead of having to show tangible employment action to prove adverse action, the plaintiff needs to show materiality. *Id.* The court applied these principles in Hillig even though it was "highly unlikely that Hillig lost any employment opportunity" due to negative employment references. *Id.* Whether or not a job was lost or gained, badmouthing and negative references are considered adverse actions in themselves and must be treated as such.

In Hashimoto, the Ninth Circuit decided "that the retaliatory dissemination of a negative employment reference violates Title VII, even if the negative reference does not affect the prospective employer's decision not to hire the victim of the discriminatory action." 118 F.3d at 676. The court held that the plaintiff need not show that but for the negative reference, she would have received the job because the negative job reference itself is an adverse action. *Id.*<sup>7</sup>

The aforementioned cases directly speak to Dr. Lewis' circumstances. Dr. Lewis does not need to prove that the badmouthing through the dissemination of the negative reference information (including the failure of the EPA to comply with its policy regarding responding to inquiries about its research scientists), created an actual job loss at UGA and/or specifically interfered with his ability to be employed as an expert witness. The facts show that EPA, through a series of actions, provided extremely negative references about Dr. Lewis to the public and potential employers, including UGA. CX 29 at 14-17, TR 205. In addition to EPA's circulation of the White Paper, EPA created highly negative "peer review" comments which it made part of the public record. Negative information from these peer review evaluations were released to the public and were used by groups such as the Water Environment Federation and

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<sup>7</sup> Significantly, as stated above, in analyzing adverse action, the Eleventh Circuit agrees with the Ninth Circuit and Tenth Circuit analysis.



Synagro to degrade Dr. Lewis and impeach his credibility to work on matters related to sludge.

Moreover, as explained in the unimpeached testimony of Dr. Russo and Ms. Harrison, and confirmed in the Joint Stipulations entered in this case, EPA had a policy of responding to inquiries about the conduct of its research scientists, including Dr. Lewis. The record demonstrates, without contradiction, how the failure to adhere to this reference policy could harm, and did harm, Dr. Lewis. The record also demonstrates, without contradiction, that the only reason EPA did not adhere to this policy was due to Dr. Lewis' protected activity.

Additionally, in response to a specific request for information from UGA concerning Dr. Lewis' scope of employment, EPA failed to follow its policy of vetting such inquiries with the responsible program manager (in this case Dr. Russo). As a result, EPA provided an incomplete and misleading letter to UGA concerning the scope of Dr. Lewis' work and also provided an inaccurate letter to OSHA (which is now part of the public record regarding Dr. Lewis). Again, the unrebutted testimony of Dr. Russo confirms that EPA's failure to adhere to its standard policy on responding to inquiries was discriminatory.

Dr. Lewis' testimony and the unrebutted testimony of the Chairman of the Marine Sciences Department at UGA, Dr. Hodson, strongly support the conclusion that Dr. Lewis' prospective job opportunities were harmed as a result of EPA's actions. CX 24 at 28-29, 37-40.

In addition to unwarranted negative references, a public entity's release of personal information to the media (and by extension, the public) also constitutes adverse action. Shotz v. City of Plantation, Florida, 344 F.3d 1161, 1181 (11th Cir. 2003). In Lewis' case, information was released by EPA to the public via Dr. Walker's distribution of the White Paper to Southern Waste and EPA's creation of publicly available "flawed" peer reviews; this behavior constitutes adverse action under Shotz.

A bad reference can have a devastating effect on a person's ability to obtain employment; the destructive nature of a bad reference can make a job disappear before it is even created. "Therefore, an act by an employer that does more than *de minimis* harm to a plaintiff's future employment prospects can. . . be regarded as an 'adverse employment action,' even where plaintiff does not show the act precluded a particular employment prospect." Hilliq, 381 F.3d at 1033.

Instead of performing a "badmouthing" analysis, as briefed by Complainant, the ALJ inappropriately applied the "failure to hire" line of cases and he faults Dr. Lewis for not submitting an application to UGA for the tenured professorship. See Complainant's Conclusions of Law, p. 31; RDO 60. As the bad reference line of cases makes clear, looking for a specific lost

job when determining if badmouthing contributed to adverse employment action is setting the threshold too high.<sup>8</sup>

**B. EPA'S FLAWED PEER REVIEW PROCESS AND FAILURE TO REMOVE THE REVIEW FROM THE PUBLIC RECORD CONSTITUTE A BAD REFERENCE.**

While the ALJ admitted that the peer review process used to evaluate Dr. Lewis' article was flawed, he ignored the fact that a peer review is accessible to the public, used professionally to determine the competency of a scientist, and, in effect, is equivalent to a super employment reference. See RDO 57. He also failed to fully analyze the extent to which the peer review process was flawed. The ALJ gave little attention to the numerous procedural violations surrounding the creation of the peer review panel, selection of its members, and failure of the peer review process to adhere to the most basic standards mandated by the EPA.<sup>9</sup> That the EPA committed these violations

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<sup>8</sup> Although not mandated by the case law, Dr. Lewis submitted compelling and undisputed testimony regarding how the bad references and EPA's communications with UGA in fact significantly undermined his ability to obtain employment. CX 24 (Hodson) (concerning the specific interference with Dr. Lewis' ability to obtain a professorship at UGA); TR 240 (Lewis) (extensive testimony regarding how the communications interfered with his employment); CX 29 (Gattie) (concerning the specific interference with Dr. Lewis' employment caused by the distribution of the White Paper); CX 140 (Harrison) (concerning the specific need for EPA to respond to Synagro's February 6, 2002 letter).

<sup>9</sup> The peer review coordinator is responsible for selecting appropriate peer reviewers who should be technically competent in the subject matter of the paper, should not be aggressive critics of the author, and should not have conflicts of interest. RDO 6. The peer reviewers should also abide by the confidentiality rules. RDO 6. In addition, the peer review comments should be the author's own; passing an outside source's review off as one's own is inappropriate. RDO 6.

was admitted by Dr. Smith chairman of the peer review panel. TR 1286. *Accord* CX 145, Rule 3.4.1, 3.4.4, 3.4.5, 3.4.6, 4.2.1.<sup>10</sup>

Dr. Lewis lost a benefit of employment when EPA denied him a procedurally fair peer review and allowed such a flawed peer review to remain in the public record to be used by Synagro, WEF and others to destroy Dr. Lewis' ability to function as an internationally renowned scientist.

The peer review was flawed in several respects. First, the decision to conduct a peer review was made contrary to EPA's explicit policy.<sup>11</sup> In fact, but for Dr. James Smith's concern over Dr. Lewis' status as a whistleblower, a formal peer review of Dr. Lewis' article would not have been ordered. Second, in deciding who would participate in the review, Dr. Smith chose only pro-sludge scientists, including Robert Brobst, Robert Bastain, and John Walker, which created a one-sided record that viciously attacked Dr. Lewis. TR 1231-32. In addition, Dr. Smith asked Dr. Walker to sit on the peer review board despite his lack of qualifications in the area of microbiology as well as his

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<sup>10</sup> Dr. Holm also testified that EPA's conflict of interest policy related to participation in peer reviews is of paramount importance and the reason behind the policy is to maintain a fair and credible peer review process. TR 649.

<sup>11</sup> Under EPA's own rules, if an article is controversial, the first threshold is whether the EPA should perform the peer review. Instead of performing an internal peer review of controversial articles, the EPA might opt instead for an external peer review. TR 1287. In Dr. Lewis' case, the EPA did not follow this guideline. The decision to perform a peer review of the article was made because the article was controversial. TR 1287-88. "Holm agreed that this 'internal' peer review was an unusual process because the article was simultaneously submitted to a journal for peer review." RDO 20.

clear conflict of interest as EPA's public relations representative on biosolids. TR 1234-35, 1135; CX 151 at 4. Dr. Walker's comments were included within the peer review record and remain on the peer review record even though he has admitted that nearly all of his comments were plagiarized from Dr. Millner.

The ALJ states that "although the peer review process was flawed, that does not necessarily indicate that the actual peer reviews were flawed." RDO 57. On the contrary, the process is exactly what should be used to determine whether the peer reviews were flawed. Here, EPA allowed Dr. Walker, who was not qualified and had a clear bias and conflict of interest, to review the article. TR 1234-35, 1135; CX 151 at 4. The result was that an unqualified and biased scientist with a conflict of interest inserted a derogatory statement ("significantly flawed") into a plagiarized review, which has remained in the record and has been picked up by a leading trade organization (WEF) and a highly aggressive corporation (Synagro) as a method by which to discredit Dr. Lewis. In addition to Dr. Walker, the other reviewers selected by Smith also had significant conflicts of interest which were not screened. It was highly inappropriate for EPA to ignore vital conflict of interest screening requirements in establishing a peer review panel to weigh the

credibility of a major research project written by a leading scientist/whistleblower.<sup>12</sup>

The flawed peer review created a body of material which the ALJ himself even credited. RDO 66. Experts in the area, including Dr. Russo, Dr. Lewis' Lab Director, and Dr. Harvey Holm, Dr. Lewis' Research Director, both from the Office of Research and Development, approved Dr. Lewis' original publication and praised his work on biosolids. CX 1 at 74, TR 686. Ellen Harrison, from the National Academy of Sciences, gave unimpeached testimony praising his work. CX 140. She declared it to be a major break-through as the first time a theory had been set forth that plausibly explained how sludge was harming people. CX 140, TR 34-35. Even with the knowledge that the peer review process was flawed and resulted in biased and plagiarized comments, the ALJ discounted the aforementioned testimony and instead was persuaded by the peer review, believing that Lewis' work was unmerited.<sup>13</sup> RDO 66.

The ALJ tersely mentions that criticisms and reprimands are not adverse actions absent tangible job consequences, implicitly likening the flawed peer review of Dr. Lewis' article with receiving a negative job performance review. RDO 54. In doing

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<sup>12</sup> "The selection of appropriate reviewers is critical." RDO 6. Dr. Smith testified that the selection of peer reviewers under EPA policy is crucial to an effective peer review. TR 1281.

<sup>13</sup> The ALJ also relied on the fact that Lancet rejected the article, however, the record reveals that this fact was blown out of proportion. Lancet is an extremely prestigious publication, one in which no other EPA scientist had ever been published.

so, the ALJ overly simplifies the "performance review" line of cases. Courts have not held that bad performance reviews are *per se* nonactionable. Instead, courts have considered the consequences of the performance review and its context to determine whether it is actionable. The ALJ failed to address those cases in which criticisms and reprimands are considered to be significant enough to constitute adverse actions.<sup>14</sup>

Courts have taken into consideration several factors in determining whether a bad performance review constitutes an adverse action. Because employer criticism is an ordinary and appropriate feature of the workplace, "[e]xpanding the scope of Title VII to permit discrimination lawsuits predicated only on unwelcome day-to-day critiques and assertedly unjustified negative evaluations would threaten the flow of communication between employees and supervisors and limit an employer's ability to maintain and improve job performance." Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1242 (11th Cir. 2001). Thus, "[c]ourts have held that a letter of reprimand placed in an employee's file alone, does not qualify as adverse employment action." Nelson v. University of Maine System, 923 F. Supp. 275, 282 (D. Maine 1996) (citations omitted). However, if the reprimand is made by a

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<sup>14</sup> See Wyatt v. City of Boston, 35 F.3d 13, 15-16 (1st Cir. 1994) (stating that actions other than discharge, such as unwarranted negative job evaluations, are covered by Title VII's anti-retaliation provision); Yartzoff v. Thomas, 809 F.2d 1371, 1375 (9th Cir. 1987) (holding that non-ultimate employment decisions, such as undeserved performance ratings, constitute adverse action under Title VII).

formal committee and contained in a formal report, as compared to an informal letter, the court will be more likely to find adverse action.<sup>15</sup> In addition, if there has been wide circulation, as compared to containment in the employee's file, the courts will be more likely to find adverse action. *See Id.* Finally, if the evaluation remains in the employee's file, as opposed to being removed, the courts will be more likely to find adverse action because the threat of harm to reputation has not been removed. *See Id.*

Applying this case law, the flawed EPA peer review constituted an adverse action under the performance evaluation standard. A peer review is performed by a formal committee and is solidified in a formal report. RDO 6. It is not meant to be an informal coaching document. Rather, a peer review plays a significant role within EPA as well as within the scientific community in terms of providing an objective evaluation of a particular scientist's theories, research, and conclusions.

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<sup>15</sup> See Howze, 901 F. Supp. at 1098 (holding that an employer's report criticizing a professor's conduct constituted adverse action because it could hinder her future endeavors, including "obtaining research grants, endowed professorships, publications, and other similar accoutrements of a tenured professor."); Nelson v. University of Maine System, 923 F. Supp. 275 (D. Maine 1996) (holding no adverse action and distinguishing employer's letter of reprimand from Howze on basis that an employee was not criticized by a formal committee, a letter, not a committee report was issued, his file was not widely circulated, and the letter was ultimately removed from his file).



In this case, the flawed peer review comments were not only a matter of public record, but were distributed to WEF<sup>16</sup> and Synagro<sup>17</sup> and were publicly used to impeach Dr. Lewis and interfere with his ability to be used as a credible scientist in his area of work. TR 1181-82. Even the ALJ himself relied upon the flawed peer review process to impeach Dr. Lewis' science.<sup>18</sup>

Finally, a peer review is not solely contained in the employee's private employment file, but it is performed with the purpose of creating a record accessible to the public. EPA's flawed peer review will negatively impact Dr. Lewis' ability to be considered a scientific expert by the court. In Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993), the Supreme Court established a set of standards for assessing "whether the testimony's underlying reasoning or methodology is scientifically valid and properly can be applied to the facts at issue." Daubert considers several factors "including whether the theory or technique in question can be (and has been). . .

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<sup>16</sup> TR 238.

<sup>17</sup> In Synagro's February 6, 2002 letter to EPA, Synagro refers to the "significantly flawed" language used by EPA's own peer reviewer to discredit Dr. Lewis. CX 12.

<sup>18</sup> The ALJ stated: "But as the peer reviews indicate, he has not provided credible scientific evidence to back up his belief. . ." (emphasis added). RDO 66. In this regard, the ALJ lacked subject matter jurisdiction to make any scientific findings or render any scientific opinions regarding whether Dr. Lewis' article contained "credible scientific evidence." Landers v. Commonwealth-Lord, 83-ERA-5, ALJ op. p. 3 (May 11, 1983), adopted by SOL (September 9, 1983) ("it is clear that this office does not have jurisdiction to decide any issues relative to the quality . . ."). The ALJ has no training or expertise whatsoever in interpreting the validity of any of the scientific data relevant to this case.

subjected to peer review and publication." EPA's flawed peer review impedes Lewis' ability to perform his job as an expert scientific witness, and therefore constitutes an adverse employment action.<sup>19</sup>

The ALJ credited EPA with taking corrective action with regards to the flawed peer review. RDO 59. In the ALJ's opinion, EPA "acted quickly and appropriately once it was informed of Walker's actions." RDO 59. In fact, EPA took no meaningful corrective action with regards to the flawed peer review, which remains on the public record, complete with Dr. Walker's biased and plagiarized comments. The EPA merely counseled Dr. Walker for his plagiarism. TR 1200. When given the opportunity to correct the record regarding Walker's comments (i.e. after being questioned about comments contained in Walker's peer review by Synagro and the WEF), EPA declined to correct the record and let Walker's comments stand unexplained.

The ALJ admits that "Walker's dissemination of his peer review of Complainant's article to Synagro, whether orally or directly by providing a copy, demonstrated an extreme lack of judgment." RDO 59. The truth of the matter is, Synagro could have obtained a copy of the peer review comments through a FOIA request, as the peer review is part of the public record. Thus, it is inconsistent for the ALJ to find that providing comments

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<sup>19</sup> See Frank v. State of New York, et. al., 972 F. Supp. 130 (N.D. NY 1997) (holding expert testimony was not sufficiently reliable to meet Daubert, in part because peer review of theory had revealed a host of flaws, and thus was inadmissible).

accessible to the public was an "extreme lack of judgment" yet find that it was not adverse action for EPA to leave the flawed peer review on the public record.

**C. DR. WALKER BADMOUTHED DR. LEWIS TO SOUTHERN WASTE BY SENDING SOUTHERN WASTE THE WHITE PAPER, WHICH CONSTITUTES A BAD REFERENCE FOR WHICH EPA SHOULD BE HELD LIABLE.**

On September 21 and 24, 2001, EPA provided copies of the Synagro White Paper to a corporation known as Southern Waste. TR 208. At the time it provided this document for Southern Waste=s use, EPA knew that Southern Waste was involved in a number of very public proceedings in which the company was attempting to obtain information from EPA. TR 208. Also, the EPA knew that Dr. Lewis was providing expert assistance as part of these proceedings. TR 210. The record in this case fully demonstrates that EPA=s distribution of this document did create, or reasonably could have created, an inference that EPA endorsed or approved of the document.<sup>20</sup>

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<sup>20</sup> The record in this case demonstrates that Southern Waste obtained its copy of the White Paper from EPA. There is nothing on the record which indicates that Southern Waste obtained the document from another source. Moreover, each time Southern Waste distributed the document or publicly discussed the document, they stated that the document had been provided by EPA. CX 29 at 14. Thus, on the basis of the record in this case, but for EPA=s distribution of the White Paper, Southern Waste would not have even had a copy of the document to use at the Franklin and Dawson County Commission Hearings. Thus, EPA was not only responsible for adding credibility to the White Paper, but was the direct cause of the document being distributed in Georgia and UGA employees learning of it.

The EPA employee who provided the White Paper to Southern Waste is Dr. John Walker, an individual well known as one of EPA=s leading "biosolids spokesmen" and "foremost authorities" on sludge. RDO 8. At the time of the distribution, Dr. Walker=s responsibilities included promoting EPA=s pro-sludge policy. RDO 8, CX 151 at 4. Dr. Walker had formal agency responsibility for preparing "responses to correspondence [from the] general public relating to program activities" and providing "Technical information and assistance" to "non-EPA personnel." CX 150 at 4. In his official EPA performance standards applicable when Dr. Walker distributed the White Paper, Dr. Walker was designated as EPA=s "lead authority on biosolids" with the specific responsibility to "provide technical assistance" and Agood outreach@ to members of the "public" or "stakeholders." CX 151 at 4. He was also responsible for "run[ning]" a "successful program for encouraging the beneficial use of biosolids." CX 151 at 4.

The fact that the document was distributed by one of EPA=s leading experts on the sludge rule, a scientist who had been working on the rule since the 1970's and officially designated as EPA's public spokesperson on sludge, added further credibility to the paper. Supporters of sludge, Southern Waste, identified the paper not just as a document prepared by a biased corporation, but as a document provided to them by the EPA - the responsible regulatory body. CX 29 at 14.

In October of 2001, Dr. David Gattie, an assistant professor at UGA and colleague of Dr. Lewis, attended a hearing in Franklin County, Georgia regarding the land application of sewage sludge in the county. CX 29 at 8-9. In attendance at the meeting were county commissioners, an attorney from Southern Waste, and a crowd of people. CX 29 at 10. Dr. Gattie testified that the attorney from Southern Waste, with the White Paper in hand, represented that the EPA, specifically Dr. Walker, had provided him with information that the land application of sludge is safe and that the EPA did not support David Lewis' position on the land application of sludge.<sup>21</sup> Furthermore, after listening to Southern Waste, it was Dr. Gattie's "impression that EPA had endorsed the white paper." CX 29 at 14.

Uncontested evidence reveals that Dr. Walker's distribution of the White Paper to Southern Waste significantly harmed Dr. Lewis' reputation. Dr. Gattie testified that people at UGA "wanted to know why he [Dr. Lewis] was there. . . . [and] why he was working on biosolids." CX 29 at 14-16. He further testified that he "learned from faculty that something had come up . . .

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<sup>21</sup> "[The attorney for Southern Waste] had documents in his hand that he had raised for the commissioners to see. One. . . he referred to as the white paper on Dr. Lewis. The other was a letter from John Walker that stated that . . . [EPA] was in agreement essentially with the white paper." CX 29 at 11-12. In addition, "[the attorney for Southern Waste said] [t]hat the information John Walker had provided him supported their position that land application of sludge was fine and that they did not support David Lewis's position on the land application of sludge." CX 29 at 13.

there were some rumblings, and some comments had been made to Tim [Hollibaugh] about why David Lewis was there." CX 29 at 14-16.

In evaluating whether the EPA should be held liable for Dr. Walker's actions, the ALJ performed an inaccurate and truncated analysis. In Meritor Savings Bank, FSB, v. Vinson, the Supreme Court of the United States held that traditional agency principles were relevant for determining employer liability and cited the Restatement §§ 219-237 with general approval. 477 U.S. 57, 71 (1986). Restatement (Second) of Agency § 219(a) provides that "[a] master is subject to liability for the torts of his servants committed while acting in the scope of their employment." The ALJ overlooked this provision and instead evaluated EPA's liability based upon §219(2), which provides that "[a] master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless... (b) the master was negligent or reckless" (i.e., the employer knew or should have known about the violation and failed to respond in a reasonable manner).

A "government entity cannot act by itself. . . . they can effectuate their goals only through their agents." Davis, 115 F.3d at 1371. Under the Restatement, an employer will be held liable for actions taken within the scope of the agent's employment. Any act "plausibly related to employment" will fall within the scope of employment standard. Davis, 115 F.3d at 1371. In Betts Baking Co., Inc., v. N.L.R.B., a company was

found liable for the unlawful actions of a company spokesman. 80 F.2d 199, 202 (10th Cir. 1967).<sup>22</sup>

As EPA's premier public relations agent regarding sludge issues, Dr. Walker had complete responsibility for disclosing the EPA's positions to the public. CX 151 at 4. When Dr. Walker distributed the White Paper, which attacks Dr. Lewis' sludge research, whistleblowing on sludge safety, and employment qualifications, he was clearly acting within his official capacities at EPA because it was within Dr. Walker's job responsibilities to publicize EPA's pro-sludge policy. TR. 802. Dr. Walker assumed the position of the EPA when he disclosed information and documents about Dr. Lewis' anti-sludge research. Thus, Dr. Walker's action of distributing the pro-sludge anti-Lewis "White Paper" to Southern Waste constitutes an action of the EPA and an action for which EPA is ultimately liable.<sup>23</sup> Likewise, Dr. Walker's distribution of the flawed peer review constituted an action of the EPA.

It is also the ALJ's opinion that the EPA "acted quickly and appropriately once it was informed of Walker's actions," by requiring that he clarify EPA's position with regard to the

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<sup>22</sup> See also N.L.R.B. v. Solo Cup Co., 237 F.2d 521 (8th Cir. 1956) (holding employer liable for employee's coercive conduct towards other employees after holding him out as 'the personnel man' and giving him specific functions bearing upon personnel and labor relations with employees);

<sup>23</sup> The ALJ states that "respondent was not put on notice," RDO 58, such that it cannot be held liable for Dr. Walker's actions. However, Dr. Walker distributing the paper is equivalent to EPA distributing the paper. Thus, EPA had notice.

"White Paper" with Southern Waste. RDO 58-59. After Dr. Walker contacted Southern Waste in this regard, EPA learned that Southern Waste's counsel was not going to engage in the corrective action requested by Walker, yet it did not pursue the matter further. "Half-hearted" corrective action will not relieve an employer from liability. Henderson, 217 F.3d at 616. Furthermore, a company will not be relieved of liability if it does not disclose its agent's illegal activities to the rest of the employees. See Furr's Inc., v. N.L.R.B., 381 F.2d 562 (10th Cir. 1967). The EPA did not take any steps to inform Dr. Lewis or other employees that EPA did not endorse the White Paper. Appropriate corrective action to remedy the harm to Dr. Lewis caused by Dr. Walker's distribution of the White Paper would have included informing ALL of the people in attendance at the hearings that EPA did not endorse the White Paper and providing Dr. Lewis with confirmation that Walker's conduct was not proper. In light of the facts presented above, it is clear that the EPA is liable for the actions of Dr. Walker and that the EPA did not take the appropriate measures necessary in order to relieve itself from liability.

**D. EPA'S FAILURE TO APPROPRIATELY RESPOND TO SYNAGRO'S FEBRUARY 6, 2002 LETTER AND UGA'S INQUIRY CONCERNING THE SCOPE OF DR. LEWIS' IPA CONSTITUTE BAD REFERENCES.**

The ALJ takes an extremely simple argument and makes it so complex as to be nearly incomprehensible. By describing all of the letters involved in the case in one section, he confuses the issue. The issue is based primarily on the February 6, 2002



letter in which Synagro raises hostile rhetorical questions concerning Dr. Lewis' research and the propriety of Dr. Lewis' conduct. CX 140, TR 65, CX 12. Synagro makes five highly charged and slanderous allegations, including that Lewis was engaged in criminal conduct. CX 12. EPA did not respond to the February 6, 2002 letter from Synagro nor any other letter filed by Synagro alleging misconduct by Dr. Lewis.<sup>24</sup>

The ALJ said that "if Complainant wanted EPA to provide a more detailed response, Complainant should have initiated a waiver [of his rights under "the Employment Privacy Laws"]."<sup>25</sup> However, the ALJ's comments concerning privacy laws are irrelevant. EPA stipulated that the reason it failed to respond was the "litigious environment" between Dr. Lewis and EPA, not his failure to waive his privacy rights.<sup>26</sup>

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<sup>24</sup> EPA stipulated that "no draft response has been prepared for Synagro's February 6, 2002 letter," JS 15, and that "[t]he EPA never specifically responded in writing to any of the allegations filed by Synagro, including (but not limited to) the allegation that Dr. Lewis had in some manner violated the scope of his IPA." JS 35.

<sup>25</sup> RDO 61. In fact, waiving his rights under the Privacy Act would not have helped Dr. Lewis. Regardless of any waiver, EPA would have had to respond in the affirmative to allegations that the peer review described Dr. Lewis' research as "significantly flawed." Indeed, the peer review did contain such comments.

<sup>26</sup> "EPA has not responded in writing to Synagro's February 6, 2002 letter (CX 12) in which they raised concerns about the scope of Dr. Lewis' work on his IPA due, in part, to the 'litigious environment' between Dr. Lewis and EPA." JS 12. Furthermore, It was further stipulated that the litigious atmosphere was a derivative of Dr. Lewis' protected activities. JS 13. "The 'litigious environment' concerned a complaint filed by Dr. Lewis against Synagro under 29 C.F.R. Part 24 and the complaint filed by Dr. Lewis against EPA which concerned EPA's alleged relationship with Synagro." JS 13. Thus, EPA admitted that it

In addition, EPA stipulated that it had a policy of responding to outside inquiries and that it violated such policy when it did not respond to the February 6, 2002 letter from Synagro.<sup>27</sup> The purpose of this policy is to protect scientists' reputations and such policy was clearly a benefit of employment for GS-15 scientists, as EPA stipulated<sup>28</sup> and Dr. Russo recognized.<sup>29</sup> Dr. Russo testified that in the normal course of business, the agency would have asked her to draft the initial response to Synagro's letter. CX 1 at 56-60. By failing to do so in this case, EPA violated standard procedures. CX 1 at 56-60. Furthermore, Dr. Jewel Morris informed Dr. Lewis and Dr. Russo that the EPA would respond to this letter and Dr. Lewis did not file an objection under the Privacy Act. TR 439-440.

Thus, Dr. Lewis was denied a benefit of employment when the EPA failed to respond to the letter, as EPA policy mandated, as

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failed to follow standard operating procedures due to Dr. Lewis' protected activity (i.e., filing DOL claims).

<sup>27</sup> "Generally, if a letter is received by EPA regarding the conduct of an employee, if there is no litigation, that letter will be handled by the appropriate program office." JS 14. In addition, "concerns [about performance and ethics, among others] raised by members of the public which are obtained by the Agency that do not involve issues in litigation, are initially forwarded to an employee's program office for review." JS 21.

<sup>28</sup> JS 14.

<sup>29</sup> In the normal course of business, EPA had a policy of responding to issues about employees, including contentious outside inquiries such as Synagro's February 6, 2002 letter to EPA. See CX 1 at 57, 66-68. Specifically, Dr. Russo testified that EPA failed to follow such standard procedures when it did not ask her to respond to the allegations raised in the Synagro February 6, 2002 letter.

EPA told him it would, and as would be expected for a GS-15 level internationally renowned scientist.

Moreover, as a result of Synagro's allegations that Dr. Lewis' work on biosolids exceeded the scope of his IPA, UGA Associate Director for Legal Affairs Arthur Leed asked for clarification of EPA's position on Dr. Lewis' research on sludge at UGA, specifically as to the truthfulness of Synagro's allegations. CX 24 at 27-29. EPA Assistant General Counsel Bridget Shea responded but chose not to inform UGA that Synagro's allegations were false, or at least completely unfounded, so far as EPA knew. CX 1. Furthermore, Ms. Shea failed to inform UGA that Dr. Lewis was permitted to work on sludge related projects and that the scope of his permissible work would be determined by his laboratory director, Dr. Rosemarie Russo. Indeed, EPA failed to follow its own standard operating procedures when it failed to consult with Dr. Russo regarding the contents of this letter. CX 1 at 56-60.<sup>30</sup>

Dr. Lewis was able to show, through extensive, convincing and unrebutted subjective and objective testimony, that he was denied a benefit of employment as a result of EPA's violation of its policy to respond to outside inquiries and such denial caused

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<sup>30</sup> Similarly, Greg Kester, a member of the National Academy of Sciences panel reviewing the sludge rule, asked EPA for clarification of the Agency's position concerning the veracity of Synagro's White Paper on Dr. Lewis. EPA chose not to respond at all to Mr. Kester, even after it distributed the White Paper to Southern Waste and even after EPA's distribution of the White Paper became widely known. TR 1198.

him significant harm by interfering with his professional standing at UGA and his ultimate future employability. Dr. Lewis' subjective testimony revealed how his stellar relationship with UGA has deteriorated.<sup>31</sup> Dr. Lewis witnessed on a day-to-day basis how EPA's failure to clarify his IPA role and fully respond to the inquiries made by Synagro undermined both his ability to perform his job at UGA and his potential employment as a tenured professor at that institution. This is further proven through the testimony of Ms. Ellen Harrison, from the National Academy of Sciences, and Dr. Robert Hodson,<sup>32</sup> who during the relevant time period served as the chairman of the Marine Sciences Department at UGA for which Dr. Lewis would have been hired as a full professor. Ms. Harrison testified, in no uncertain terms, that given Dr. Lewis' professional reputation and the hostile allegations made by Synagro, the letter should have been responded to. CX 1, 56-60. Dr. Hodson testified that EPA's failure to respond to outside inquiries by Synagro and UGA harmed Dr. Lewis' relationship with UGA.

Ms. Harrison testified as to the importance of EPA responding to Synagro's allegations and clarifying the Agency's position. The impact of that kind of letter, which raises allegations and goes unanswered for a prolonged period of time,

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<sup>31</sup> TR 240.  
<sup>32</sup> CX 24.

and was sent by someone in a position to make that fact very public "would be destructive." CX 140, TR 66.<sup>33</sup>

Moreover, Dr. Hodson testified that the lack of clarification from EPA impacted Dr. Lewis' reputation within the department and potential for "future collaborations."<sup>34</sup> Dr. Hodson testified that Dr. Lewis' "reputation at the university has been strong for many years"<sup>35</sup> and that prior to the IPA controversy, Dr. Lewis was being considered for a tenured professorship.<sup>36</sup> However, after the IPA controversy, and EPA's

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<sup>33</sup> Knowledge of Synagro's public advocacy reputation would have "absolutely" added to Ms. Harrison's evaluation of when a host institution like the EPA should respond to the types of questions in the Synagro letter. CX 140, TR 67. Ms. Harrison explained that a letter written by an entity that is spending "a tremendous amount of time and energy" trying to discredit an EPA scientist by spreading "whatever information they have" around can have "tremendous reverberations" and "really affect[] [a scientist's] reputation." CX 140, TR 68. Ms. Harrison further explained that when a letter comes in from a responsible stakeholder in a regulated industry, to leave it unanswered, without filing a timely response, would "have big repercussions." CX 140, TR 69.

<sup>34</sup> CX 24 at 28-29. For example, Dr. Hodson testified that prior to the IPA controversy, Dr. Hollibaugh "was 100 percent behind bringing him [Dr. Lewis] in [as a tenured professor at UGA]." CX 24 at 40. After the IPA controversy, Dr. Hodson had conversations with Dr. Hollibaugh regarding a proposal to set up a series of centers for research and training regarding ocean and human health. With regards to including Dr. Lewis in the proposal, Dr. Hodson said "[Dr. Hollibaugh] stated to me that he knows that scientifically it would be the right thing to do because the work from the university and out of Lewis' operation are very complimentary. But worry did present itself, according to him, as to whether there's a hidden down side that might somehow hamper funding or otherwise get in the way. . ." CX 24 at 37-38.

<sup>35</sup> CX 24 at 7-8.

<sup>36</sup> "There was considerable enthusiasm for seeing if something could be developed that would pay a salary for him, set up a professorship, perhaps even a chaired professorship, based on the reputation that he had in these several very high-profile, very

failure to implement its standard reference policy regarding properly responding to outside inquiries about employees, Dr. Lewis' standing within the university soured and his ability to obtain a professorship ended. CX 24 at 33-34.

The un rebutted testimony of Russo, Hodson and Harrison all demonstrate the importance of EPA's reference/reply policy in protecting scientists and ensuring their employability.

**II. EPA'S FAILURE TO FUND DR. LEWIS' RESEARCH, PERMIT HIM TO PARTICIPATE IN PROFESSIONAL CONFERENCES AND COLLABORATE ON SCIENTIFIC PROJECTS WITH EPA SCIENTISTS WAS DISCRIMINATORY.**

The ALJ conceded that certain conduct toward Dr. Lewis did constitute adverse action. RDO, 64 (failure to provide funding for post-IPA research). However, the record contains specific examples of concrete employment actions taken against Dr. Lewis, all of which would qualify as adverse action under the most restrictive definition. This includes the failure to fund his research, the failure to assign him to work which matched his expertise and the needs of the EPA, the failure to permit him to participate in professional functions and conferences and the failure to permit him to collaborate with other scientists employed by EPA, which caused Dr. Lewis to become professionally isolated. FOF 531-537, 538-547, 606-613, 656, 684, 685, 749-50; Tr. 110, 540-541, 582-83, 857, 690-93.

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strong research interfaces between environmental and medical sciences." CX 24 at 22-23. Dr. Hodson discussed the potential professorship with Dr. Lewis, other faculty members, and the administration. *Id.*

The ALJ ignored this evidence of adverse action, in part, based on his finding that Dr. Lewis could not properly demonstrate animus related to the funding issue. However, as set forth in the Findings of Fact, the evidence of animus in this case was overwhelming and not challenged. For example, Dr. Lewis' second line supervisor and laboratory director testified, without contradiction, that Dr. Lewis was **"treated differently because he dared to publish research that shows the sludge rule to have technical flaws."** CX 1, Tr. 104. Other evidence on the record fully supports this testimony and demonstrates that animus played a role in all of the adverse employment actions related to Dr. Lewis. See e.g. Findings of Fact Nos. 4, 9, 28, 142, 168-69, 171-178, 223, 656, 659, 676.

In regard to the funding issue dismissed by the ALJ, regardless of whether ORD faced "funding" constraints, the requirement of the IPA mandated that Dr. Lewis be returned to work in a manner consistent with the his pre-IPA working conditions. Prior to going on the IPA, Dr. Lewis had hundreds of thousands of dollars in EPA-related research support. The undisputed testimony was that Dr. Lewis could have performed very useful research and writing, even during the time period between his return to EPA and his forced retirement. Finally, although EPA submitted testimony about generic funding limitations,<sup>37</sup> there

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<sup>37</sup> Even if EPA's overall research budget were limited, ORD - in response to Dr. Lewis' publications while on his IPA - had approved new funding specifically for the issues he raised in his

was no testimony whatsoever that EPA could not have funded Dr. Lewis' post-IPA research. EPA did not meet its burden of proof on this issue. Consolidated Edison v. Donovan, 673 F.2d 61, 62 (2nd Cir. 1982).

### **III. EPA'S CONTINUING PATTERN OF CONDUCT CREATED A HOSTILE WORK ENVIRONMENT FOR DR. LEWIS.**

A complainant can recover on either an adverse action claim or a hostile work environment ("HWE") claim. Even assuming arguendo that none of the aforementioned conduct rises to the level of a "tangible job detriment" recognized under 29 C.F.R. Part 24, Dr. Lewis sets forth an actionable HWE claim.<sup>38</sup> In Williams, the ARB set forth its framework for establishing when various instances of harassment collectively create a "tangible job detriment," cognizable under a HWE theory. Williams, 1997-ERA-14. Under Williams, the complainant must establish that prohibited harassment created a HWE, through proof, by a preponderance of the evidence, of the following elements:

- 1) that he engaged in protected activity;
- 2) that he suffered intentional harassment related to that activity;

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papers (CX 1, p. 107). Yet, ORD would not fund his research when he returned to EPA even though his local managers approved his research plan and request for funding to continue his IPA-related research (TR 692-93).

<sup>38</sup> Complainant provides an extensive HWE discussion in his Post-Hearing Brief on pages 47-75, which the ALJ simply ignored. We hereby incorporate that discussion by reference.



- 3) that the harassment was sufficiently severe or pervasive so as to alter the conditions of employment and to create an abusive working environment;<sup>39</sup>
- 4) that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant.

Williams, 1997-ERA-14 at 9. (citations omitted).

The record unquestionably demonstrates, through overwhelming direct and circumstantial evidence, that Dr. Lewis engaged in protected activity and that he suffered intentional harassment related to that activity. Thus, the only elements of the Williams test that must be analyzed are elements three and four.

Under the third element of the Williams analysis, the level of hostility necessary for harassment to be cognizable is not determined by any mechanistic formula, but instead is dependent upon the specific characteristics of the workplace in question. Williams, 1997-ERA-14 at 14.

In this case, it is uncontested that Dr. Lewis' workplace was highly professional in nature. Specifically, Dr. Lewis was required to have a strong international reputation as a leading scientist to perform his job at an internationally respected level.<sup>40</sup> Consequently, the communications and conduct in issue

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<sup>39</sup> The Williams case directly addresses EPA's position that some or all of the harassment at issue in this case does not rise to the level of adverse action. Under Williams, harassment, even when it does not result in a tangible job detriment, can still constitute adverse action when it rises to a sufficient level of pervasiveness.

<sup>40</sup> "[A] GS-15 research scientist must have a good international reputation. . . . obviously a scientist's reputation is a critical factor for career advancement." RDO 48. Ms. Harrison

have to be viewed in light of these aspects of Dr. Lewis' workplace.

Furthermore, the level of harassment necessary to present a cognizable claim is directly tied to the legislative purposes of the Five Acts, i.e. the goal that the work environment should encourage employee protected activities. Williams, 1997-ERA-14. In this regard, as set forth above, the "focal point" of analyzing the harassment faced by Dr. Lewis is "whether such harassment undermines the raising of safety concerns." Williams, 1997-ERA-14 at 14.

In evaluating the third element in the context of Dr. Lewis' case, the first action which created an abusive work environment for Dr. Lewis was EPA's failure to respond appropriately to inquiries filed with the agency concerning Dr. Lewis. Despite standard operating procedure, EPA did not respond to the February 6, 2002 letter from Synagro or any other letter filed by Synagro alleging misconduct by Dr. Lewis.<sup>41</sup> Moreover, as a result of Synagro's allegations, UGA sought clarification of EPA's position on the scope of Dr. Lewis' IPA, to which EPA provided a response that failed to inform UGA that Synagro's allegations were false and that Dr. Lewis was permitted to work on sludge related projects. CX 24 at 27-29.

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recognized that for a scientist in Dr. Lewis' position, in terms of professional work environment at a university or a research institution like ORD, "your reputation is extremely important." CX 140, TR 65. Dr. Hodson testified that Dr. Lewis had an "equally strong" reputation nationally and abroad. CX 24 at 7-8.<sup>41</sup> JS 15, 35.

EPA's failure to follow its standard operating procedure for responding to outside entities was prejudicial to Dr. Lewis, in that it adversely impacted Dr. Lewis' relationship with UGA and his standing in the professional community. Unrebutted testimony from Dr. Lewis, Ms. Harrison, and Dr. Hodson reveal how Dr. Lewis' reputation and ability to work at UGA was fundamentally damaged by EPA's conduct.

Along with failing to respond appropriately to outside inquiries, EPA's flawed peer review contributed to the abusive work environment. EPA failed to adhere to a number of very important peer review regulations, creating a flawed peer review. See Findings of Fact 261-374. EPA's failure to follow its peer review procedures, properly screen participants for conflicts of interest, and to remove the resulting flawed peer review comments from the public record created a hostile environment directly impacting Dr. Lewis' reputation and ability to perform his work.

EPA's distribution of the White Paper, which clearly undercut Dr. Lewis' credibility and his standing at the UGA, contributed to the abusive work environment. The White Paper directly questioned Dr. Lewis' qualifications to work as an expert in sludge, and it questioned his general character as a scientist. CX 93. After EPA gave the White Paper to Southern Waste, Southern Waste further distributed the White Paper and identified the paper as one that was "provided to us by EPA."<sup>42</sup>

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<sup>42</sup> CX 82 at 77.

Unrebutted evidence reveals that EPA's distribution of the White Paper to Southern Waste harmed Dr. Lewis' reputation. Dr. Gattie testified that as a result, people at UGA questioned Lewis' presence and research on biosolids. CX 29 at 14-16.

In addition to the incidents set forth above, as fully set forth in the extensive record in this matter and documented in the Findings of Fact numbers 751-795, Dr. Lewis was subjected to other adverse actions and/or harassments which also added to the abusive work environment. Evidence of such actions include, but are not limited to, the following:

- \* failure to properly credit Dr. Lewis' work on sludge;
- \* disparate treatment of Dr. Lewis due to his protected activities related to sewage sludge safety;
- \* probations/restrictions on Dr. Lewis' ability to collaborate with other EPA employees;
- \* Dr. Walker's testimony that Dr. Lewis' protected activity (i.e. his filing whistleblower claims) impacted his qualifications to collaborate on various projects;
- \* testimony that managers believed Dr. Lewis needed to be "muzzled;"
- \* testimony from a private citizen that she was told that Dr. Lewis' participation in certain professional functions would be limited due to his protected activity;
- \* testimony from Dr. Lewis regarding the subjective impact of the harassment, including his utility as an expert witness;

- \* testimony regarding the numerous conflicts and disputes regarding disclaimers;
- \* testimony from the Research Director of the Athens lab concerning the failure of EPA to assign Dr. Lewis to sludge related work, and the need to "bring in" Dr. Lewis from the "cold." TR 689.

The fourth element in Williams, "that the harassment would have detrimentally affected a reasonable person and did detrimentally affect the complainant," is satisfied through the extensive and unrebutted subjective testimony of Dr. Lewis, as well as objective testimony of Ms. Harrison, Dr. Hodson, Dr. Russo and Dr. Gattie.<sup>43</sup>

Although Dr. Lewis extensively briefed the law of HWE,<sup>44</sup> the ALJ did not attack this analysis except on the issues of co-worker liability and corrective action. The ALJ did not hold EPA liable for Dr. Walker's conduct and found that EPA took sufficient corrective action. RDO 59. These findings are erroneous.

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<sup>43</sup> The incidents of harassment at issue in this case are of a far greater magnitude than those upon which the ARB has previously found actionable. See Smith v. Esicorp, 93-ERA-16, D&O of Remand by SOL (March 13, 1996) (holding that "sarcastic, derogatory cartoons of whistleblowers were 'tantamount to intimidation, having a chilling effect on open communication."); Williams, 1997-ERA-14 (finding a HWE for all of the employees involved because the harassment at issue arose directly in response to protected activities).

<sup>44</sup> See Complainant's Conclusions of Law, p. 44-77.

First, all of Dr. Walker's misconduct in this matter was performed in an official capacity, as part of his formal EPA job duties. EPA is liable for Dr. Walker's actions regardless of whether Dr. Walker was a mere co-worker.<sup>45</sup> When Dr. Walker distributed the White Paper, he was clearly acting within his official capacities at EPA because he was acting in accordance with his position description and his explicit delegation of duties by EPA (i.e., to publicize EPA's pro-sludge policy). TR. 802. EPA cannot appoint an official national spokesperson on sludge, who is given the authority to communicate with the public on sludge issues, and then disavow that spokesperson's comments and actions. Likewise, EPA cannot formally appoint Dr. Walker to a peer review panel, fail to conduct any conflict of interest review and then attempt to disavow Walker's misconduct. His work on the peer review panel was official, and his conflicts were well known to everyone with involvement in this case. Likewise, Dr. Walker has official responsibilities and input into the formal decision-making process for the EPA related to the allocation of research grants and the selection of participants for meetings and conferences. EPA cannot disavow Dr. Walker's intentional discrimination against Dr. Lewis on these matters.

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<sup>45</sup> The ALJ characterizes Dr. Walker as a co-worker and cites to Williams for the proposition that EPA is not liable for Dr. Walker's actions. RDO 54. As discussed above, Dr. Walker is not a co-worker for he works in a completely separate office from Dr. Lewis.

Even if Walker did not engage in his misconduct in an official capacity, under Williams, the EPA will be held liable for an employee's harassing conduct "if the employer knew, or in the exercise of reasonable care should have known, of the harassment and failed to take prompt remedial action." Williams, 1997-ERA-14 at 48. Applying the Williams analysis to this case, The ARB set forth a two-pronged evaluation of "reasonable care," which includes: 1) consideration of when higher management was put on notice of the hostile work environment, through either actual or constructive notice;<sup>46</sup> and 2) evaluation of the remedial actions taken in response to notice of the harassment. Williams, 1997-ERA-14 at 50.

In order to meet the first prong of the Williams "reasonable care" test regarding notice, the employer in Williams set forth evidence that it had in fact established procedures to facilitate employee complaints, including a published whistleblower protection policy, a whistleblower "bulletin," and an "Employees' Concern Program" for formal reporting. Williams, 1997-ERA-14 at 50.

In this case, the March 2000 House Science Committee hearings put EPA on notice that it had a problem with hostility against whistleblowers. In addition, EPA's own Inspector General recommended that EPA take additional steps to inform and train

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<sup>46</sup> The constructive notice inquiry includes examination into the complaint procedures in place to facilitate receipt of notice by higher management.

its employees, specifically managers, regarding employee rights under the Five Acts. Dr. Walker (EPA spokesperson on sludge and a GS-14 employee who was responsible for distributing the White Paper to Southern Waste and contributing to the flawed peer review process), Ms. Morris (an SES manager), and Dr. Smith (whose concerns over Dr. Lewis' protected activity prompted him to contact his managers and obtain authorization for leading the formal peer review), all testified that they had never received any whistleblower training. TR 935-36. Thus, that aspect of the OIG recommendation, which was strongly supported by leading members of the House Science Committee and a DOL ALJ, was never implemented. The Administrator and an Assistant Administrator of EPA were directly questioned in a House Science Committee hearing as to why the EPA had not implemented the OIG recommendations but no answer was provided. CX 59. Moreover, EPA did not have any specific complaint procedures or employee concerns program designed to respond to concerns filed under the Five Acts.<sup>47</sup>

In order to meet the second prong of the Williams "reasonable care" test regarding responsive remedial actions, the Respondent in Williams set forth evidence of its corrective action.<sup>48</sup> It is clear from the nature of the corrective action

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<sup>47</sup> The EPA has an Office of Inspector General but the OIG has no special training or knowledge of employee protections under the Five Acts. CX 59, pp. 143.

<sup>48</sup> The corrective action included informing employees that reprisals against whistleblowers would not be tolerated, implementing a training plan to address harassment issues with special courses for supervisors, ordering a "root cause" analysis



implemented by the Respondent that the Respondent was interested in immediately correcting the hostile work conditions and ensuring that future co-employee or supervisor harassment come to an end. The corrective action was taken "immediately" and, by conducting a "root cause" analysis, the scope of the corrective action was complete.

In Dr. Lewis' case, EPA's failure to implement corrective action, along the lines instituted in the Williams case, demonstrates that EPA cannot satisfy the second prong of the Williams "reasonable care" test. The alleged corrective action which was ordered regarding the distribution of the White Paper and flawed peer review was radically deficient. In regards to the distribution of the White Paper, EPA Office of Water ("OW") management told Dr. Walker to contact counsel for Southern Waste and explain that EPA did not endorse the White Paper. TR 259. After EPA learned that Southern Waste's counsel was not going to engage in any form of corrective action, it did not pursue the matter further. With regards to the flawed peer review, EPA managers in OW merely counseled Dr. Walker for his plagiarism. TR 1200. No corrective action was taken regarding the numerous procedural flaws in the peer review. No corrective action was taken to correct the flawed public record. Even when EPA learned

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to determine the causes of harassment, conducting "lessons learned" discussions regarding harassment, and implementing training in effective human interaction and teamwork followed by a line-by-line review of whistleblower procedures. Williams, pp. 52, 53.

of the nature of scope of Walker's misconduct, EPA did not even require that his peer review be removed or corrected in any manner whatsoever.<sup>49</sup>

**IV. EPA'S ACTIONS WERE "REASONABLY LIKELY TO DETER" EMPLOYEES FROM ENGAGING IN PROTECTED ACTIVITY AND THUS CONSTITUTE AND ADVERSE ACTION.**

The Equal Employment Opportunity Commission has defined "adverse employment action" as "any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter the charging party or others from engaging in protected activity." EEOC Compliance Manual Section 8, "Retaliation," p. 13 (1998). "Instead of focusing on the ultimate effects of each employment action, the EEOC test focuses on the deterrent effects," thus effectuating the purpose of Title VII. An

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<sup>49</sup> The ALJ cited Williams, et al. v. Mason & Hanger Corp., 97-ERA-14, D&O of ARB (Nov. 13, 2002) (rev'd, in part, on other grounds) when he stated that "EPA needed to issue remedial and preventative *discipline* to avoid liability." (emphasis added). In doing so, he inappropriately substituted the term "discipline" for "corrective action." See Williams, 97-ERA-14. Even if EPA had severely disciplined Dr. Walker, which it did not, it would have been insufficient to fulfill the Williams corrective action standard. Henderson v. Simmons Food, Inc., 217 F.3d 612, 616 (8th Cir. 1999) (holding "half-hearted" corrective action, consisting of an incompetent and inefficient investigation into sexual harassment complaint and threat to harasser that he would lose his job if he continued, was insufficient to relieve employer of liability). Furthermore, courts have ruled that reprimands and other actions will not relieve a company from liability if they do not disclose their agent's illegal activities to the rest of the employees. See Furr's Inc., v. N.L.R.B., 381 F.2d 562 (10th Cir. 1967).

equivalent standard was incorporated directly into the DOL's environmental whistleblower regulations.<sup>50</sup>

EEOC Guidelines, "while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." Meritor Savings Bank, 477 U.S. at 65 (citation omitted). Moreover, the Ninth Circuit found "the EEOC ['reasonably likely to deter'] test to be consistent with our prior holdings, and with the holdings in the First, Seventh, Tenth, Eleventh and D.C. Circuits." Ray v. Henderson, 217 F.3d 1234, 1243 (9th Cir. 2000).

Because the EEOC standard is consistent with prior case law and effectuates the purpose of Title VII, the Ninth Circuit held "an action is cognizable as an adverse employment action if it is reasonably likely to deter employees from engaging in protected activity." Thus, the Ninth Circuit addressed the concern that an employer's retaliatory actions would have a chilling effect on

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<sup>50</sup> Under Part 24, discriminatory conduct is defined in two separate provisions. The first provision is substantially similar to the wording of Title VII. 29 C.F.R. § 24.2(a). The circuit split referenced in the beginning of this brief applies to interpretations of this provision. The second provision of the regulation defines adverse action in a manner consistent with the EEOC guidance: "[a]ny employer is deemed to have violated . . . the regulations in this part if such employer intimidates, threatens, restrains, coerces . . . or in any other manner discriminates against any employee" because the employee has engaged in protected activity. 29 C.F.R. § 24.2(b). The cases referenced in the circuit split did not interpret the language referenced in this provision of the DOL regulation. The ALJ also ignored this language.

employee complaints. Brooks v. City of San Mateo, 229 F.3d 917, 928 (9th Cir. 2000) quoting Ray, 217 F.3d at 1243.

If the ALJ had addressed the "reasonably likely to deter" line of cases [an analysis required under 29 C.F.R. § 24.2(b)], he would have found adverse employment action. For each action that EPA took against Dr. Lewis, the following question must be asked: is it reasonably likely that EPA's actions would deter an employee from engaging in protected activity? Specifically, is it reasonably likely that a potential whistleblower (an employee considering whether to engage in protected activity) would be deterred from engaging in protected activity if he:

\* knew that the EPA would no longer follow its policy of responding to outside inquiries if he blew the whistle?

\* knew that a leading public spokesman for the agency would distribute a highly derogatory "White Paper" if he blew the whistle?

\* knew that peer review rules would be violated and reviewers with prohibited conflicts of interest would be permitted to participate in the review if he blew the whistle?

\* knew that "flawed" peer reviews would be made part of the public record and provided to special interest groups with a material interest in impeaching the credibility of the whistleblower-scientist if he blew the whistle?

\* knew that, while on an IPA, the EPA would provide inaccurate and misleading information to the host organization regarding the scope of the IPA employment agreement if he blew the whistle?

\* knew that, as a result of filing a claim under 29 C.F.R. Part 24, he would not be invited to participate in professional conferences and/or permitted to participate in significant EPA research projects if he blew the whistle?

If the answers to any of these questions individually or collectively is yes, then under the "reasonably likely to deter" line of cases, adverse action against Dr. Lewis occurred.

#### **CONCLUSION**

For the above-stated reasons, and as set forth in the complete record of this case, this Board should find that EPA violated the Five Acts and should remand this case for proceedings related to damages.

Respectfully submitted,

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## Instances of Hostile Work Environment By the EPA

<i>Type of Adverse Action</i>	<i>Corrective Action Taken (Date)</i>	<i>Impact on Dr. Lewis</i>
<p><i>Distribution of Synagro's White Paper</i> on September 21, 2001 to an attorney for Southern Waste by an unknown EPA official (TR 246 L. 25, CX 112)</p>	<p><b>NONE</b></p>	<p><b>SUBJECTIVE IMPACT:</b> <i>Emotional distress, impact on family life, humiliation and loss of reputation</i> within the international scientific community and within the faculty of UGA (TR 239-40, 255-8, 302-03)</p> <p>The cascading effect of this action was devastating and led to many of the actions listed below. All of the testimony can therefore be assumed as an impact for this action.</p>

<p><b><i>Dr. Walker's Distribution of Synagro's White Paper</i></b>  on September 24, 2001 to an attorney for Southern Waste to be used in various public proceedings (TR 247 L.17, 248 L.4-5, CX 96. P. 3)</p>	<p><b>Dr. Walker's letter to Southern Waste attorneys on <b>December 12, 2001</b> denying EPA endorsement of White Paper along with a request for Southern Waste to correct the public record (TR 259 L.19)</b></p>	<p><b>SUBJECTIVE IMPACT: <i>Emotional distress, impact on family life, humiliation and loss of reputation</i></b>  within the international scientific community and within the faculty of UGA (TR 239-40, 255-8, 302-03)</p>
<p><b><i>Circulation</i></b> of the White Paper by Southern Waste in public meetings around late September, 2001 claiming EPA endorsement (TR 254-256 )</p>	<p><b>NONE</b></p>	<p><b>SUBJECTIVE IMPACT: <i>Emotional distress, impact on family life, humiliation and loss of reputation</i></b>  within the international scientific community and within the faculty of UGA (TR 239-40, 255-8, 302-03) <b>OBJECTIVE IMPACT:</b> Dr. Gattie testified that the implications of the White Paper at the Dawson County meeting were that the EPA, specifically John Walker, had distributed the paper to Southern Waste. He also testified that after the meeting, faculty at UGA became very weary of Dr. Lewis's research at The University and wondered why he was there. (CX 29 p. 14-17)</p>

<p><i>Failure</i> to properly respond to UGA's request for clarification of Dr. Lewis's IPA (CX 28-29)</p>	<p><b>Situation Deteriorated by sending an inaccurate and misleading clarification that did not adhere to EPA procedures</b></p>	<p><i>Interference with eligibility for professorship</i> at UGA and a <i>diminished relationship</i> with UGA officials.  <b>OBJECTIVE IMPACT:</b> Dr. Hodson testified regarding the need for the EPA to clarify the scope of Dr. Lewis's IPA which resulted in an unfavorable future for Dr. Lewis in dealing with UGA. (CX 24 p.28-41)</p>
<p><i>Violation of EPA policy</i> regarding clarification of Dr. Lewis's IPA (JS 35, CX 1 p. 56-60)</p>	<p><b>NONE</b></p>	<p><b>SUBJECTIVE IMPACT:</b> Open to criminal prosecution for misuse of federal funds, loss of entire scientific credibility, monetary loss, and unable to carry out research (TR. 261-269)  <b>OBJECTIVE FACT:</b> Dr. Russo testified that she would normally have been asked to respond to allegations in the White Paper, specifically the terms of Dr. Lewis's IPA. She also testified that this a normal course of action the EPA takes as a benefit to its employees. (CX 1 p. 56-60)  <b>OBJECTIVE IMPACT:</b> Ms. Harrison testified that the allegations raised in the</p>



<p><i>Violation of EPA reference policy by failing to respond</i> to letter from Synagro on February 6, 2002 (TR 277, 997-998, 1059, CX 12)</p>	<p><b>EPA failed to follow through with promise made to Dr. Lewis that it would respond to the Synagro letter</b> (TR 278-279)</p>	<p><b>SUBJECTIVE IMPACT:</b> "At, at this point, the allegations raised in the September 6th letter from the President of Synagro have permeated the scientific community, the general public, my co-workers at the University of Georgia, universities across the country, every conceivable potential employer I might have, these allegations having gone without any response from EPA have now become accepted -- widely accepted as fact. I know that to be a fact." (TR 277-278)</p> <p><b>OBJECTIVE IMPACT:</b> Ms. Harrison testified that the allegations raised in the February 6, 2002 letter from Synagro were "destructive" to the reputation and credibility of Dr. Lewis and that "reputation is extremely important" to a scientist on Dr. Lewis's GS 15 level. She also testified about the importance for the EPA to respond to Synagro's letter . (TR 65-69, CX 140)</p>
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<p><i>Submission</i> of inaccurate IPA information to OSHA on December 18, 2001 (CX14, TR. 262-263)</p>	<p><b>NONE</b></p>	<p><b>SUBJECTIVE IMPACT:</b> Open to criminal prosecution for misuse of federal funds, loss of entire scientific credibility, monetary loss, and unable to carry out research (TR. 261-269)</p>
<p><i>Violation of EPA regulations</i> regarding the formation of Dr. Lewis's peer review (RDO 6, TR 653, 1286-1287)</p>	<p><b>NONE</b></p>	<p><i>creation of highly derogatory and prejudicial peer review evaluation</i> that will follow Dr. Lewis's career indefinitely. This review has been used in the past, and can be used by industry and trade groups in the future, to impeach Dr. Lewis.</p> <p><b>OBJECTIVE VIEW:</b> Dr. Holm testified that "this 'internal' peer review was an unusual process because the article was simultaneously submitted to a journal for peer review." (RDO 20)</p>

<p><i>Placement</i> of Dr. Walker, an unqualified scientist, on the Peer Review (TR 228, 1007-1008)</p>	<p><b>NONE</b></p>	<p><i>creation of highly derogatory and prejudicial peer review evaluation</i> that will follow Dr. Lewis's career indefinitely. This review has been used in the past and can be used by industry and trade groups in the future to impeach Dr. Lewis.</p>
<p><i>Placement</i> of scientists <i>with a conflict of interest</i>, on the Peer Review (TR 228-229, 1007-1008, 1118-1119)</p>	<p><b>NONE</b></p>	<p><i>creation of highly derogatory and prejudicial peer review evaluation</i> that will follow Dr. Lewis's career indefinitely. This review has been used in the past, and can be used by industry and trade groups in the future, to impeach Dr. Lewis.</p>
<p><i>failure to follow numerous peer review rules and procedures</i> concerning the formation of the peer review and the conduct of peer reviewers (TR 325, 1005)</p>	<p><b>NONE</b></p>	<p><i>creation of highly derogatory and prejudicial peer review evaluation</i> that will follow Dr. Lewis's career indefinitely. This review has been used in the past, and can be used by industry and trade groups in the future, to impeach Dr. Lewis.</p>

<p>Dr. Walker's <i>plagiarism</i> on Lewis's peer review (TR 233, 1139, RDO 22, RX 55A)</p>	<p><b>Counseling which included an oral confidential chastising with no correction to the public peer review record.</b></p>	<p><i>creation of highly derogatory and prejudicial peer review evaluation</i> that will follow Dr. Lewis's career indefinitely. This review has been used in the past, and can be used by industry and trade groups in the future, to impeach Dr. Lewis.</p>
<p><i>Dr Walker's communications</i> with Synagro and others regarding Dr. Lewis's peer review in 2001 (TR 1126, 1181-2, CX 11, 106-107, RX 55 A)</p>	<p><b>Dr. Walker was ordered</b> not to discuss peer review any further with Synagro, but there was <b>NO ACTION</b> taken to correct the peer review record</p>	<p><i>Synagro was informed</i> that there was a highly derogatory internal peer review of Dr. Lewis <b>SUBJECTIVE IMPACT:</b> "I was extremely concerned about the likelihood that the paper we submitted to <u>Lancet</u> would be widely distributed publicly, criticized unfairly by peer reviewers who had a conflict of interest and basically it would kill any chance of that work being published (TR 190)"</p>
<p><i>Failure to conduct a conflict of interest screening</i> on Dr. Walker and other peer reviewers (TR 228-229)</p>	<p><b>NONE</b></p>	<p><i>Creation of a peer review panel</i> with unbalanced viewpoints containing members that did not belong on the panel due to a conflict of interest</p>

<p><b><i>Failure</i></b> to credit Dr. Lewis's work in the EPA's <u>Federal Register</u> publication submitted April 2 2003 (TR 697-700, 1304-1324, CX 156-157 )</p>	<p><b>NONE</b></p>	<p><b><i>Ineligible</i></b> to receive special awards for work done on sludge and gain related employment</p>
<p><b><i>Failure to allow</i></b> Dr. Lewis to collaborate with other scientists (TR 540-541)</p>	<p><b>NONE</b></p>	<p><b><i>Unable</i></b> to perform research properly</p>
<p><b><i>Failure to include Dr. Lewis</i></b> in research conducted regarding sewage sludge for the release of the Federal Register publication submitted April 2 2003 (TR 110, ,1305)</p>	<p><b>NONE</b></p>	<p><b><i>Prevented Dr. Lewis from</i></b> being a part of and conducting research related to biosolids</p>
<p><b><i>Failure to include Dr. Lewis in biosolids research</i></b> (TR 688-689)</p>	<p><b>NONE</b></p>	<p><b><i>Prevented Dr. Lewis from</i></b> being a part of and conducting research related to biosolids</p>
<p><b><i>Failure to fund Dr. Lewis's research</i></b> after his completion of the IPA (TR 690-693, CX 155)</p>	<p><b>NONE</b></p>	<p><b><i>Prevented Dr. Lewis from</i></b> being a part of and conducting research related to biosolids</p>

<p><i>Dr. Walker's communication to Hollingsworth</i> regarding the use of Dr. Lewis in a conference (TR 582-583)</p>	<p><b>NONE</b></p>	<p><i>Prevented Dr. Lewis from</i> being a part of and conducting research related to biosolids</p>
<p><i>Dr. Walker's failure to use Dr. Lewis in conferences</i> because of pending litigation (TR 582-583)</p>	<p><b>NONE</b></p>	<p><i>Hindered Dr. Lewis's ability</i> to be a part of and conduct research related to biosolids</p>
<p><i>White Paper Publication</i> on the NEBRA website funded by EPA (TR 595-599, 791, CX 97, 187)</p>	<p>Knew about NEBRA's publication of the White Paper since October 4, 1999 (TR 791). Placed a disclaimer on September 6th 2002 (RX 187) but <b>CONTINUED TO FUND</b> NEBRA's publication of the White Paper</p>	<p><i>Public assumption that the White Paper was an endorsement of the EPA</i> <b>FOR THREE YEARS</b></p>