Case Nos. VWA-0007 and VWA-0008

DECISION AND ORDER
OF THE DEPARTMENT OF ENERGY

Initial Agency Decision

Names of Petitioners: C. Lawrence Cornett, Maria Elena Torano Associates, Inc.

Date of Filing: May 9, 1996

Case Numbers: VWA-0007, VWA-0008

This Decision involves a complaint filed by C. Lawrence Cornett (Complainant) under the Department of Energy's Contractor Employee Protection Program, 10 C.F.R. Part 708. Complainant contends that various types of reprisals were taken against him by his employer, Maria Elena Torano Associates, Inc. (META), after he raised public health and safety concerns regarding the Programmatic Environmental Impact Statement (PEIS).(1) At the time of Complainant's hiring in November 1992, META was under contract to the DOE to review and revise draft materials for the PEIS including the performance of data analysis. See DOE Contract No. DE-AC01-91EM40002, Attachment B.(2)

The Office of Contractor Employee Protection (OCEP) conducted an investigation of Complainant's allegations and issued a Report of Investigation and Proposed Order (Report) on April 17, 1996. OCEP, in the Report, found that the available evidence supported Complainant's allegations and proposed that he be granted relief, though not as much as Complainant felt he was entitled to. Both Complainant and META requested a hearing before an Office of Hearings and Appeals (OHA) Hearing Officer under 10 C.F.R. 708.9(a). The hearing in this case was held on October 29-31, 1996 at DOE Headquarters in Washington, D.C.

I. Background

A. The DOE Contractor Employee Protection Program

The DOE Contractor Employee Protection Program became effective on April 2, 1992. 57 Fed. Reg. 7533 (March 3, 1992). Its purpose is to encourage contractor employees performing work at DOE facilities to disclose information that they believe exhibits unsafe, illegal, fraudulent, or wasteful practices and to protect those "whistleblowers" from reprisals by their employers. 10 C.F.R. 708.1.

The Part 708 regulations were adopted to improve the prior, informal process of resolving whistleblower complaints by establishing procedures for independent fact-finding and a hearing before an OHA Hearing Officer, followed by an opportunity for review by the Secretary of Energy or her designee.

B. Factual Background

The following summary of the facts and allegations in this case is primarily based on the testimony of witnesses at the October 29-31 hearing and the OCEP investigation.(3) In November 1992, Complainant was hired as a Senior Environmental Scientist by META. Complainant was initially employed to provide analysis in the field of human health risk assessment with regard to various waste management options to be reviewed in the PEIS. See Complainant's (Plaintiff's) Exhibit (hereinafter Pl. Ex.) 3. META subsequently designated Complainant as one of its "key personnel" with regard to the PEIS contract. See

OCEP Ex. 59. Almost immediately upon beginning work at META, Complainant reviewed the text of the Draft Implementation Plan for the PEIS. The draft text stated that the role of risk assessment in environmental remedial action decision-making had been significantly decreased since the Comprehensive Environmental Response Compensation Liability Act (CERCLA) was passed.[(4)] Complainant believed that these statements were incorrect and notified XXXXX, Chief Scientist, Louis A. Berger Associates (Berger),[(5)] regarding his opinion that the text of the Implementation Plan should be changed. OCEP Ex. 1 (Complainant's Sworn Statement) at 3. Complainant subsequently wrote memoranda to management officials outlining his position, providing examples of the role of risk assessment in various Environmental Protection Agency (EPA) regulations and orders, and suggesting changes to the text. Id.; see also Pl. Ex. 9. Despite Complainant's attempts to influence management, XXXXX declined to change the text of the Implementation Plan in the manner proposed by the Complainant. On or about December 20, 1992, Complainant had a meeting with XXXXX who informed him that he could go along with the text of the Implementation Plan or "quit and picket." OCEP Ex. 1 at 3, Tr. at 66; see also OCEP Ex. 33 (XXXXX Interview Summary). Complainant then contacted Bob Morgan (Morgan), President of META, and informed him that the language in the Draft Implementation Plan regarding the importance of risk assessment was erroneous. According to Complainant, Morgan then assigned him to rewrite the section of the Implementation Plan dealing with the role of risk assessment and CERCLA. See OCEP Ex. 1 at 3. Complainant alleges that XXXXX appeared to resent Complainant going over his head to Morgan and subsequently refused to communicate with him or provide him with needed information, thus minimizing his participation in some project activities and reducing his responsibilities.

While reviewing data and other PEIS materials, Complainant would send reports to his supervisors such as Dave McGuire (McGuire), Project Manager of the Waste Management Section of the PEIS Project, and Frank Skidmore (Skidmore), Deputy Project Manager for Waste Management, reporting on the work he accomplished and detailing his opinions and concerns regarding matters affecting the PEIS. For example, in January 1993, Complainant sent a memo to Skidmore and McGuire detailing his opinions regarding the types of information which the DOE national laboratories should include in their analyses of human health risk assessments along with his opinion that the use of "time discounting" methods should not be employed to estimate risk to future generations.[(6)] See OCEP Ex. 44. Also included in that memo was an evaluation of High Level Waste (HLW) risk assessment reports submitted by Oak Ridge National Laboratory (ORNL) and ANL. Complainant continued to send reports and memos to META/Berger management officials throughout 1993 and early 1994 detailing his concerns about deficiencies in the draft PEIS materials.

In the summer of 1993, Peter Astor (Astor) became Director of Hazardous Waste Studies for the PEIS project. Complainant thereafter performed his risk assessment work under Astor's supervision. In the fall of 1993, Complainant became concerned with data about the West Valley Demonstration Project (WVDP). Specifically, Complainant believed that the data indicated that full scale treatment of HLW at the WVDP would result in a significantly higher cancer rate among the general public than treatment of all of DOE's HLW at all other sites combined. Complainant alleges that he contacted officials at META/Berger, ORNL and Pacific National Laboratory regarding this finding. Complainant then expressed his concerns regarding the WVDP during a meeting in November 1993. He alleges that he subsequently was informed by someone in META/Berger management that the WVDP data was in error, although Complainant was unable to find confirmation of that fact. OCEP Ex. 1 at 4. Subsequently, Complainant was removed from having primary responsibility for summarizing the impacts of waste management and was given duties involving less responsibility. Id. at 4-5. Complainant alleges that he contacted Bob Lee (Lee), Director of Federal Services at Berger, about his diminished responsibilities and exclusion from certain technical meetings, and was informed that he shouldn't be concerned since there was still important work for him to perform, but that DOE personnel did not want him to attend the meetings. Id. at 5, 15. According to Lee, DOE and ORNL employees had complained about the Complainant's tendency to refuse to let subjects drop, thus interfering with the progress of meetings, and some had requested that Complainant not attend meetings. OCEP Ex. 29 (Lee Interview Summary).

In mid-December 1993, Albert Tardiff (Tardiff) became the manager for the PEIS project.[(7)] A few weeks later, Dr. Sharon Segal (Segal; "Siegel" in the hearing transcript), was hired to be the lead person on the Human Health Risk section and became Complainant's immediate supervisor. During the period from January through the first week of March 1994, Complainant identified concerns he had regarding changes to the text he wrote for the PEIS about radionuclide impacts. Complainant believed that the changes produced a misleading impression regarding the seriousness of the human health impacts from radionuclides. Additionally, Complainant was concerned that the edited text omitted information regarding airborne radon at DOE's Fernald Environmental Management Project (Fernald) and that the health effects of contaminated game and fish at the DOE's Savannah River Site (SRS) were not being considered in assessing risks at that site. Complainant sent a Progress Report, dated January 10, 1994, to META/Berger management officials detailing these concerns. OCEP Ex. 3. Complainant alleges that on the same day he distributed the January 10 Progress Report, he was called to a meeting with Tardiff, who told him to "back off" and that META's job was to make DOE "look as good as possible." OCEP Ex. 1 at 12. Tardiff does not recall having a meeting with Complainant on January 10, 1994. Tr. at 432. Complainant subsequently sent a memo and Progress Report on January 14, 1994, in which he reiterated his concerns and asked why radiation exposure data at Fernald and SRS was deleted and misrepresented in the most recent draft of the Affected Environment section of the draft PEIS. See OCEP Exs. 5, 6. Complainant alleges that Tardiff met with him later that day and criticized him for his disclosure pertaining to radionuclide data and threatened to take him off the PEIS project once Segal no longer needed his input. OCEP Ex. 1 at 12. Tardiff denies that this meeting occurred. Tr. at 432-33. In another memo, dated February 15, 1994, Complainant expressed his concerns that necessary chemical exposure data was not being incorporated into the Affected Environment section of the PEIS. OCEP Ex. 9.

According to Complainant, Tardiff summoned him to his office on March 8, 1994, and informed him that his employment was being terminated effective March 22, 1994. OCEP Ex. 1 at 14. Tardiff states that at a meeting he attended in Tucson, Arizona in late February 1994, Glen Sjoblom (Sjoblom), a special assistant to the Assistant Secretary for Environmental Management at DOE, informed him that META/Berger should layoff a total of 10 employees. Tr. at 403. Tardiff states that he determined that Complainant could be released after consulting with Lee, Segal and Skidmore and being informed by them that Segal could perform the work previously performed by Complainant. Tr. at 407-8, 417. Tardiff denies this action was taken in retaliation for Complainant's expressing his concerns about the PEIS process to META and DOE. Tr. at 434.

C. Procedural History of the Case

On March 9, 1994, Complainant filed a complaint pursuant to 10 C.F.R. Part 708. As indicated above, OCEP conducted an investigation of Complainant's allegations and issued its Report on April 17, 1996. In the Report, OCEP concluded that Complainant had made protected disclosures regarding health and safety issues and that it had jurisdiction over his complaint. Further, OCEP concluded that a preponderance of the evidence supported a finding that Complainant's protected disclosures contributed to his selection by META to be terminated and that META had failed to show by clear and convincing evidence that Complainant would have been terminated absent his protected disclosures. OCEP proposed that Complainant be awarded back pay and benefits, minus any earned income and associated benefits, from the time his employment was terminated until the date of the issuance of the Draft PEIS in September 1995, as well as reasonable costs and expenses, including attorney fees, that he incurred in bringing his complaint.

In a submission to OCEP dated April 30, 1996, Complainant asked for a hearing under 10 C.F.R. 708.9.[(8)] On May 1, 1996, META also submitted a hearing request to OCEP. On May 9, 1996, OCEP transmitted these requests to OHA together with the Report, the complaint file, and a request that a Hearing Officer be appointed.[(9)] On May 13, 1996, I was appointed Hearing Officer in this matter.

META filed a Motion to Dismiss Complainant's Part 708 complaint on May 21, 1996. In its Motion, META argued that DOE did not have jurisdiction to hear the complaint since Part 708 applies only to

employees of DOE contractors who perform work at DOE-owned or DOE-leased facilities. META asserted that, with the exception of a limited number of visits to DOE sites to perform work ancillary to the primary purposes of the PEIS contract, it did not perform work at DOE sites. Because of the factual issues raised by META's Motion and the subsequent submissions by the parties on this matter, I issued an Order to Show Cause providing for a hearing on this jurisdictional matter. See C. Lawrence Cornett, 25 DOE 87,504 (1996) (Case No VWX-0009).[(10)] That hearing was held on July 31, 1996. In an Interlocutory Order dated August 22, 1996, I denied META's Motion because I found that META employees had in fact performed activities on DOE sites that could not be considered merely ancillary to the primary purposes of the PEIS contract. See META, Inc., 26 DOE 87,501 (1996) (Case No. VWZ-0006).

On October 4, 1996, META submitted a Motion to Dismiss the complaint for failure to state an actionable claim. META asserted that Complainant had not made a "disclosure" pursuant to Part 708 since DOE and META officials already knew the information in the claimed disclosures. Further, META asserted that Complainant's alleged disclosures did not involve a substantial and specific threat to any person's health and safety as required by Part 708. In an October 23, 1996 Decision, I denied META's October 4 Motion. META, Inc., 26 DOE 87,504 (1996)(Case No. VWZ-0007). In this Decision, I found that there is no requirement in Part 708 that a protected disclosure must contain unique information not known to the DOE or contractor. Additionally, I found that because the regulations only require that an individual in good faith believe that his disclosure concerns a substantial and specific danger and Complainant's good faith belief is a factual issue, it would be inappropriate to grant META's Motion.

Pre-Hearing Submissions were filed by both parties by telecopier on October 11, 1996. I conducted a pre-hearing conference call with the attorneys for the parties on October 17, 1996. At the October 29-31 hearing the following witnesses testified in addition to Complainant: McGuire, Tardiff, Sjoblom, Dr. Thomas Hale, and Dr. Jane Rose. The transcript of the October 29-31 hearing was received by OHA on November 7, 1996, and the record upon which I have based this Initial Agency Decision was closed at that time.

II. Discussion

A. The Complainant's Burden

It is the burden of a complainant under Part 708 to establish "by a preponderance of the evidence that there was a disclosure, participation, or refusal described under section 708.5, and that such an act was a contributing factor in a personnel action taken or intended to be taken against the complainant." 10 C.F.R. 708.9(d). Thus, in order to meet his burden under this section Complainant must prove by a preponderance of the evidence that it is more probable than not, see 2 McCormick on Evidence 339 at 439 (4th ed. 1992), that he was engaged in a protected activity that was a "contributing factor" in his termination.

The standard of proof adopted in Section 708.9(d) is similar to the standard adopted in the Whistleblower Protection Act of 1989 (WPA), 5 U.S.C. 1221(e)(1), and the 1992 amendment to 210 (now 211) of the Energy Reorganization Act of 1974 (ERA), 42 U.S.C. 5851. In explaining the "contributing factor" test in the WPA, the Senate floor managers, with the approval/concurrence of the legislation's chief House sponsors, stated:

The words "a contributing factor", ... mean any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision. This test is specifically intended to overrule existing case law, which requires a whistleblower to prove that his protected conduct was a "significant", "motivating", or "predominant" factor in a personnel action in order to overturn that action.

135 Cong. Rec. H747 (daily ed. March 21, 1989) (Explanatory Statement on Senate Amendment-S.20). See Marano v. Dep't of Justice, 2 F.3d 1137 (Fed. Cir. 1993) (Marano) (applying "contributing factor" test).

In addition, "temporal proximity" between a protected disclosure and an alleged reprisal has been held to be "sufficient as a matter of law to establish the final required element in a prima facie case of retaliatory discharge." County v. Dole, 886 F.2d 147, 148 (8th Cir. 1989).

Applying these standards to the present case, I find that Complainant has met his burden under Part 708 of proving by a preponderance of the evidence that his health and safety disclosures were contributing factors in his termination by META.

1. Were there "Protected Disclosures"?

In its Report, OCEP chronologically listed 17 categories of alleged disclosures that Complainant made during his employment at META. OCEP concluded that these disclosures constituted "protected disclosures" without individually analyzing any of them. This conclusion has been vigorously contested by META, which has argued that none of the statements made by Complainant related to the preparation of the PEIS meet the regulatory requirements of a protected disclosure that are asserted to be applicable in this case, namely, that the employee disclosed to an official of DOE or the contractor information which the employee in good faith believes evidences a substantial and specific danger to employee or public health and safety. See 10 C.F.R. 708.5(a)(1)(ii). As discussed below, I find that META's general arguments regarding the nature of Complainant's disclosures are without merit. Further, I find that Complainant did indeed make protected disclosures. (11)

a. META's Arguments

META has argued that it, DOE and the public were already aware of all of the matters communicated by Complainant pertaining to the PEIS and thus Complainant did not make any "disclosures." Tr. at 573 (closing argument). As indicated above, in my Decision denying META's October 4 Motion to Dismiss, I rejected META's interpretation of the word "disclose" and found that information does not have to be unique to the recipient in order to be considered a disclosure for the purposes of Part 708. Moreover, Complainant's disclosures consisted not only of information that was communicated, but the manner in which that information was selected and presented. He was selecting certain information from a large body of material and using that information to argue that data or methodologies should or should not be included in the PEIS.

META also argues that Complainant's communications were not motivated by a desire to warn anyone of impending threats to health and safety but were instead motivated by an intention to prevent DOE and the contractor from embarrassment and to have decisions decided in his favor. E.g., Tr. at 575 (closing argument). Thus, META concludes that Complainant's communications were not based upon a good faith belief that they pertained to a specific and substantial threat to health and safety. In support of this position, META has pointed out, inter alia, the following excerpts from the Complaint:

Failure to include this [a discussion of radiation effects] will give persons commenting on the PEIS an opportunity to grandstand about the effects that the PEIS is not disclosing. . . .

* * *

Stakeholders reading the report would see this as a brazen attempt at a coverup. . . .

* * *

If the PEIS did not contain information on site impacts that were documented in site environmental reports stakeholders could bring this out in hearings and the media to embarrass DOE.

META's Motion to Dismiss for Failure to State an Actionable Claim at 7 (quoting from OCEP Ex. 1 at 8, 11-12).

META also notes that in his January 10, 1994 Progress Report, Complainant remarks:

Discrepancies or missing information that could lead to gross underestimates of impacts could undercut Hazel O'Leary's work establishing a good reputation for DOE concerning disclosure to the public of impacts. . . .

* * * *

I pointed out that the PEIS should take care not to undercut Hazel O'Leary's work establishing a good reputation for DOE concerning full disclosure, rather than taking a short term approach to this and trying to not bring attention to DOE problems, which the public and stakeholder groups are aware of (many of which are documented in Site Environmental Reports) and will drag into the open if DOE doesn't come forth with them first.

Id. (quoting from OCEP Ex. 3).

Complainant has testified that he used the "embarrassment" argument as a tool to motivate Tardiff who he felt would not respond to arguments relating to public health and safety. Tr. at 244-45, 280-282. In its cross examination of Complainant, META challenged Complainant's explanation especially in light of the fact that Complainant's supervisors had extensive experience in environmental matters and presumably would not need such a pretext to make appropriate decisions.

While Complainant used the "embarrassment" argument on occasion, I find that his disclosures were also motivated by a good faith belief that the information that he communicated evidenced a substantial and specific danger to public health and safety. This finding is significantly supported by the testimony of McGuire regarding Complainant's attitude when discussing PEIS issues in various meetings:

Yes, Larry [Cornett] is exceptionally articulate about the points of view he advances. . . . [H]e has a regard for the ultimate end for which we were all working; that is . . . he understood in a visceral way the fact that we were talking about actions which could conceivably harm or kill people over a period of time, and that therefore that was a serious responsibility.

. . . [W]ith Larry, it was visceral and honestly felt, and, so, he had a strong motivation more than as a technocrat to carry on and advocate his point of view.

Tr. at 207-08.

Moreover, the statements cited by META constitute a very small percentage of the voluminous communications by Complainant in the record. The vast majority of those communications refer to health effects either expressly or indirectly through reference to CERCLA and other environmental laws and regulations.(12) Consequently, there is no basis for finding that Complainant's sole motivation in making his communications was to prevent DOE from embarrassment. Further, Part 708 does not require that a concern about a substantial and specific danger to public health be the sole motivating force in order for an individual to make a protected disclosure. Accordingly, to the extent that motivation is relevant to a finding of good faith belief, I find that Complainant's disclosures were motivated by his genuine concern that a methodologically flawed PEIS would have an adverse impact on human health.

META has also argued that none of Complainant's communications involved a substantial and specific danger to public health and safety. E.g., Tr. at 575 (closing argument). Specifically, META asserts that almost all of the concerns by Complainant were in fact disagreements on technical policy issues regarding risk assessment methodology. Such disagreements, META asserts, are most appropriately settled in peer review journals. To buttress this argument, META has submitted a report from an Ad-Hoc Independent Work Group (AHWG Report) from the EPA which found that most of the allegations of inadequate risk assessment raised by Complainant were "technical policy issues."(13) META Hearing Ex. 11 at 1.

I do not believe that all of Complainant's communications involved only policy matters. However, even assuming arguendo that all of Complainant's disclosures concerned only technical policy issues that fact would not defeat his Part 708 complaint. Part 708 only requires that an individual have a good faith belief that the information he or she discloses evidences a substantial and specific danger to public health and safety. See 10 C.F.R. 708.5(a)(1)(ii); META, Inc., 26 DOE 87,504 (1996). The fact that all of Complainant's concerns could be considered as "policy concerns" would not foreclose his having a sincere and reasonable belief that those concerns involve substantial and specific dangers to health and safety. The record supports a finding that the Complainant had such a belief. The record also shows that the human health risk concerns raised by Complainant related to radioactive and other toxic waste at the nation's largest nuclear facilities. The subject matter of Complainant's disclosures is therefore precisely the type of disclosure that the Part 708 regulations were designed to protect. As the Secretary of Energy has stated, "[W]e have important environmental cleanup, national security and research missions that must be effectively and efficiently discharged. Maintaining a climate that allows for concerns to be raised without retaliation is critical to this task." Department of Energy, Energy Department Accelerates Whistleblower Reforms (DOE Press Release, March 26, 1996) <http://apollo.osti.gov/doe/whatsnew/pressrel/pr96038.html> (visited December 16, 1996). Compare Mehta v. Universities Research Association, 24 DOE 87,514 at 89,065 (1995) (Part 708 not intended to protect claim of "mismanagement" if it involves only a disagreement within the area of traditional management prerogatives). Moreover, as shown by the quote from McGuire above and as will be discussed below, the record clearly supports a finding that the Complainant had a good faith belief that certain changes were necessary in the PEIS in order to protect the public from increased risks of cancer and other adverse health effects.

b. Specific Disclosures

While Complainant's communications regarding the draft PEIS involved many issues, I shall only evaluate those major disclosures about which there is sufficient information in the record for me to make a finding that they meet the Section 708.5(a)(1)(ii) protected disclosure criteria.

i. Acceptable Level of Risk

As indicated in the Factual Background section, supra, Complainant pointed out to XXXXX that the Draft Implementation Plan was incorrect when it stated that the role of risk assessment had been reduced since the enactment of Superfund. He specifically objected to the statement in the plan that a one percent risk of cancer (10^{-2}) for an individual was an acceptable risk and proposed instead alternatives involving risk based objectives of 10^{-4}, 10^{-5}, or 10^{-6}. (14) Pl. Exs. 8, 9; Tr. at 63-65. I find that the disclosures Complainant made regarding the PEIS Draft Implementation Plan were protected disclosures. The PEIS was designed to be a nationwide study examining the environmental impacts of managing various types of radioactive and other hazardous wastes. See Draft Waste Management Programmatic Environmental Impact Statement Summary, Vol.1 at 2 (Pl. Ex. 130). The PEIS is to be used as a tool to assist DOE in deciding where to locate additional treatment, storage and disposal capacity for such wastes. Id. Given this function, the determination of what is the standard for assessing permissible risk directly impacts on the health and safety of individuals who may be located near a particular site. Further, Complainant's testimony at the hearing convinced me that his disclosures were based on a good faith belief that the risk levels initially proposed for the PEIS would have a direct adverse impact on public health and safety. See Tr. at 66-67, 348.

ii. Time Discounting

I also find that the memoranda regarding the issue of time discounting that Complainant provided to META/Berger management were protected disclosures. See Pl. Exs. 16, 25, 58, 85, 86. In these memoranda, Complainant stated his view that in general time discounting is an inappropriate technique for use in human health risk assessment in the PEIS since it could introduce large systematic errors that would understate human health risk calculations and make it harder for decision makers to understand risk issues,

thus adversely affecting waste management decisions based on the PEIS. See Pl. Exs. 25 at 3; 58 at 2. I am convinced by both the Complainant's memoranda and testimony that his memoranda regarding time discounting indicate a concern over what he believed was a specific and substantial danger to public health. See Tr. at 85-89. Moreover, the reasonableness of Complainant's concern is supported by the fact that time discounting was eventually not included in the Draft PEIS.

iii. Methodological Problems Regarding the PEIS

Complainant submitted numerous memoranda regarding methodological problems he believed existed in the risk assessments conducted by DOE national laboratories. Examples of these concerns are listed below:

Lack of analysis regarding the biases in various mathematical modeling methodologies which were to be employed in risk estimation for the PEIS. See, e.g., Pl. Exs. 15, 85, 87.

The failure to include the calculated uncertainties in various risk estimation figures. See, e.g., Pl. Exs. 52, 60, 69.

These disclosures involved possible errors in assessing the risk to human health implicated by various waste treatment options. After reviewing the memoranda and listening to Complainant's testimony about these methodological issues at the hearing, see Tr. at 72-74, I am convinced that the concerns raised in the memoranda evidence Complainant's good faith belief that without further analysis, unknown biases and lack of revealed uncertainties could produce a substantial and specific risk to public health and safety.

iv. High Level Waste Treatment at the WVDP

I further find that in November 1993 Complainant made protected disclosures concerning the potential threat to public health if WVDP were utilized to process high level nuclear waste. According to data from ORNL, cancer rates among the general public resulting from HLW treatment at the WVDP would be significantly higher than at other DOE facilities. META, however, argues that Complainant's communications regarding the WVDP did not involve a substantial and specific danger to public health and safety since they were based on data that assumed that the vitrification plant at West Valley would be completed without using the most efficient filters. Tr. at 576 (closing argument). Thus, given the hypothetical nature of the data upon which Complainant's communications were based, META contends that they were not protected disclosures. I disagree. Complainant's disclosures concerned an increased risk of cancer to the local population if the WVDP were fully utilized to treat HLW with the High Efficiency Particulate (HEPA) filters in use at the time the relevant risk assessment data were collected. As the Complainant stated at the hearing:

They [ORNL] were predicting killing six or seven people from cancer and causing cancer in about 23 people, and they got a pretty high impact on the most exposed individual, about three in 10,000, which is in excess of what's normally accepted for a level that would declare a place a Super Fund site.

Tr. at 91. See also Tr. at 243-46

As the Complainant acknowledged, the HLW treatment was not scheduled to begin at West Valley until 1996, and other more efficient filters existed. Tr. at 91-92, 245. However, the fact that a danger may not materialize if other options are taken does not mean that the Complainant did not have a good faith belief that a specific and substantial danger to public health existed. Here the record clearly shows that the Complainant had such a belief.

v. Exposure of Game at DOE Sites to Radionuclides

As indicated above, on January 10, 1994, Complainant submitted a Progress Report to META/Berger officials criticizing the fact that ORNL's risk assessment methods and site environmental reports did not take in account the possible adverse health effects from radionuclide exposure that might be experienced

by persons who consumed animal meat or fish obtained from SRS. See OCEP Ex. 3. This Progress Report and other communications addressing this issue, as well as Complainant's testimony at the hearing, see, e.g., Tr. at 99-100, 345, demonstrate that this concern was sincerely held by Complainant. Moreover, the reasonableness of Complainant's concern about the possible health effects has been acknowledged by META officials who were otherwise critical or complacent. See, e.g., OCEP Ex. 26 at 3 (Interview Summary of Ronald Feit (Feit), Chapter Leader for PEIS Affected Environment Section). Thus, Complainant had a good faith belief that the exclusion of the radionuclide exposure information involving game and fish posed a substantial and specific threat to public health, and his communications about this issue were protected disclosures.

vi. Airborne Radon at Fernald

In the same January 10, 1994 Progress Report in which he detailed deficiencies regarding contaminated game and fish, Complainant noted that radiation exposure data from airborne radon at Fernald had been excluded from the appendix to the Affected Environment section of the Draft PEIS and that the appendix failed to state that radon had been excluded. OCEP Ex. 3. Complainant raised this issue in two other memoranda a few days later. See OCEP Exs. 5, 6.(15) At the hearing, Complainant testified regarding his concern that radon exposure at Fernald implicated an approximate one percent risk of cancer to the most exposed individual in the surrounding community, which he calculated would probably result in more than 20 cases of cancer. Tr. at 101, 346-47. According to Dr. Rose, this concern was shared by Fernald management:

They [radon emissions] were very high, and I -- I can't remember how high, but I was at Fernald, and they showed me where this waste was stored that was emitting the radon. They knew it was a problem, and it's definitely a problem.

Tr. at 532. Given this testimony and the likelihood that nondisclosure of this data could impact decision-making based on the PEIS, I find that Complainant had a good faith belief that the information that he disclosed regarding radon evidenced a specific and substantial threat to public health and safety. Accordingly, I conclude that these disclosures were protected under Section 708.5(a)(1)(ii).

2. Did the Protected Disclosures Contribute to the Decision to Terminate Complainant?

The one alleged reprisal for which Complainant requests relief is his termination from employment in March 1994. META does not dispute that Complainant's termination is a "personnel action . . . against the complainant," as that term is used in Section 708.9(d). META does, however, strongly dispute Complainant's claim, and OCEP's finding, that Complainant's disclosures contributed to the decision to terminate his employment. In support of this position, META points out that his termination occurred more than 15 months after his first alleged disclosure (regarding the acceptable risk discussion in the Draft Implementation Plan for the PEIS). In this regard, META notes that Complainant was an employee at will and could have been terminated at any time.

On the basis of the entire record, I find that Complainant has established by a preponderance of the evidence that he was terminated in early March 1994 at least in part as a result of his protected disclosures. I am not persuaded by META's argument regarding the length of time Complainant was employed prior to the termination for two reasons. First, during that period prior to 1994, Complainant was subject to a number of reprisals by META.(16) The broad definition of reprisal which is set forth in Section 708.5(a), states that a DOE contractor "may not discharge or in any manner demote, reduce in pay, coerce, restrain, threaten, intimidate, or otherwise discriminate against" an employee who makes a protected disclosure. 10 C.F.R. 708.5(a) (emphasis added). Under this broad definition, there is sufficient evidence in the record for me to find that the following actions constituted reprisals:

- In response to his disclosure regarding the Draft Implementation Plan, XXXXX began to withhold information Complainant needed to perform his job and prevented him from participating in a

portion of the PEIS project.

- Complainant was barred from meetings which he should have normally attended.
- Complainant was removed as lead for risk assessment when Astor was hired.
- In response to his disclosure regarding the WVDP, Complaint was removed from having primary responsibility for summarizing the impacts of waste management.

Second, and more importantly, a significant organizational change occurred in December 1993 when Tardiff became PEIS project manager. Complainant continued to make protected disclosures, and, based on the evidence, Tardiff swiftly responded in a manner adverse to Complainant.

As indicated above, on January 10, 1994, Complainant sent a Progress Report to META/Berger managers in which he noted his concern that the draft appendix to the Affected Environment section of the Draft PEIS did not contain data regarding radon exposure at Fernald and radionuclide exposure from contaminated game and fish at SRS. OCEP Ex. 3.The managers to whom the Report was addressed included Lee, Skidmore and Segal, but not Tardiff. However, Complainant states that later that day he was summoned by Tardiff who told him to back off from his position on the deletion of Fernald and SRS exposure data. (17) Tr. at 100-01; see also Tr. at 279-82. While Tardiff testified that he did not recall this meeting, Tr. at 432, I find that Complainant's testimony is more credible on this point. It is supported by a written report which Complainant states was prepared right after the meeting and it appears from the contents that this is so. See Tr. at 278-80, 283; OCEP Ex. 3 (1/10/94 Contact by Larry Cornett). (18) Moreover, in view of Tardiff's testimony about the meetings which he does remember, I find his failure to recall the January 10 meeting to be convenient, but not credible. Specifically, Tardiff testified that he had attended 12 meetings in which the Complainant was in attendance and that at none of these meetings did he notice the Complainant being insistent in making his view known. Tr. at 390. In contrast, other persons working on the PEIS project uniformly describe the Complainant in meetings as being unduly persistent in raising issues. See, e.g., Tr. at 205-07 (McGuire), OCEP Ex. 29 at 2 (Lee Interview Summary), OCEP Ex. 28 at 1 (Interview Summary of Mary Hassell, Environmental Scientist), OCEP Ex. 23 at 2 (Astor Interview Summary), OCEP Ex. 26 at 3 (Feit Interview Summary). OCEP Ex. 33 at 1 (XXXXX Interview Summary), OCEP Ex. 47 (Interview Summary of Kenneth Cornelius, ANL).

Subsequently, on January 14, 1994, Complainant sent a Progress Report to Segal in which he stated that he undertook to discover who was responsible for the deletions and misrepresentations concerning radiation exposure in the Affected Environment section of the PEIS. OCEP Ex. 6. On that same day, Complainant sent a memorandum to Lee and other META/Berger managers reiterating his objections to the exclusion of radon exposure and contaminated game data at Fernald and SRS, respectively, and requesting that the Affected Environment section be corrected. OCEP Ex. 5. Complainant testified that later that day he was summoned by Tardiff, who demanded to know who had appointed him as the "ombudsman" on PEIS issues and threatened to take him off the PEIS program as soon as Segal indicated that she no longer needed him. Tr. at 103-04, 296, 299-301, 325. Although Tardiff denies that this meeting occurred, Tr. at 432-33, for the reasons set forth in the previous paragraph I find his testimony not to be credible. Moreover, here again Complainant's testimony is supported by notes which appear to have been prepared right after the meeting. See Pl. Ex. 138. In his notes, as in his testimony about the January 14 meeting, Complainant states that Tardiff indicated that he would be phased into a META contract involving an EPA enforcement project. This is consistent with Tardiff's testimony regarding his intention to place Complainant in an EPA project around January or February of 1994 if META obtained the contract. Tr. at 422-24.

Complainant continued to send Progress Reports containing protected disclosures to Segal during

the seven weeks following the January 14 meeting. See OCEP Exs. 7 (January 31), 8 (February 14), 9 (February 15), 10 (February 18), 11 (March 3). All but one (Ex. 10) were copied to Lee, Skidmore and other META/Berger officials, and Complainant began including Tardiff on his distribution list with the February 14 Progress Report. As indicated above, Complainant was terminated from his employment at META on March 8. It is undisputed that this decision was made by Tardiff. See Tr. at 389. According to Tardiff, he made this decision after consulting Lee, Skidmore and Segal. Tr. at 417.

Significantly, the decision to terminate Complainant's employment was made less than two months after the two meetings in which Tardiff indicated his displeasure with Complainant for making certain protected disclosures. Given this relatively short time period, I find that the Complainant's protected disclosures were a contributing factor in his selection to be laid off by META. Cf. David Ramirez, 23 DOE 87,505, aff'd, 24 DOE 87,510 (1994) (Ramirez); Ronald A. Sorri, 23 DOE 87,503 (1993), aff'd, 24 DOE 87,509 (1994) (Sorri).

B. The Contractor's Burden

Subsection 708.9(d) provides that, once the complainant has met his or her burden under that subsection, "the burden shall shift to the contractor to prove by clear and convincing evidence that it would have taken the same personnel action absent the complainant's disclosure. . . . " 10 C.F.R. 708.9. The "clear and convincing evidence" standard of proof is more stringent than the "preponderance of the evidence" standard applied to complainants, but not as high as the "beyond a reasonable doubt" standard used in criminal cases. See 2 McCormick on Evidence 340 at 442 (4th ed. 1992). It has been described as that quanta of evidence sufficient to persuade a trier of fact that the truth of a contested fact is "highly probable." Id. For the reasons set forth below, I have concluded that META has not met this stringent standard.

META has strongly asserted that it would have terminated Complainant notwithstanding any alleged disclosures he made. In support of this assertion META has put forth the following arguments:

- The individual who made the decision to terminate Complainant, Tardiff, testified that his decision was not based on anything Complainant had said or written.
- Complainant was just one of the employees META selected to eliminate from the PEIS project in accordance with Sjoblom's instructions to reduce its staffing on the PEIS project by 10 persons for financial reasons.
- By March 1994, the risk assessment work which still remained could be adequately performed by other employees who were as qualified or more qualified that Complainant.
- The fact that META considered Complainant for employment on possible META projects for the EPA and the Agency for International Development (AID) in the Philippines demonstrates that META had no intention to retaliate against Complainant.
- The fact that the PEIS was changed in response to the Complainant's disclosures demonstrates that Complainant's opinions were respected and that he would not have been terminated absent financial necessity.

I am not persuaded by these and similar arguments for the reasons discussed below.

Since Tardiff made the decision to terminate Complainant, his testimony is crucial in this case. After observing and listening to Tardiff at the hearing and reviewing the transcript, I am unable to accept as credible his denial that Complainant's protected disclosures were a factor in the decision to terminate his employment. Tardiff's testimony was characterized by evasiveness and contradictions as he tried to portray Complainant as one of ten individuals who happened to be selected for

termination for financial considerations. It is clear that other considerations also played a part, and Tardiff's testimony does not convince me that Complainant would have been selected absent his protected disclosures.

One way that Tardiff attempted to justify his selection of Complainant was by downplaying the importance of risk assessment work on the project in general and Complainant's role in that process in particular. For example, after testifying that during the period from September 1993 through early March 1994, META tripled its personnel on the PEIS project (from around 25-30 to about 85), Tardiff was asked by Complainant's counsel how many new META or Berger employees performed risk assessment. He initially stated "one" (Borghe), but after considerable evasiveness, he acknowledged that at least four other employees hired in the months prior to Complainant's termination had risk assessment responsibilities:

Q. Okay. Who else was brought on in that period of time who was working in the area of risk assessment?

A. I don't understand the question.

Q. Who else was brought on in that six-month time period who was working in the area of risk assessment on this contract?

A. I said Mr. Borghe.

Q. I just wanted to make certain of that.

* * *

Q. Was Sharon Siegel brought on in that period of time?

A. Yes.

Q. What was her field of responsibilities or responsibility?

A. Human health risks.

Q. Did she -- and was that risk assessment, a phase of it?

A. It was the core.

Q. So, in fact, there were at least two people then in the build-up period who were brought on in risk assessment?

A. Yes.

Tr. at 396-97 (emphasis added). After further questioning by Complainant's counsel, Tardiff acknowledged that John DeMarzio, Carmine Smedira and Lynn Fairobent were new employees who also had risk assessment responsibilities. Tr. at 396-99.

Tardiff's evasiveness and attempt to minimize the build up in risk assessment work just prior to Complainant's termination can be contrasted with the forthright testimony of McGuire:

Q. Okay. And was there an enlargement of staff at Berger occurring in late '93 or early 1994?

A. There -- you're asking the question about Berger. I can talk to you about META/Berger and the PEIS. Is that what you mean?

Q. Let's talk about -- yes, please.

A. Yes, a number of additional persons were hired around that time, maybe a little later.

Q. Were they hired in respect to areas of risk assessment?

A. Yes, some of those persons hired were competent in the area of risk assessment and were hired for that purpose.

Q. And why was there perceived a need to enlarge -- or why was there perceived a need to hire people in risk assessment at that time?

A. The obvious -- the most obvious reason was that the workload connected with calculating the risk assessment factors and coming to conclusions about them and given the various alternatives that were being advanced by the Department of Energy that it wished us to study and given practical problems of lack of the total data for everything that people would like to know, the workload had become extremely large and burdensome. So, we needed more people to do it.

Tr. at 200-01.

Despite this increased need to perform risk assessment work, Tardiff tried to minimize the need for Complainant's risk assessment activities as the following excerpt from the transcript shows:

Q. Let me ask you this. In the end, Ms. Siegel -- Dr. Siegel was performing some risk assessment work. She took over Larry Cornett's?

A. No.

Q. She did not?

A. No.

Q. Who, if anybody, took over the work Mr. Cornett was performing?

A. Dr. Siegel continued in that area. I don't believe she picked up anything he was doing.

Q. No. Did she pick up some of it?

A. She would have to.

Q. Approximately how much?

A. I have no idea.

Q. So, who picked up the rest?

A. It wasn't -- it was assessed that we didn't need everything he was doing.

Q. It was?

A. That's my understanding.

Tr. at 405.

Yet Tardiff acknowledged that prior to the hiring of additional persons with risk assessment responsibilities in the September 1993-early March 1994 period, Complainant was one of only two

persons working full time on risk assessment. Tr. at 436. Moreover, Complainant had been designated by META as one of the "key" personnel on the PEIS project. The work done by "key" personnel was work essential to the project. As explained by Tardiff:

Generally, key personnel clauses required for those individuals on a -- on a project are essential to the continuing scope of that particular project, and if one of those individuals were to leave or be replaced, he would have to be replaced by an equivalent, if necessary.

Tr. at 385. In addition, the importance of the contributions Complainant made to the PEIS risk assessment process was recognized by officials on the project, including those who were perturbed by the manner in which Complainant made his disclosures, such as McGuire, Tr. at 215-16; Lee, OCEP Ex. 29; Astor, Ex. 23. Complainant's contributions were also recognized by a 1993 year-end cash bonus that he received from META. See Pl. Ex. 144.

While Tardiff has claimed that there was no performance-based reason why Complainant was terminated, see, e.g., Tr. at 394, the record does not support his assertion. By performance, I refer not to Complainant's scientific accomplishments, but his interactions with others on the PEIS project. According to the OCEP Interview Summary, Tardiff stated that Complainant's relationship with ORNL indirectly affected his decision to lay off Complainant. OCEP Ex. 38 at 2. At the hearing, Tardiff denied that he had made this statement and denied that Complainant's relationship with ORNL affected his decision to lay Complainant off. Tr. at 389, 450. Nevertheless, as can be seen from the transcript excerpt below, shortly before he made his decision, Tardiff was aware that Complainant's supervisors felt that Complainant was unable to get along with others on the project, particularly personnel at ANL and ORNL:

Q. Mr. Tardiff, I'd like to turn your attention to [OCEP] Exhibit 38, which is the April 6th memo, turn to the first page, the first sentence of the fourth full paragraph. "Tardiff became aware that peers from Argonne National Lab did not want to work with him", meaning the Complainant. Do you see that?

A. Yes.

Q. Is that -- whether or not you said it then, is that correct at this point in time?

A. Today?

Q. Yes. There -- let me -- well, actually, let me rephrase this.

Was it correct as of the time you gave this statement?

A. Yes.

Q. And from whom did you become aware?

A. From his supervisors.

Q. Dr. Siegel?

A. Could have been her.

Q. Okay. The next sentence said, "Siegel had to take over all contacts with scientists at Oak Ridge National Lab."

A. Yes.

Q. Was that -- whether or not you said it at that point in time, was that statement correct as of the

time that statement was made?

A. I believe so.

Q. And that would have been something you would have heard from Ms. Siegel? Dr. Siegel?

A. Most likely.

Q. Now, what I'd like to do is take you to the next page of that document, Page 2, the last full sentence states, "Oak Ridge National Lab could not work with him", meaning Complainant, "and he could have a negative future impact on DOE projects."

* * *

Q. [W]as it at the time, this statement as recorded, to your knowledge correct, that ORNL could not work with Complainant?

A. I did not have firsthand knowledge of that.

Q. But that knowledge was conveyed to you by someone else?

A. Not in that form. This is reversed.

Q. Okay. Would you tell us what you would do to -- to make that a correct statement?

A. It's coupled with the second part of the sentence. If -- if ORNL could not work with him, he could have a negative impact.

Q. That's why I separated the two. Was it your knowledge -- was it a correct statement as of April of '95, just the part that ORNL could not work with Complainant? Was that a correct statement, to your knowledge, at that point in time?

A. I -- it's like a rumor that I heard. I was aware that there was a problem in that area, but I could not say for sure that ORNL, which is a big, couldn't work with Dr. Cornett.

Q. Okay. But you had information --

A. But I was aware that there was problems in that area.

Q. Okay. And -- and do you recall, did Dr. Siegel -- did she convey any information to that effect?

A. Yes.

Q. Okay. The next part, "and Complainant could have a negative future impact on DOE projects", was information to that effect also conveyed to you?

A. I don't recall referring to any DOE projects, other than this project, the PEIS.

Tr. 423, 453-456.

On the basis of the above testimony, and the statements to the OCEP investigators made by the three supervisors that Tardiff stated he consulted prior to his termination decision (Lee, Skidmore and Siegel), I find that Complainant's relationship with persons working on the PEIS project, particularly persons at ANL and ORNL, was a factor in Tardiff's decision to lay off Complainant rather than someone with less seniority on the PEIS project. Moreover, in my view, the conduct of Complainant that so annoyed some personnel at those national laboratories and META/Berger was inextricably

intertwined with his protected disclosures. Thus, the fact that he annoyed some personnel would not justify his termination under Section 708.9. (19) Cf. Ramirez, 23 DOE at 89,034-35 (citing Mackowiak v. University Nuclear Systems, Inc., 735 F.2d 1159 (9th Cir. 1984)). And while at least one supervisor, Feit, described Complainant as "disruptive" in meetings, OCEP Ex. 26, I find credible McGuire's description that Complainant conducted himself at meetings "without personal rancor or animosity. When I say that he was determined and persistent and so on, he -- he is not standing on the tables and pounding and screaming or yelling. Not that at all." Tr. at 208.

I am thus not convinced by META's claim that, absent the protected disclosures, Complainant would still have been selected for termination because the remaining individuals left to perform risk assessment work were more qualified than he and the amount of risk assessment work was decreasing. In view of the hiring of four persons to do risk assessment work in the months immediately preceding Complainant's termination, I give no credence to META's assertion that risk assessment work was decreasing.(20) As indicated above, Tardiff testified that his decision to lay off Complainant was made after his consultation with several senior management officials and supervisors who informed him that Complainant could be terminated without any effect on the project. However, META did not call any of those persons to testify, and their statements to the OCEP investigators appear inconsistent with Tardiff's testimony. For example, Tardiff stated that in making the decision to terminate Complainant, he relied on Lee's recommendation. Tr. at 408. According to the Lee Interview Summary, however, "Tardiff talked to Lee after the decision was made. Lee had no input in the firing decision." OCEP Ex. 29 at 1.(21) Similarly, contrary to Tardiff's testimony, Tr. at 417, "Segal denied having any input in the decision to terminate the Complainant from employment, nor was she consulted about the decision." OCEP Ex. 35 at 2 (Segal Interview Summary). A third person that Tardiff stated he consulted, Skidmore (see Tr. at 417), related that he told Lee (not Tardiff) that he felt that Segal was more valuable to the project than Complainant. OCEP Ex. 37 (Skidmore Interview Summary). It is clear from their statements, however, that these three supervisors had negative opinions about Complainant based upon the manner in which he made his protected disclosures. Thus, even if Tardiff's decision was based on conversations he had with Lee, Skidmore and/or Segal, I am not convinced that it would have been made absent those disclosures.

Other reasons exist supporting my finding that META has not met its burden of proof in this case. If reducing monthly expenditures on personnel was the reason for the lay off, as Tardiff testified, Tr. at 403-04, it would seem that some consideration would have been given to terminating Segal, whose salary was considerably higher than Complainant's.(22) However, from Tardiff's non-responsive answers to questions put to him by Complainant's counsel, it is clear that he did not consider salary differentials when he decided to retain Segal and lay off Complainant. See Tr. at 406-09. Nor is there any evidence that salary differentials played any part in Tardiff's decision to retain other persons in risk assessment that had less seniority than Complainant. Instead Tardiff stated that he relied on the opinion of Lee and other others that Complainant was expendable, and that the other persons doing risk assessment work were assigned to different tasks on the PEIS project than Complainant. Tr. at 395-99, 407-08. However, on the basis of information in the record regarding Complainant's experience and qualifications, it appears to me that he was fully capable of performing those tasks.

I am also not persuaded by META's argument that absence of discriminatory intent is evidenced by the fact that changes were made in the PEIS consistent with Complainant's disclosures. Some or all of these decisions may have been made in response to recommendations from others. Moreover, even if these changes were made in response to Complainant's disclosures, that would not convince me that there was no reprisal. See Sorri, 23 DOE at 89,006 (changes made by contractor to alleviate health and safety problems disclosed by complainant not treated as evidence of no reprisal, but as support for finding that the disclosures involved bona fide danger to safety).

Furthermore, neither the stated intention to transfer Complainant to a position on a META/EPA contract nor the putative AID job offer made to Complainant after his termination convinces me that META's termination of Complainant was not in reprisal for his disclosures. Given the account of the January 14 meeting provided by Complainant in his testimony and in his notes, summarized above, it is hard to believe that Tardiff's proposal to move Complainant to the EPA contract was anything other than a reprisal itself. Cf. Marano (Drug Enforcement Administration agent reassigned as a result of a reorganization inextricably intertwined with his disclosure).

The post-termination offer of possible employment with AID in the Philippines also does not provide any evidence of the absence of a retaliatory motive behind Complainant's termination. It is undisputed that this did not involve an actual job offer. According to Tardiff, AID issued a "task" to contractors who had a presence in Manila, including META, for the services of a health risk person, and someone in META's main office in the Washington, D.C. area (the Arlington office) asked him to see whether the Complainant was interested.(23) Tr. at 415. Moreover, the contrast between this vague potential offer and the treatment of the nine other META/Berger employees who were allegedly terminated for the same financial reasons as Complainant is revealing. (24) At the hearing, Tardiff testified that two of the nine, one META employee and one Berger employee. were later re-employed by META/Berger on the PEIS project, Tr. at 409-10, four other Berger employees were reassigned by Berger to other projects, Tr. at 412, and of the remaining three META employees, one was reassigned to the Arlington office, id., one was brought back for part time work on a separate contract, Tr. at 413, and one (Reife) was given a special status as available for work. Id. While Reife did not receive any pay or benefits, Tardiff indicated that he was given that status because META wanted him to be available in case certain work with the Nuclear Regulatory Commission or EG&G materialized. Tr. at 413-14. No such arrangement was made with Complainant vis a vis the possibility of the AID job or any other position.

In sum, I am unpersuaded by these and other arguments that META has presented in support of its claim that it had no retaliatory motive in terminating Complainant. I also find that META has failed to present clear and convincing evidence to demonstrate that it would have terminated Complainant absent his protected disclosures.

C. Remedy

In his October 11, 1996 Pre-Hearing Submission, Complainant requested the following relief: (i) back pay throughout the time that he would have remained employed at META, (ii) reimbursement for out of pocket expenses incurred in pursuing his complaint including printing, postage, travel, depositions, and telephone bills, (iii) attorneys fees, (iv) restitution for the 10 percent tax penalty for his early withdrawal of $32,050 from his Individual Retirement Account (IRA) and the lost interest on that money, and (v) front pay for a period of five years.

Subsection 708.10(c) provides that "[t]he initial agency decision may include an award of reinstatement, transfer preference, back pay, and ... all reasonable costs and expenses (including attorney and expert-witness fees) reasonably incurred by the complainant in bringing the complaint upon which the decision [is] based." In accordance with this provision, I find that Complainant is entitled to relief as described below.

1. Back Pay

Given the above findings, there can be no doubt that back pay is appropriate in this case. See Howard W. Spaletta, 24 DOE 87,511 at 89,058 (1995). OCEP proposed that back pay and benefits (less earned income and associated benefits) be awarded for the period from the last day for which Complainant was paid by META until September 1995, the month that the draft PEIS was issued. Complainant contends that he should receive additional back pay since he would have likely remained employed at META past that date and he has had no other employment. Pre-Hearing

Submission at 6; Tr. at 110. In support of his position, he has stated that he has the expertise needed to analyze the comments on the Draft PEIS in connection with the preparation of the Final PEIS. Tr. at 110-11. He has further asserted that Lou Borghi (Borghi; "Borghe" in the hearing transcript except as quoted supra) continues to work on the PEIS project, albeit as an employee of a META subcontractor.[(25)] Id. META disputes that Complainant would have remained employed until September 1995, contending that in view of his allegedly narrow set of skills, there would have been no need for him on the PEIS project long before that date. According to META, Segal left her position on the PEIS project in January 1995, and no one worked full time on risk assessment thereafter. Tr. at 580 (closing argument). META also notes that Complainant's employment history is marked by relatively brief job tenures, and suggests that he would have voluntarily left the PEIS project.

There is no way to know with certainty how long Complainant would have remained employed by META if he had not been terminated in March 1994. However, I believe that December 31, 1995 is a reasonable ending date for a back pay award in this case. I recognize that there were reductions in total employment on the PEIS project in late 1994 and throughout 1995. However, risk assessment continued to be an essential part of the PEIS project and Complainant had the experience and ability to perform that work. Although Borghi was selected in January 1995 to replace Segal as the PEIS key person for health risk issues, that determination was made by the same management person responsible for the reprisal termination of Complainant. To justify Borghi's selection, META told OCEP that Borghi was already working on risk assessment issues on the PEIS project and had developed a close working relationship with ORNL. OCEP Ex. 75 (META's March 15, 1996 Response to OCEP Request for Information # 12). However, if Complainant had not been unlawfully terminated in March 1994, he most likely would have still been working on the PEIS project at the time Segal left.[(26)] And, as indicated above, Complainant's purported poor relationship with ORNL was inextricably intertwined with his protected disclosures and the unlawful termination of his employment.

Furthermore, although it can be reasonably assumed that META's analytical work on the Draft PEIS was completed by the end of August 1995, neither META's role in the PEIS project nor the need for risk assessment expertise ended at that point. On September 13, 1995, the DOE issued a notice that announced the commencement of a 90-day public comment period on the Draft PEIS. 60 Fed. Reg. 49264 (September 22, 1995) (Notice of Draft PEIS Availability). For a few months after the issuance of the Draft PEIS, Borghi continued to work on the project, see Tr. at 430 (Tardiff), and in December 1995 some former META employees (Feit and Charles-Kondokov) were brought back temporarily to assist the comment response team. OCEP Ex. 75 (META's March 15, 1996 Response to OCEP's Request for Information # 9).

Under the above circumstances, I find that Complainant would have been employed until December 31, 1995. I reject, however, Complainant's contention that he is entitled to back pay after December 1995. While the comment response process did continue after that month and the Final PEIS has not yet been issued, by that point in time META's responsibilities on the PEIS project had apparently wound down considerably. In January 1996, for example there were only two people at META working on the project. See OCEP Ex. 74 at 11 (META Response to OCEP Letter dated January 24, 1996). It thus appears evident that Complainant would not have been employed by META under any circumstances after December 1995. Nor is there any evidence that the PEIS comment response work that has been done by Borghi or other contractor employees since January 1996 amounts to full time or even regular part time work.

Reviewing the entire record, I also find that Complainant has made diligent efforts to find work similar to his position at META. Accordingly, I find that Complainant is entitled to back pay and related benefits for the period from March 22, 1994 through December 31, 1995.

According to the information that META provided to OCEP, at the time that he was terminated,

Complainant's salary was $70,000 per annum and the value of the benefits provided by META was $21,000 per annum. Thus Complainant's back pay award will be calculated on the basis of $91,000 per annum plus any firm wide cost of living increases that META may have given during the March 1994-December 1995 period. Complainant's counsel will be directed to calculate the amount of back pay on a quarterly basis, less the amount earned by Complainant during the one very brief period that he stated he worked.(27) META should provide to Complainant's counsel any additional information they need in order to make these calculations. This will not preclude META from objecting to the relevance or appropriateness of that information in the calculation of the back pay award.

As part of his back pay, Complainant is entitled to receive interest to compensate him for the time value of money lost. In prior cases, the DOE has followed the practice of the Merit System Protections Board (MSPB) under the WPA in determining the rate of interest that should be applied to the back pay award to a contractor employee under Subsection 708.10(c). See, e.g., Howard W. Spaletta, 25 DOE 87,502 (1996) (Spaletta). The MSPB awards interest on back pay under the Office of Personnel Management regulation found at 5 C.F.R. 550.806(d). That regulation in turns refers to the "overpayment rate" established by the Secretary of the Treasury under 26 U.S.C. 6621 (a)(1). The overpayment rate is the Federal short-term rate plus two percentage points. The Federal short-term rate for a particular calendar quarter is the short-term rate for the first month of the preceding calendar quarter, rounded to the nearest whole percent.

2. Reasonable Costs and Expenses

In order for me to determine whether the more than $6,000 claimed by Complainant for costs and expenses (other than attorney fees) was actually spent and was (i) reasonable and (ii) reasonably incurred in bringing the complaint, Complainant will be required to submit a full, documented accounting for these expenses. However, reimbursement for costs relating to seeking employment is not provided for in Section 708.10(c). See Ramirez, 23 DOE at 89,037 n. 24. Consequently, I will not grant Complainant's request for such costs, with one exception. Since I have indicated that the back pay award should be offset by any income earned by Complainant, I believe it is reasonable to reduce the amount of that income by any costs reasonably related to the obtaining of that employment.

3. Attorney Fees.

I intend to follow other DOE whistleblower cases by applying the "lodestar approach" to determine the amount of attorney fees in this case. See, e.g., Spaletta, 25 DOE at 89,003 (citing Blanchard v. Bergeron, 489 U.S. 87 (1989)). Under this approach, a reasonable attorney fee is the product of reasonable hours times a reasonable rate. Interpreting the phrase "reasonably incurred" in this manner recognizes the public interest nature of whistleblower representation in Part 708 cases and encourages attorneys to take these cases. The fee applicant has the burden of producing satisfactory evidence that the requested rates are comparable to those prevailing in the community for similar services by lawyers of reasonable comparable skill, experience or reputation. See Blum v. Stenson, 465 U.S. 886 (1984). Therefore, counsel for Complainant should submit appropriate evidence to show what is a reasonable hourly rate for them to receive in this case.

4. IRA Tax Penalty and Lost Interest Income

This portion of Complainant's claim is denied. In my view, these items do not meet the Section 710.10(c) standard of "reasonable costs and expenses . . . reasonably incurred by the complainant in bringing the complaint upon which the [initial agency] decision was issued." Cf. David Ramirez, 24 DOE 87,504 at 89,016 (1994), aff'd, 24 DOE 87,510 (1994). As Complainant's testimony makes clear, he needed the funds withdrawn from his IRA primarily to meet his living expenses. Tr. at 122. However, even if some of these funds were used for litigation expenses, I do not believe it is

reasonable to reimburse the individual for the expense of the tax penalty and the lost interest income. These items appear to be too remote from the type of litigation-related costs and expenses for which reimbursement is provided by Section 708.10(c). [(28)]

5. Front Pay

Complainant has also requested that he be awarded five years of front pay in light of the damage to his professional reputation that has resulted form META's actions. In his Pre-Hearing Submission, Complainant cited two cases, Simmons, v. Florida Power Corp., 89-ERA-28 (ALJ Dec. 13, 1989) (Simmons), and McNeil v. Economics Lab, Inc., 800 F.2d 111 (7th Cir. 1986) (McNeil), which hold that front pay be may an appropriate remedy in certain employee protection cases. These two cases are inapposite since relief in each case was granted under a broadly worded statutory remedy which has been construed to authorize remedies such as front pay. See 29 U.S.C. 626(b) (remedy provision of the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 et seq., applied in McNeil); 42 U.S.C. 5851(b)(2)(B) (remedy provision of ERA applied in Simmons). In contrast, Section 710.10(c) does not authorize a hearing officer to award front pay. Consequently, I deny Complainant's request for front pay.[(29)]

III. Conclusion

For the reasons discussed above, I find that Complainant has met his burden of proof of establishing by a preponderance of the evidence that he made health and safety disclosures protected by 10 C.F.R. Part 708. I also find that these disclosures were a contributing factor in his termination. Furthermore, I find that META has not proven by clear and convincing evidence that it would have terminated Complainant absent his disclosures. Accordingly, I conclude that a violation of Part 708 has occurred and that Complainant should be awarded back pay (including benefits) plus interest as a result of the reprisal taken against him, as well as all costs and expenses reasonably incurred by him in bringing the present complaint. After the parties have provided the information and comments referred to in the Order below, I will issue a Supplemental Order specifying the exact amount to be awarded to Complainant.

It Is Therefore Ordered That:

(1) The request for relief under 10 C.F.R. Part 708 submitted by C. Lawrence Cornett (Cornett) , OHA Case No. VWA-0007, is hereby granted as set forth in Paragraph (3) below and is denied in all other respects.

(2) The objections to Cornett's request for relief submitted by Maria Elena Torano Associates, Inc. (META), OHA Case No. VWA-0008, are hereby denied for the reasons set forth in the foregoing Decision.

(3) META shall pay to Cornett an amount to be determined based on the information provided pursuant to Paragraphs (4) and (5) in compensation for lost salary and benefits, and interest thereon, and for all costs and expenses, including attorney fees reasonably incurred by Cornett in bringing his complaint under Part 708.

(4) Counsel for Cornett shall, no later than 30 days after service of this Decision by the Assistant Inspector General for Assessments, the successor to the Director of the Office of Contractor Employee Protection, submit to the undersigned Hearing Officer and to counsel for META the following information:

(a) A schedule estimating the salary and other benefits that Cornett would have earned from his employment at META for each calendar quarter from the second quarter of 1994 through the fourth quarter of 1995. [(30)] This submission should specify the assumptions upon which it is based and any

information that is not in the record or which META has not voluntarily provided which is necessary for a more accurate calculation.

(b) A quarterly schedule of any income and benefits that Cornett earned during the period from April 1, 1994 through December 30, 1995, and any expenses reasonably incurred in the obtaining of the employment generating this income.

(c) Copies of Cornett's Federal Income Tax Return Form 1040 for 1994 and 1995.

(d) A detailed and itemized list of each and every expense incurred in bringing the complaint, the dates incurred and the provider of the good and service provided.

(e) Documentation for each requested expense such as bills, invoices, receipts or affidavits.

(f) For any attorney fee claimed, the identity of each attorney providing such service and the date, time, duration and nature of the service provided.

(g) For any attorney who provided services on behalf of Cornett, evidence that the hourly rate for services incurred is comparable to those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.

(5) Counsel for META shall, no later than 15 days after receipt of a copy of the submission referred to in paragraph (4), submit to the Hearing Officer and counsel for Cornett:

(a) The information specified by Cornett's counsel as necessary for a more accurate calculation of back pay and benefits.

(b) A response to the submission by Cornett's counsel that is limited to the reasonableness and accuracy of the calculations set forth in that submission, including the assumptions underlying those calculations.

(6) Counsel for Cornett shall, no later than seven days after receipt of a copy of the submission referred to in Paragraph (5), submit to the Hearing Officer and counsel for META either a response to that submission or notification that they do not intend to respond.

(7) This is an Initial Agency Decision that shall become the Final Decision of the Department of Energy unless, within five days of its receipt, a written request for review of this Decision and/or the Interlocutory Decisions issued under Case Nos. VWZ-0006 and VWZ-0007 by the Secretary of Energy or her designee is filed with the Assistant Inspector General for Assessments.

Ted Hochstadt

Hearing Officer

Office of Hearings and Appeals

Date:

1. 1/ The purpose of the PEIS was, inter alia, to evaluate alternatives for the treatment, storage and disposal of radioactive and other hazardous wastes and explain the policy decisions of the DOE's Office of Environmental Restoration and Waste Management. See DOE Contract No. DE-AC01-91EM40002, Attachment B; META, Inc., 26 DOE 87,501 (1996) (Motion to Dismiss).

2. 2/ In October 1993, the University of Chicago, the contractor which operates Argonne National Laboratory (ANL), a DOE facility, contracted with META to continue to provide technical support regarding the development of the PEIS. See ANL Contract No. 34006426.

3. 3/ The OCEP investigation included the acquisition and analysis of relevant documents and the conducting of on-site and telephone interviews. Summaries of the interviews are contained in the OCEP Report.

4. CERCLA is often referred to as Superfund.

5. 5/ Berger was a principal subcontractor on the PEIS project and its employees performed essentially the same types of work as META employees. In some cases Berger employees supervised META employees and in some cases META employees supervised Berger employees. See Transcript of October 29-31, 1996 Hearing (Tr.) at 379-80; OCEP Ex. 18E.

6. Time discounting is a mathematical methodology in which calculated risks to future generations of individuals are reduced.

7. Tardiff was employed on the PEIS project by META beginning in September of 1993. Tr. at 394.

8. 8/ Although not indicated in the April 30 submission, Complainant requested the hearing to contest the level of relief proposed in the OCEP Report. See Complainant's Pre-Hearing Submission at 6-7 (October 11, 1996).

9. 9/ Cornett's hearing request was assigned OHA Case No. VWA-0007 and META's request was assigned Case No. VWA-0008.

10. 10/ Although the interlocutory proceedings in this case have been assigned separate OHA case numbers, all submissions and determinations are part of the record of Complainant's whistleblower complaint case.

11. In accordance with the Part 708 regulations, in arriving at this finding, it was not necessary for me to make any determination on the validity of Complainant's arguments concerning the data or methodologies that should be included in the PEIS and I have not made any such determination.

12. In its Report, OCEP did not make any finding as to whether Complainant's disclosures involved a violation of any law, rule or regulation under Section 708.5(a)(1)(i). See Report at 7-8. In his Pre-Hearing Submission, Complainant did not take issue with OCEP's limiting its disclosure finding to Section 708.5(a)(1)(ii) (danger to public health or safety). Nevertheless, the record is replete with communications in which Complainant either alleges violations of environmental laws and regulations or proposes methodologies to bring the PEIS process within what he believed to be the requirements of those laws and regulations. See, e.g., Pl. Exs. 9, 10.These laws and regulations are directly related to public health and safety. See, e.g., 42 U.S.C. 6901 (b) (Congressional findings with respect to the environment and health in the Resource Conservation Recovery Act (RCRA)).

13. Although the AHWG Report reviewed allegations made by Complainant after his termination, the allegations by and large involved the subject matter of his alleged disclosures.

14. 10^{-4} is a scientific notation representing 1×10^{-4} or 0.0001. Likewise, 10^{-5} represents 1×10^{-5} or 0.00001 and so forth.

15. Although OCEP Ex. 5 is dated January 14, 1993, it clearly was prepared in 1994.

16. In view of the fact that META was responsible for overall management of the PEIS project and that there was no operational distinction between META and Berger employees, see supra note 5, I find that META is responsible for reprisals against the Complainant made by Berger managers and supervisors.

17. Although Complainant testified on direct examination that the meeting occurred "about January 8," on

cross examination he was more specific and stated "January 10," a date for which there is considerable support in the record.

18. Although the "Contact" report is included in the same exhibit as the January 10, 1994 Progress Report, it is a totally separate document.

19. In a post hearing submission, counsel for META asserts that the "regulation in question does not prohibit firing an employee for monopolizing discussions [or] having bad manners . . . ." This may be true, but irrelevant since throughout this proceeding META has never claimed that Complainant was terminated for those reasons. A fortiori, META has not made a clear and convincing showing that Complainant would have been terminated for those reasons in the absence of his protected disclosures.

20. META has also not convinced me that the other 60 or so persons hired in the six months prior to Complainant's termination were better qualified to work on the PEIS project than Complainant.

21. Statements quoted from the OCEP Report are from the investigator's account of oral statements made by the persons interviewed and are not direct quotes from the interviewee.

22. META has also not explained why, if Complainant was laid off solely as part of a plan to reduce personnel out of financial considerations, its overall personnel numbers on the PEIS project appear substantially the same for months after the decision was made to terminate 10 employees on the PEIS project. While the firm's full time equivalents (FTE) calculations for the PEIS project show a decrease in the two months after the Tucson meeting (March and April 1994), from May through July, the FTE calculation exceeded the February figure and remained at or slightly below the February figure during the following three months. See OCEP Ex. 75 (Schedule of PEIS Monthly Expenditures).

23. Complainant testified that he tried without success to learn more about the possible job from META's Arlington office. Tr. at 128-29

24. While Complainant has alleged that the termination of the other nine META/Berger employees was a mere pretext to disguise the real reason for his termination, I find no evidence substantiating this assertion.

25. It is unclear from Complainant's testimony whether his information about Borghi was current as of the date of the hearing or as of the spring of 1996.

26. As indicated above, neither the EPA nor the AID contracts came through, and, according to META, the firm had no contracts other than the PEIS one that required Complainant's expertise. OCEP Ex. 74 at 10 (META's Response to OCEP's January 24, 1996 Request for Information # 6c). Although META suggests that Complainant may have been affected by PEIS staff reductions in 1994, id. at 11, the record indicates that the vast majority of the reductions occurred in 1995, after Segal left. See OCEP Ex. 75 (PEIS Monthly Expenditures). In view of Complainant's interest in the PEIS project there is also no basis for finding that Complainant would have voluntarily left META before December 1995.

27. As I indicated at the hearing, Complainant will have to verify his statement that he has had no regular income since his termination from META.

28. At the hearing, Complainant also stated that he had borrowed money from his father to pay for his living expenses and requested compensation for the loss of interest income that his father incurred as a result. Tr. at 122, 124-25. For the reasons stated above, I also will deny this claim.

29. I note however that the Secretary of Energy's authority to grant relief under Part 708 appears more extensive than that granted to a hearing officer. See 10 C.F.R. 708.11(c) (the Secretary may grant "such other relief as is necessary to abate the violation and provide the complainant with relief").

30. To simplify the calculation of interest, this schedule should be based on the assumption that Cornett

would have been paid for the last 10 days of March 1994 in April, but payment for the period ending December 31, 1995 would have been on that date.