

~~CUI//PRIG//PRVCY~~

# Report of Investigation: Whistleblower Reprisal Investigation



September 1X, 2024 | Report No. 24-N-00XX

## **REDACTED VERSION FOR PUBLIC RELEASE**

The full version of this report contained controlled unclassified information. This is a redacted version of that report, which means the controlled unclassified information has been removed. The redactions are clearly identified in the report.



## Abbreviations

C.F.R.	Code of Federal Regulations
	
EPA	U.S. Environmental Protection Agency
FY	Fiscal Year
OIG	Office of Inspector General
OPPT	Office of Pollution Prevention and Toxics
RAD	Risk Assessment Division
U.S.C.	United States Code

**Are you aware of fraud, waste, or abuse in an EPA program?**

**EPA Inspector General Hotline**

1200 Pennsylvania Avenue, NW (2431T)  
Washington, D.C. 20460  
(888) 546-8740

[OIG.Hotline@epa.gov](mailto:OIG.Hotline@epa.gov)

Learn more about our [OIG Hotline](#).

**EPA Office of Inspector General**

1200 Pennsylvania Avenue, NW (2410T)  
Washington, D.C. 20460

(202) 566-2391

[www.epaoig.gov](http://www.epaoig.gov)

Subscribe to our [Email Updates](#).

Follow us on X (formerly Twitter) [@EPAoig](#).

Send us your [Project Suggestions](#).

# *Table of Contents*

## **Report of Investigation**

<b>Introduction and Summary.....</b>	<b>1</b>
<b>Findings of Fact .....</b>	<b>2</b>
<b>Analytic and Legal Framework.....</b>	<b>13</b>
<b>Analysis .....</b>	<b>15</b>
<b>Conclusions .....</b>	<b>22</b>
<b>Recommendation .....</b>	<b>22</b>

# Report of Investigation

## Introduction and Summary

On June 28, 2021, and August 3, 2021, the U.S. Environmental Protection Agency Office of Inspector General received OIG Hotline complaints filed by the nonprofit organization Public Employees for Environmental Responsibility on behalf of four scientists who worked in the former Risk Assessment Division, or RAD, of the Office of Pollution Prevention and Toxics, or OPPT, in the EPA Office of Chemical Safety and Pollution Prevention. The complaints and subsequent interviews of the scientists raised multiple allegations of misconduct, including that the Agency took a total of four personnel actions against [REDACTED] over the course of three years: three actions in 2019 and 2020, after [REDACTED] expressed differing scientific opinions, and one action in 2022, after PEER filed the June and August 2021 hotline complaints. We opened an investigation to determine whether the alleged actions in 2019 and 2020 were in retaliation for [REDACTED] differing scientific opinions, in violation of the EPA's *Scientific Integrity Policy* (2012). We also investigated whether the 2022 action was in retaliation for [REDACTED] complaints made to the OIG, in violation of the Whistleblower Protection Act.

Our investigation first sought to determine whether [REDACTED] expressed differing scientific opinions or made disclosures or engaged in other activities that were protected under the Whistleblower Protection Act and whether any of these were a contributing factor in any personnel actions taken against [REDACTED]. We determined that [REDACTED] expressed and was perceived to have expressed differing scientific opinions in 2019 and 2020 and engaged in protected activity and made a protected disclosure in 2021. We found that management knew of [REDACTED] differing scientific opinions when it took two personnel actions against [REDACTED] (1) issued [REDACTED] a lower performance rating than the previous year and (2) reassigned [REDACTED] to a different division. Our investigation identified [REDACTED] as [REDACTED] who issued [REDACTED] FY 2020 performance evaluation and identified [REDACTED] as [REDACTED] [REDACTED] who reassigned [REDACTED]. Both personnel actions occurred within a period of time such that a reasonable person could conclude that [REDACTED] differing scientific opinions were a contributing factor in the personnel actions. We determined that [REDACTED] differing scientific opinions were not a contributing factor in one of the remaining two actions and that the other remaining action did not constitute a personnel action. We determined that [REDACTED] protected activity and protected disclosure were not contributing factors in the personnel actions taken against [REDACTED].

Next, we assessed whether the EPA could establish that it would have taken the same two personnel actions even if [REDACTED] had not expressed differing scientific opinions. After reviewing the evidentiary support for the two personnel actions, any evidence of any retaliatory motive on the part of officials involved in the decision, and any evidence that the Agency took similar actions against similarly situated employees who were not whistleblowers, we substantiated [REDACTED] retaliation allegation with respect to [REDACTED] performance rating. We did not substantiate [REDACTED] retaliation allegation with respect to [REDACTED] reassignment. We recommend that the EPA administrator consider appropriate corrective action considering these findings.

On August 23, 2024, we provided [REDACTED] with a tentative conclusions letter containing our preliminary report of investigation and gave [REDACTED] an opportunity to review and comment before we finalized our report. In [REDACTED] response, dated September 6, 2024, [REDACTED] disagreed with our conclusions. [REDACTED] stated that [REDACTED] did not penalize [REDACTED] for [REDACTED] disagreements, but instead assessed [REDACTED] overall performance against various metrics, including [REDACTED] ability to meet programmatic deadlines for new-chemical assessments. [REDACTED] stated that management had the responsibility to ensure that program goals are met and that the EPA's FY2018-2022 Strategic Plan emphasized the importance of adhering to statutory deadlines. [REDACTED] pointed out that performance ratings are not static and that employees are not entitled to the same rating they received in a previous year. [REDACTED] highlighted that [REDACTED] considered [REDACTED] rebuttal of [REDACTED] rating, and that [REDACTED] adjustment of [REDACTED] rating demonstrated [REDACTED] commitment to fairness in the evaluation process. Finally, [REDACTED] noted that the agency's *Approaches for Expressing and Resolving Differing Scientific Opinions* guidance was not available to [REDACTED] at the time of [REDACTED] rating, as it was published in October 2020.

After carefully considering [REDACTED] response, we amended some sections of the report but did not alter our original conclusions.<sup>1</sup>

## Findings of Fact

[REDACTED] is a [REDACTED] in the [REDACTED] within the OPPT. [REDACTED] started at the EPA in [REDACTED] in RAD, where [REDACTED] did [REDACTED] work under the Toxic Substances Control Act as well as contributed to human health assessments of new chemicals<sup>2</sup>. [REDACTED] testified that [REDACTED] was initially hired in RAD to do [REDACTED] work but was assigned to complete new-chemicals assessments because of organizational needs. When the OPPT was reorganized in October 2020, [REDACTED] was moved to the [REDACTED].

## Background

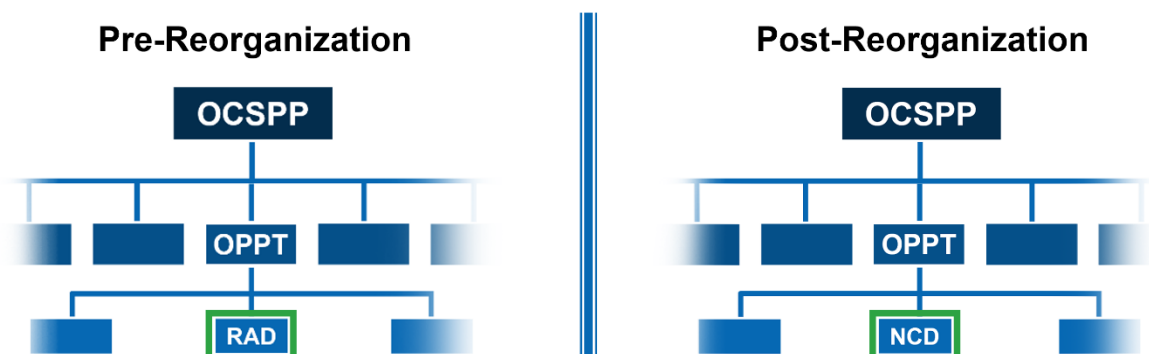
Prior to the OPPT reorganization in October 2020, RAD was responsible for assessing the hazards of new chemicals before they entered U.S. commerce to determine whether they posed an unreasonable risk to human health and the environment. RAD's hazard assessments were sent to the Chemical Control Division in the OPPT, which conducted risk management assessments. These assessments were made under the Toxic Substances Control Act, which requires a final regulatory determination within 90 days of submission.<sup>3</sup> After the two divisions completed their assessments, the OPPT deputy director would review their work and approve a final regulatory determination regarding the risks posed by each new chemical. As a result of the OPPT reorganization in October 2020, the full assessments and regulatory

<sup>1</sup> While we included what we believe is a reasonable synopsis of [REDACTED] response, we provide a copy of the full response with this report.

<sup>2</sup> As a human health assessor, [REDACTED] worked on assessments of how new chemicals would impact the human health of consumers, workers, and the general population. In addition to human health assessors, RAD had assessors from four other disciplines: engineering, exposure science, fate, and ecological toxicity.

<sup>3</sup> Toxic Substances Control Act § 5(a)(3)(A)-(C), 15 U.S.C. § 2604(a)(3)(A)-(C).

determinations were assigned to the New Chemicals Division and were subject to the same statutory 90-day deadline.



Notes: NCD = New Chemicals Division; OCSP = Office of Chemical Safety and Pollution Prevention.

Source: OIG analysis of OPPT reorganization. (EPA OIG image)

The EPA's assessments of new chemicals constitute scientific products. The hazards in new-chemicals assessments are identified by assessing and interpreting scientific data, such as testing on the new-chemical substance or on analogue chemicals. These hazards, as well as data from the other disciplines, such as exposure and engineering data, are used to inform the EPA's final regulatory determination.

In 2016, the Toxic Substances Control Act was amended by the Frank R. Lautenberg Chemical Safety for the 21st Century Act.<sup>4</sup> RAD staff testified that prior to the 2016 amendment, the division conducted a full assessment of about 20 percent of the new-chemicals submissions. As a result of the 2016 amendment, the EPA was required to conduct a full assessment for *every* chemical within the same statutory 90-day deadline. Despite the increased workload, the division did not receive an increase in staff or contractor resources.

Agency staff testified that the division was not prepared or equipped to satisfy the new requirements. Management consistently testified that 90 days was not enough time to complete the new-chemicals assessment process and that the division lacked the resources to meet this deadline. [REDACTED]

[REDACTED] described the statutory deadline as "ridiculous" and stated that everyone knew it could not be met. A human health assessor described completing the new requirements within 90 days as "somewhat impossible." If new-chemicals assessments are not completed within the statutory 90-day deadline, they become a part of the "backlog." The backlog existed before the 2016 amendment, but it grew as a result of the increased workload. While management testified that there had always been pressure to clear the backlog, as the backlog grew, so did the political pressure to eliminate it.

Management called the pressure from Agency leadership to eliminate the backlog "intense." [REDACTED]

[REDACTED] who were responsible for [REDACTED]

<sup>4</sup> Frank R. Lautenberg Chemical Safety for the 21st Century Act, Pub. L. No. 114-182, § 5, 130 Stat. 448 (2016).

[REDACTED] testified that Agency leadership was constantly contacting them.<sup>5</sup> One of [REDACTED] described the pressure as “pushing us like animals in a farm.” [REDACTED] testified that [REDACTED] was afraid that if it was not reduced, there would be repercussions in [REDACTED] performance evaluation. Witnesses from [REDACTED] explained that because the human health assessment took the most time and had the most room for disagreement, pressure to reduce the backlog was disproportionately applied to the human health assessors. [REDACTED] called the human health assessment “the hardest part of the risk assessment.” [REDACTED] testified that a political appointee complained about specific human health assessors as being “slow” and asked their management to be more involved in their work. Agency leadership also characterized these assessors as too “conservative” in their approach.

However, witness testimony indicated that the assessment completion timeline and the backlog size were not entirely in the assessors’ control. Companies that submit new chemicals for assessment play a large role in the new-chemicals assessment process. RAD and New Chemicals Division management testified that since 2016, the EPA regulates new chemicals via consent orders. Before the final regulatory determination is made, the chemical submitters are told the EPA’s tentative conclusion and have an opportunity to dispute the EPA’s assessment or provide additional information. According to [REDACTED], the division is required to consider anything the chemical submitters supply, no matter when it is received. As a result, assessors often must review and respond to new information submitted in rebuttal to the initial assessment, a process referred to as “rework.” If chemical submitters do not agree with the initial regulatory determination, then they can continue to submit more information for the EPA to consider until an agreement between the chemical submitters and the EPA is reached, extending the timeline beyond the statutory 90-day deadline. [REDACTED] testified that submitters’ desire for a regulatory decision that their chemicals are not likely to present risk to human health or the environment causes “heavy” rework and emphasized that an average case goes through two or three back-and-forth cycles. [REDACTED] and [REDACTED] explained that assessments that submitters disagree with end up more delayed than assessments that they agree with. [REDACTED] also testified that identifying fewer hazards or determining that a chemical was less hazardous led to quicker case completion.

Delays are also caused by internal scientific disagreements that are inherent to the new-chemicals review and approval process. Staff from RAD and the New Chemicals Division testified that human health assessors often have little-to-no test data regarding the new chemicals when writing their reports. Instead, hazards in new-chemicals assessments are identified by finding existing chemicals that are structurally similar to the new chemicals to use as analogues. [REDACTED] testified that the division did not have

---

<sup>5</sup> In March 2020, the assessors who worked on new chemicals were split into two groups: a backlog team and an incoming-submissions team. [REDACTED] was assigned to [REDACTED] team. [REDACTED] served as the [REDACTED] manager. However, [REDACTED] supervisor of record was [REDACTED] manager.

written guidance regarding how to select the best analogue chemical, but instead that the decision was based in part on professional judgment and a review of the scientific data. According to [REDACTED], the New Chemicals Division is working on creating objective measures for analogue selection. The data gap and resulting need for extrapolation leaves room for scientific disagreements.

### **Scientific Disagreements While in RAD**

Once a human health assessor completed their initial assessment, the OPPT deputy director and the OPPT senior science advisor would conduct an extensive technical review and provide edits back to the assessors. According to [REDACTED], the OPPT deputy director and the OPPT senior science advisor believed that the [REDACTED] human health assessors who were on the [REDACTED] team, including [REDACTED] took an overly conservative approach in their assessments, in particular regarding hazard identification. As noted above, hazards in new-chemicals assessments are identified by assessing and interpreting scientific data. OPPT managers' disagreements regarding hazard identification would be included in their edits back to the human health assessors. These disagreements were also raised at weekly disposition meetings, where management and the human health assessors would discuss scientific issues that arose in the new-chemicals assessments.

[REDACTED] testified that from approximately May 2019 through October 2020, [REDACTED] frequently expressed scientific disagreements to RAD and OPPT managers concerning their edits to [REDACTED] assessments of new chemicals. [REDACTED] testified that [REDACTED] disagreements were about hazard identification and analysis in assessments of new chemicals. OPPT management disagreed with [REDACTED] analogue and point of departure selection in certain assessments.<sup>6</sup> For example, in a [REDACTED] 2019 draft assessment, the OPPT deputy director inserted comments questioning [REDACTED] use of a particular analogue chemical. Additionally, in April 2020, [REDACTED] documented a disagreement about analogue selection in a disposition meeting. After the meeting, [REDACTED] emailed all participants and noted that "we've been getting lots of comments from the OPPT IO [immediate office] on our POD [point of departure] selection rationales." [REDACTED] also documented a discussion disputing changes that were made to another one of [REDACTED] assessments. In May 2020, a [REDACTED] and the OPPT senior science advisor changed the points of departure in an assessment that [REDACTED] had completed, resulting in the removal of concerns for "reproductive toxicity" from the new chemical's Safety Data Sheet.<sup>7</sup> [REDACTED] emailed the OPPT senior science advisor and others, noting that [REDACTED] disagreed with the revised points of departure. The OPPT senior science advisor testified regarding this same incident and confirmed that changes were made to the assessment. In a message to the OPPT deputy director about

<sup>6</sup> Points of departure are values taken from scientific studies that reflect the lowest dose at which test subjects experienced observable adverse effects from exposure to the analogue chemical, also known as the lowest observable adverse effect level, or if no effects are observed in the study, the highest tested dose at which there was no adverse effect, also known as the no observed adverse effect level.

<sup>7</sup> Safety Data Sheets are used to communicate the hazards of a given chemical. Employers must ensure that the Safety Data Sheets are readily accessible to all employees for each hazardous chemical in their workplace.



the meeting, the OPPT senior science advisor called the [REDACTED] human health assessors the “tox[ic] [REDACTED].”

At the time, there was no process in place for addressing and documenting these scientific disagreements. Neither the OPPT deputy director nor the OPPT senior science advisor was officially in the assessors’ chain of command. Although they would edit the assessors’ work and express any disagreements, neither they nor the assessors’ supervisors directed the assessors to make the changes.

[REDACTED] and the other [REDACTED] human health assessors would frequently respond to OPPT management’s edits because they disagreed with the edits and thought that the edits were not protective of human health. There was no mechanism to end the back-and-forth edits and responses. Thus, when the human health assessors expressed their scientific disagreements with the OPPT deputy director and OPPT senior science advisor’s edits, the review process for the given chemical would be delayed, as the two sides would go through multiple rounds of discussions and edits to arrive at a final assessment. [REDACTED] and the other [REDACTED] human health assessors were perceived by management as more likely to express scientific disagreements than other assessors. [REDACTED] testified that all assessors had delays, and one noted that assessors who did not express scientific disagreements processed cases faster.

[REDACTED] and the other [REDACTED] human health assessors received negative attention from political appointees, OPPT management, and RAD management for expressing scientific disagreements. [REDACTED] described how political appointees pressured OPPT and RAD management to move new-chemicals assessments more quickly. For example, the Office of Chemical Safety and Pollution Prevention [REDACTED] would require the [REDACTED] to “defend the outputs from our data systems every week” in weekly meetings about delayed assessments, which became a “never-ending status update.” [REDACTED] recalled a meeting in which the Office of Chemical Safety and Pollution Prevention [REDACTED] “barked” at [REDACTED] the [REDACTED] manager, and the OPPT senior science advisor and asked why the [REDACTED] team was not completing assessments more quickly. [REDACTED] recalled the Office of Chemical Safety and Pollution Prevention [REDACTED] communicating that RAD supervisors needed to have a “firm hand” and push timelines. [REDACTED] testified that the OPPT [REDACTED] constantly contacted [REDACTED] pressured [REDACTED] and focused on the division completing assessments.

OPPT management complained to RAD management about [REDACTED] and the other [REDACTED] human health assessors. On April 30, 2020, the OPPT deputy director messaged the [REDACTED] manager and [REDACTED], calling the [REDACTED] human health assessors the “worst ‘conservativist[s]’” and complaining that they were “trying to indict every chemical.” [REDACTED] described how the OPPT deputy director and the OPPT senior science advisor began to characterize the [REDACTED] human

health assessors' scientific disagreements as insubordination in 2019 and 2020. In early 2020, the OPPT deputy director stated in an email that [REDACTED] human health assessors' failure to use [REDACTED] approach to assessments "could be considered insubordination."

[REDACTED] perceived [REDACTED] and the other [REDACTED] human health assessors as closely aligned with one another. [REDACTED] emailed [REDACTED] when [REDACTED] witnessed the [REDACTED] human health assessors talking together and mentioned more than once that [REDACTED] assumed they would "join forces" to file a complaint. [REDACTED] called the [REDACTED] human health assessors passive-aggressive and described them as "piranhas" because [REDACTED] feared that they would make scientific integrity allegations about [REDACTED]. Other assessors noticed how those who disagreed with management were perceived. [REDACTED] testified that disagreeing or delaying the resolution of backlogged cases could get an employee labeled as "problematic" by management. [REDACTED] testified that, once management labeled an employee as problematic, they were "done."

### **Disclosures to the OIG**

On June 28, 2021, [REDACTED] was one of four EPA employees to file an OIG Hotline complaint with the help of Public Employees for Environmental Responsibility. The OIG Hotline complaint included allegations of harassment, retaliation, and violations of the EPA's Records Management Policy. That same day, the organization emailed the Office of Chemical Safety and Pollution Prevention's assistant administrator a copy of the complaint, which identified the four complainants by name and indicated that it was sent to the OIG. Immediately after receiving the complaint, the assistant administrator forwarded it to OPPT senior leaders, including the OPPT deputy director. The next day, at the OPPT deputy director's request, the Office of Chemical Safety and Pollution Prevention's deputy scientific integrity official, who also served as the associate assistant administrator for the Office of Chemical Safety and Pollution Prevention, sent the complaint to every individual mentioned in the complaint. This included [REDACTED] former RAD supervisor; several of [REDACTED] former coworkers; and the former [REDACTED] manager, who worked in the same division as [REDACTED] at the time. In [REDACTED] email, the deputy scientific integrity official mentioned the whistleblower protections under Whistleblower Protection Act, stating "I believe these allegations qualify as protected disclosures, thus entitling the four complainants to whistleblower protections." Despite recognizing that the complainants should be protected from retaliation, she did not redact their names prior to distributing the complaint. On August 3, 2021, Public Employees for Environmental Responsibility filed another OIG Hotline complaint on behalf of [REDACTED] and other human health assessors. The OIG Hotline complaint included allegations that assessors were verbally attacked in meetings for their disagreements and that their scientific disagreements were referenced in their performance evaluations as support for a lower performance rating in the subsequent performance period.

## ██████████ *Allegations of Retaliation*

██████████ alleged that EPA management took four actions against ██████████ in retaliation for ██████████ differing scientific opinions, protected activity, and protected disclosures: (1) issued ██████████ a lower performance evaluation for FY 2020 than the previous year, (2) reassigned ██████████ to the ██████████ in October 2020, (3) did not select ██████████ for a ██████████ position in March 2022, and (4) subjected ██████████ to harassment in 2019 and 2020.

### 1. FY 2020 Performance Evaluation

██████████ supervisor rated ██████████ as “██████████” in ██████████ FY 2019 performance evaluation.<sup>8</sup> Out of the five critical elements within ██████████ evaluation, ██████████ received a rating of “██████████” for four and “██████████” for one. ██████████ reported to the same supervisor in FY 2020, and ██████████ described ██████████ as a ██████████.

In March 2020, the RAD new-chemicals assessors were split into two teams. ██████████ was assigned to the ██████████, but ██████████ supervisor was assigned to ██████████. While on the ██████████, ██████████ day-to-day work was managed by the ██████████. ██████████ testified that ██████████ had “nothing but good things to say about ██████████ technical abilities. ██████████ a smart ██████████.”

As noted earlier, scientific disagreements between assessors and OPPT management on initial assessments led to delays. According to the testimony of management, however, such disagreements were just one of several reasons that new-chemicals assessments frequently missed the 90-day statutory deadline and assessments were often delayed even in the absence of scientific disagreements. ██████████ testified that all assessors, regardless of whether they expressed differing scientific opinions, had cases that were delayed for various reasons.

The OPPT deputy director and the OPPT senior science advisor commented to ██████████ and ██████████ that the ██████████ human health assessors’ scientific disagreements were a performance issue. The OPPT deputy director alleged in an email that the ██████████ human health assessors’ failure to use her approach to assessments could be considered insubordination.<sup>9</sup> ██████████ confirmed, however, that the assessors were not given direct orders to make changes in their assessments.

In November 2020, ██████████ supervisor issued ██████████ performance evaluation for FY 2020 and gave ██████████ a lower overall rating, “██████████,” than ██████████ had received the previous year. ██████████ rating

<sup>8</sup> For the FY 2019 and FY 2020 performance periods, the EPA used a five-level performance rating system. The highest level of performance was “outstanding,” followed in decreasing order by “exceeds expectations,” “fully successful,” “minimally successful,” and “unacceptable.”

<sup>9</sup> The OPPT deputy director declined our request for an interview.

also decreased in three of the five critical elements.<sup>10</sup> In critical element one, “Project Management and Technical Support to New Chemicals,” [REDACTED] was rated as “[REDACTED]” in FY 2019 but only “[REDACTED]” in FY 2020. [REDACTED] testified that since [REDACTED] was on the [REDACTED] [REDACTED] and [REDACTED] was on [REDACTED], [REDACTED] evaluation of [REDACTED] was based on feedback from others. Specifically, [REDACTED] rating was based on [REDACTED] understanding of [REDACTED] performance from conversations with the [REDACTED] manager, the OPPT deputy director, and the OPPT senior science advisor throughout the year. [REDACTED] testified that while the quality of [REDACTED] work on new chemicals did not decline, the timeliness of [REDACTED] work did. [REDACTED] testified, however, that [REDACTED] did not track how many cases were delayed or how delayed they were, nor did [REDACTED] receive documentation of these metrics.

[REDACTED] supervisor’s comments for critical element one stated, in part, [REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]  
[REDACTED]” (emphasis added). [REDACTED] testified that [REDACTED] comments were informed by views expressed by the OPPT deputy director and the OPPT senior science advisor, who were frustrated that the [REDACTED] human health assessors’ scientific disagreements caused delays. [REDACTED] explained that, at the time, the division did not have “the sensitivity about having ... differing scientific opinions like we have right now,” so [REDACTED] did not distinguish between delays caused by scientific disagreements or those caused by other aspects of the workflow. [REDACTED] confirmed that some of the differences in opinion directly cited in [REDACTED] performance evaluation may have been differing scientific opinions.

The supervisory comments regarding critical element one stated that [REDACTED] was “[REDACTED]  
[REDACTED]  
[REDACTED]” and that [REDACTED] at [REDACTED] level “[REDACTED]  
[REDACTED]  
[REDACTED].” [REDACTED] testified that [REDACTED] expected [REDACTED] to solve disagreements, including [REDACTED] scientific disagreements, and that [REDACTED] was expected to make compromises in order to complete the chemical assessments.

For critical element three, “Material and Financial Resources and Administrative Duties,” [REDACTED] was rated as “[REDACTED]” in [REDACTED] FY 2019 performance evaluation but only “[REDACTED]” in [REDACTED] FY 2020 performance evaluation. [REDACTED] supervisor explained that [REDACTED] recalled a decline in [REDACTED] performance in this critical element because [REDACTED] did not consistently send [REDACTED] that was required of the assessors in [REDACTED] unit. [REDACTED] explained that [REDACTED] communicated with [REDACTED] less in FY 2020 than [REDACTED] did in the previous year. [REDACTED] did not directly oversee [REDACTED] work in FY 2020, but [REDACTED] was directly involved with [REDACTED] assessments in FY 2019. [REDACTED] noted that [REDACTED] learned about the delays in [REDACTED] work from the [REDACTED] manager, not from [REDACTED]. However, [REDACTED] also testified

<sup>10</sup> For the FY 2020 performance period, [REDACTED] received no rating for critical element two because, as [REDACTED] supervisor noted in the evaluation, [REDACTED] “was not assigned work” under that critical element.

*a*

*b*

█████ supervisor testified that if a certain issue was applicable to multiple critical elements, █████ tried to avoid “double counting” and only to consider it in one critical element. Nonetheless, █████ testified that the decline in █████ rating for critical element four was, in part, for the same reason as the decline for critical element three: █████ did not consistently submit the required █████. █████ also mentioned that █████ rating in critical element four was attributable to disagreements about scientific issues in the new-chemicals assessments that affected the timely completion of █████ work.

took no steps to determine whether [REDACTED] delays were caused by scientific disagreements. [REDACTED] testified that if someone had explicitly told [REDACTED] not to include scientific disagreements in [REDACTED] performance evaluation, [REDACTED] might have had a different rating.

assessments required fewer rounds of revisions than others' assessments. After considering [REDACTED] response, [REDACTED] supervisor raised the rating for critical element one from "[REDACTED]" to "[REDACTED]".

## 2. Reassignment to the

OPPT director, the OPPT senior science advisor, and the director of the OPPT Information Management Division. The chart included separate divisions to assess new and existing chemicals and noted which staff members should be in each. That chart placed [REDACTED] in the New Chemicals Division under a section designated as "[REDACTED]." The chart, along with another organizational chart produced around that time, did not contemplate a separate [REDACTED] division. The chart also placed [REDACTED] [REDACTED] human health assessors in the [REDACTED] division with [REDACTED] while [REDACTED] was placed in [REDACTED] division.

the same project” and mentioning [REDACTED] human health assessors by name.

The OPPT senior science advisor testified that [REDACTED] believed that those assessors needed to be separated because they were engaged in “group think” and were not collaborative. [REDACTED] that [REDACTED] heard from others that [REDACTED] were “pot stirrers” and that they would “convene and ... talk too much,” which would lead to cases taking longer to complete.

By June 2020, all RAD managers were included in discussions regarding the reorganization. On June 3, 2020, [REDACTED] recommended that [REDACTED] be moved to the [REDACTED] team and that [REDACTED] position in the New Chemicals Division be filled with a human health assessor. [REDACTED] explained that [REDACTED] was hired to do [REDACTED] work and that it should be [REDACTED] primary responsibility. [REDACTED] supervisor supported the recommendation and noted that [REDACTED] was planning to move [REDACTED] back to [REDACTED] earlier that year, but the political focus on the backlog had prevented [REDACTED] from doing so. This intention was reflected in [REDACTED] supervisor’s emails as early as January 2020.

By July 2020, the proposed OPPT organizational charts included a separate [REDACTED] division, the [REDACTED], where [REDACTED] was designated to move, along with other employees who worked on [REDACTED]. [REDACTED] was informed that [REDACTED] would be transitioning to [REDACTED], and [REDACTED] emailed [REDACTED] supervisor to express [REDACTED] appreciation for refocusing [REDACTED] activities on that work. In October 2020, [REDACTED] and [REDACTED] were reassigned to the [REDACTED] as part of the OPPT reorganization.

### 3. Nonselection for a [REDACTED] Position

In February 2022, [REDACTED] applied for a position as a [REDACTED] in the Office of Research and Development, Office of Science Advisor, Policy, and Engagement, Science Policy Division.<sup>11</sup> The original vacancy listed multiple available duty stations, [REDACTED].

After [REDACTED] applied to the position, a human resources staffing specialist reviewed [REDACTED] application materials to determine whether [REDACTED] application was complete and whether [REDACTED] met the eligibility and qualification requirements. She testified that, prior to reviewing [REDACTED] application materials, she had never communicated with [REDACTED] or heard of [REDACTED].

The human resources staffing specialist determined that [REDACTED] was ineligible for the position because [REDACTED] application materials did not demonstrate that [REDACTED] had the specialized experience required for the position. When [REDACTED] reviewed resumes for this position, she looked at whether applicants had one year of full-time GS [REDACTED] level experience in three separate specialized areas that were listed in the vacancy: independently analyzing, interpreting, and evaluating the integrity of scientific processes or procedures; providing technical expertise to others; and serving as a point of contact for a department or organization. In reviewing [REDACTED] resume, she noted that [REDACTED] did not provide [REDACTED] GS level for one of [REDACTED] former positions, so that position could not be considered when determining whether [REDACTED] met the

<sup>11</sup> “GS” refers to the classification and pay level on the General Schedule system, which is used for civilian federal employees in professional, technical, administrative, and clerical positions.

specialized experience for the GS [REDACTED] position. Similarly, [REDACTED] did not demonstrate that [REDACTED] provided technical expertise to others or served as a technical point of contact for a department or organization.<sup>12</sup>

Because [REDACTED] application materials did not indicate that [REDACTED] possessed the necessary specialized experience, the human resources staffing specialist did not include [REDACTED] on the certificate of eligible applicants that was provided to the selecting official on March 11, 2022. On March 23, 2022, the selecting official returned the list of eligible applicants to human resources without a selection. The vacancy was reposted in June 2022 [REDACTED]. Although [REDACTED] did not know who made the decision to rescind and repost the vacancy, [REDACTED] was aware that multiple individuals in the [REDACTED] knew about [REDACTED] differing scientific opinions and OIG activity.

#### 4. Harassment

[REDACTED] alleged that [REDACTED] was bullied and harassed by the OPPT deputy director and the OPPT senior science advisor in 2019 and 2020 in retaliation for expressing differing scientific opinions.<sup>13</sup>

[REDACTED] testified that 90 percent of the bullying from the OPPT deputy director was via email or in comments to [REDACTED] written work. In her comments, the OPPT deputy director would ask “antagonistic rhetorical questions,” such as “who would do this?” [REDACTED] noted that she would use all capital letters or bold or underlined font with multiple question marks in a row. [REDACTED]

[REDACTED] testified that these types of questions and this written communication style were typical of the OPPT deputy director. [REDACTED] also provided one in-person instance of harassment, which occurred in a meeting on December 18, 2019. [REDACTED] described that the OPPT deputy director was providing feedback on an assessment of a new chemical that was composed in large part of a solvent that caused cancer. The OPPT deputy director told the assessors that they should not consider the hazards of the solvent when assessing the new chemical. She then threw a stack of memorandums related to solvents across the conference table, and they scattered everywhere.

[REDACTED] testified that the OPPT senior science advisor made sharp comments at weekly scientific discussion meetings. [REDACTED] felt that the OPPT senior science advisor’s comments were tied to [REDACTED] disagreements with assessors who took more conservative approaches to their new-chemicals assessments. According to [REDACTED] the OPPT senior science advisor’s comments were made with the intent to “try and get the result that he wanted from the assessment.” For example, [REDACTED] testified that the OPPT senior science advisor would routinely tell assessors that they were wasting their time. [REDACTED]

<sup>12</sup> [REDACTED] application stated that [REDACTED] represented [REDACTED] office at international meetings and was a participant on several [REDACTED] workgroups. However, because meeting attendance does not necessarily involve providing technical expertise, the human resources staffing specialist could not use that experience to credit [REDACTED] with the necessary specialized experience of providing technical expertise. She testified that she cannot assume anything that is not explicitly stated in the application materials.

<sup>13</sup> [REDACTED] also characterized [REDACTED] FY 2020 performance review as harassment by [REDACTED] supervisor. This was the sole allegation of harassment [REDACTED] made against [REDACTED] in [REDACTED] testimony.

testified regarding a quote from an email in which the OPPT senior science advisor told the team, “Wow. I can’t believe how difficult this is. You guys are wasting time with all the back and forth. GET ON THE PHONE WITH CCD AND SET UP A MEETING WITH THE SENATOR TO DISCUSS THESE ITEMS.” [REDACTED] testified that the OPPT senior science advisor would include “personal attacks sprinkled in with his scientific comments.” For example, [REDACTED] recalled the OPPT senior science advisor calling [REDACTED] “passive aggressive” in front of other staff, referring to another assessor as “emotional,” and questioning whether another assessor’s work was meeting the expectations of her GS level.<sup>14</sup>

## Analytic and Legal Framework

The Whistleblower Protection Act prohibits retaliation against most executive branch employees for making protected disclosures or engaging in protected activity. 5 U.S.C. § 2302(b)(8)-(9). To allege a reprisal violation under section 2302(b), complainants must allege that they made a protected disclosure or engaged in protected activity and that the protected disclosure or activity was a contributing factor in a covered action taken, threatened, or withheld from them. The EPA’s *Scientific Integrity Policy* extends the protections of Whistleblower Protection Act to all EPA employees who uncover or report allegations of scientific and research misconduct or who express a differing scientific opinion.<sup>15</sup>

The first step in assessing these retaliation allegations is to determine whether the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure.<sup>16</sup> The EPA’s *Scientific Integrity Policy* does not define the term differing scientific opinion. However, in October 2020, after the alleged differing scientific opinions at issue in this matter, the EPA’s Scientific Integrity Program issued a guidance document, *Approaches for Expressing and Resolving Differing Scientific Opinions*. This guidance document defines “differing scientific opinion” as:

[A] differing opinion of an EPA employee who is substantively engaged in the science that may inform an EPA decision. It generally contrasts with a prevailing staff opinion included in a scientific product under development. The differing opinion must concern scientific data, interpretations, or conclusions, not policy options or decisions. These approaches do not address personal opinions about scientific issues

<sup>14</sup> [REDACTED]

<sup>15</sup> We did not assess the EPA’s authority to extend the statutory protections of 5 U.S.C. § 2302 via Agency policy.

<sup>16</sup> An individual who has not made a protected disclosure may still be entitled to protection under section 2302 if the individual is perceived to be a whistleblower. See *King v. Dep’t of the Army*, 116 M.S.P.B. 689, 694 (Sept. 14, 2011). In such cases, the analysis focuses on the perceptions of the officials involved in the personnel actions at issue and whether those officials believed that the complainant made or intended to make disclosures that evidenced the type of wrongdoing listed in the statute. *Id.* at 694-95.



that are not accompanied by scientific arguments, are not part of a scientific product, and are not made in the context of an EPA decision.

Protected activities are defined as the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; testifying for or otherwise lawfully assisting any individual in the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation; cooperating with or disclosing information to the inspector general or the special counsel; or refusing to obey an order that would require the individual to violate a law, rule, or regulation. 5 U.S.C. § 2302(b)(9).

A protected disclosure is defined as a communication about actual or suspected wrongful conduct that the employee reasonably believes is evidence of a violation of any law, rule, or regulation; gross mismanagement; a gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. 5 U.S.C. § 2302(b)(8). Vague, conclusory, or facially insufficient allegations of government wrongdoing are insufficient to state a claim under section 2302(b)(8).<sup>17</sup> A reasonable belief exists if a disinterested observer with knowledge of the essential facts known to and readily ascertainable by the employee could reasonably conclude that the actions of the government evidence one of the categories of wrongdoing listed in the statute.<sup>18</sup>

Once it has been established that the complainant expressed a differing scientific opinion, engaged in protected activity, or made a protected disclosure, the next step is to analyze whether a preponderance of the evidence supports that one or more differing scientific opinions, protected activities, or protected disclosures were a contributing factor in the decision to take, threaten, or withhold a personnel action from the complainant.<sup>19</sup> “Contributing factor” is defined as any factor which, alone or in connection with other factors, tends to affect in any way the outcome of the decision.<sup>20</sup> The whistleblower can establish that a disclosure or activity was a contributing factor through circumstantial evidence showing that (1) “the official taking the personnel action knew of the disclosure or protected activity” and (2) “the personnel action occurred within a period of time such that a reasonable person could conclude that the

---

<sup>17</sup> *Johnston v. Merit Sys. Prot. Bd.*, 518 F.3d 905, 909 (Fed. Cir. 2008) (outlining the jurisdictional threshold for claims under the Whistleblower Protection Act).

<sup>18</sup> *Lachance v. White*, 174 F.3d 1378, 1381 (Fed. Cir. 1999).

<sup>19</sup> A preponderance of the evidence is defined as “[t]he degree of relevant evidence that a reasonable person, considering the record as a whole, would accept as sufficient to find that a contested fact is more likely to be true than untrue.” 5 C.F.R. § 1201.4(q). A personnel action is defined as “(i) an appointment; (ii) a promotion; (iii) an action under chapter 75 of this title or other disciplinary or corrective action; (iv) a detail, transfer, or reassignment; (v) a reinstatement; (vi) a restoration; (vii) a reemployment; (viii) a performance evaluation under chapter 43 of this title or under title 38; (ix) a decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph; (x) a decision to order psychiatric testing or examination; (xi) the implementation or enforcement of any nondisclosure policy, form, or agreement; and (xii) any other significant change in duties, responsibilities, or working conditions.” 5 U.S.C. § 2302(a)(2).

<sup>20</sup> *Marano v. Dep’t of Justice*, 2 F.3d 1137 (Fed. Cir. 1993).

disclosure or protected activity was a contributing factor in the personnel action.” 5 U.S.C. § 1221(e)(1)(A)-(B).<sup>21</sup>

Once a preponderance of the evidence establishes that one or more protected activities or disclosures was a contributing factor in the personnel action, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the personnel action would have been taken in the absence of the protected activity or disclosure. 5 U.S.C. § 1221(e)(2).<sup>22</sup> In other words, if the evidence shows that it is highly probable that the employer would have taken the personnel action against the employee regardless of the protected activity or disclosure, the retaliation allegation is not supported. The relevant factors to consider in this determination are (1) the strength of the evidence in support of the Agency's decision, (2) the existence and strength of any retaliatory motive by the officials involved in the decision, and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated.<sup>23</sup>

## Analysis

██████ is an EPA employee. ██████ alleges that individuals with personnel authority took personnel actions against ██████ in retaliation for expressing differing scientific opinions and providing information to the OIG. As ██████ alleged a violation of 5 U.S.C. § 2302(b)(9)(C) and a violation of the EPA's *Scientific Integrity Policy*, the OIG has jurisdiction over ██████ retaliation allegations.

***Did [REDACTED] Express a Differing Scientific Opinion, Engage in Protected Activity, or Make a Protected Disclosure?***

██████ disagreements with ██████, the OPPT deputy director, and the OPPT senior science advisor from May 2019 through October 2020 regarding hazard identification in new-chemicals assessments constituted differing scientific opinions. We obtained testimony and documentary evidence confirming that ██████ disagreements concerned interpretations of scientific data, such as the selection of analogue chemicals that were to be used in the assessments. The EPA's assessments of new chemicals constitute scientific products. Thus, ██████ scientific disagreements meet both the plain language meaning of a differing scientific opinion and the formal definition of a differing scientific opinion that was issued by the Scientific Integrity Program in October 2020.

In addition, [REDACTED] was widely perceived by OPPT and RAD management to have expressed differing scientific opinions. [REDACTED]

<sup>21</sup> Although the EPA's *Scientific Integrity Policy* notes that employees who uncover or report allegations of scientific and research misconduct or express a differing scientific opinion are protected "from retaliation or other punitive actions," because it is unclear what "other punitive actions" entails, we did not incorporate this into our analysis.

<sup>22</sup> Clear and convincing evidence is defined as “that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established.” It is a higher standard than preponderance of the evidence. 5 C.F.R. § 1209.4(e).

<sup>23</sup> *Carr v. Social Sec. Admin.*, 185 F.3d 1318, 1323 (Fed. Cir. 1999).

██████████, testified that ██████████ and the other ██████████ human health assessors were more likely than other assessors to disagree about scientific decisions made in assessments. ██████████ also testified that OPPT management perceived ██████████ as making differing scientific opinions, and in particular that the OPPT deputy director and the OPPT senior science advisor complained about the assessors' differing scientific opinions.

██████████ also engaged in protected activity when ██████████ provided information to the OIG via OIG Hotline complaints filed by the Public Employees for Environmental Responsibility in June and August 2021. Providing information to the OIG is a protected activity specifically addressed in 5 U.S.C. § 2302(b)(9)(C).

██████████ also made at least one protected disclosure in ██████████ OIG hotline complaints. The August 2021 complaint included an allegation that assessors' scientific disagreements were referenced in their performance evaluations as support for a lower rating. Retaliation for differing scientific opinions violates the EPA's Scientific Integrity Policy, which constitutes a rule. As such, it was reasonable for ██████████ to believe that referencing differing scientific opinions in a performance evaluation is evidence of a violation of a rule. Accordingly, ██████████ made at least one protected disclosure.<sup>24</sup>

### *Was a Personnel Action Taken Against, Threatened, or Withheld from ██████████ ?*

██████████ alleged four retaliatory actions to the OIG: (1) a lower FY 2020 performance evaluation than the previous year, (2) a reassignment to the ██████████, (3) a nonselection for a ██████████ position, and (4) harassment. We determined that three of these actions constitutes taking, withholding, or threatening to take or withhold a personnel action.

#### *1. FY 2020 Performance Evaluation*

In September 2020, ██████████ received ██████████ performance evaluation for FY 2020. A performance evaluation is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(viii).

#### *2. Reassignment to the ██████████*

In October 2020, ██████████ was reassigned to the ██████████ as a result of the OPPT reorganization. A reassignment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(iv).

#### *3. Nonselection for a ██████████ Position*

In March 2022, ██████████ applied for a ██████████ position. A human resources staffing specialist reviewed ██████████ application and determined that ██████████ was ineligible for the position. An

---

<sup>24</sup> For the purposes of this analysis, we did not assess whether each allegation contained within the complaints constituted a protected disclosure.

appointment is among the personnel actions specifically enumerated in the statute. 5 U.S.C. § 2302(a)(2)(A)(i). Accordingly, a nonselection for a position is the failure to take a personnel action.

#### 4. Harassment

█████ alleged that in 2019 and 2020 █████ was harassed in retaliation for expressing differing scientific opinions. While harassment is not a personnel action enumerated in the statute, it can be considered a personnel action when it constitutes a significant change in duties, responsibilities, or working conditions. 5 U.S.C. § 2302(a)(2)(A)(xii).<sup>25</sup> █████ alleges that the OPPT deputy director subjected █████ to “antagonistic rhetorical questions” regarding █████ scientific opinions and criticized █████ scientific products using all capital letters and bolded and underlined text in emails and comments. Further, █████ alleged that the OPPT senior advisor subjected █████ to harsh disagreements with personal attacks “sprinkled in,” such as calling █████ passive-aggressive. Verbal criticism and rudeness are not usually considered personnel actions.<sup>26</sup> Whistleblower Protection Act case law discussing alleged constructive discharge is also instructive here. The Merit Systems Protection Board has consistently held that a feeling of being unfairly criticized or being subjected to difficult or unpleasant working conditions is generally not so intolerable as to compel a reasonable person to resign and thus is not a personnel action.<sup>27</sup> These cases contemplate that criticism and unpleasantness in the workplace alone is not actionable under the Whistleblower Protection Act. Accordingly, the criticism and disagreements that █████ experienced do not constitute a personnel action.

In summary, █████ FY 2020 performance evaluation, reassignment to the █████, and nonselection for a █████ position constitute covered personnel actions under 5 U.S.C. § 2302(a)(2). The alleged harassment did not impose significant changes to █████ work conditions or duties and is therefore not a personnel action.

#### ***Were █████ Differing Scientific Opinions, Protected Activities, or Protected Disclosure a Contributing Factor in the Personnel Actions Taken Against █████***

A differing scientific opinion, protected activity, or protected disclosure is a contributing factor in a decision to take a personnel action if the official taking the personnel action knew of the differing scientific opinion, protected activity, or protected disclosure and the action occurred within a period of time such that a reasonable person could conclude that it was a contributing factor in the personnel

<sup>25</sup> *Covarrubias v. Social Sec. Admin.*, 113 M.S.P.R. 583, ¶ 15 n.4 (2010) (finding harassment constituted a significant change in working conditions when a supervisor monitored the employee’s phone calls and whereabouts, including following her to the restroom), overruled on other grounds by *Colbert v. Dep’t of Veterans Affairs*, 121 M.S.P.R. 677, ¶ 12 n.5 (2014).

<sup>26</sup> *Greenspan v. Dep’t of Veterans Affairs*, 94 M.S.P.R. 247, ¶ 22 (2003) *rev’d and remanded on other grounds*, 464 F.3d 1297 (Fed. Cir. 2006); *Special Counsel v. Spears*, 75 M.S.P.R. 639, 670 (1997) (holding that oral counseling does not constitute disciplinary or corrective action within the coverage of the Whistleblower Protection Act).

<sup>27</sup> *Miller v. Dep’t of Def.*, 85 M.S.P.R. 310 ¶ 32 (2000); *Brown v. U.S. Postal Serv.*, 115 M.S.P.R. 609, 616-618 (2011), *aff’d*, 469 F. App’x 852 (Fed. Cir. 2011) (holding that a pattern of poor treatment, including groundless criticism and allegedly throwing and destroying a desk, did not compel the complainant’s retirement and thus did not constitute a personnel action).

action.<sup>28</sup> After assessing the two factors, knowledge and timing, we determined that [REDACTED] differing scientific opinions, but not [REDACTED] protected activity or protected disclosure, were contributing factors in two personnel actions: [REDACTED] FY 2020 performance evaluation and [REDACTED] reassignment to the [REDACTED]. After assessing the same two factors, we determined that [REDACTED] differing scientific opinions, protected activity, and protected disclosure were not a contributing factor in [REDACTED] nonselection for a [REDACTED] position.

## FY 2020 Performance Evaluation

[REDACTED] expressed differing scientific opinions regarding new-chemicals assessments from approximately 2019 through 2020. [REDACTED] supervisor, who completed [REDACTED] performance evaluation, had direct knowledge of [REDACTED] differing scientific opinions. This is because many of [REDACTED] differing scientific opinions were expressed during the disposition meetings that [REDACTED] attended. [REDACTED] supervisor also testified that [REDACTED] knew about [REDACTED] differing scientific opinions, and [REDACTED] differing scientific opinions were explicitly mentioned in [REDACTED] performance evaluation, which was communicated to [REDACTED] in September 2020 and provided to [REDACTED] in writing in November 2020. The timing between [REDACTED] differing scientific opinions and [REDACTED] FY 2020 performance evaluation was less than a year, which is a reasonable amount of time to conclude that the differing scientific opinions were a contributing factor in the personnel action.<sup>29</sup>

## Reassignment to the [REDACTED]

Many management officials were involved in the decision to reassign [REDACTED] to the [REDACTED], including the OPPT senior science advisor and [REDACTED]. As discussed above, [REDACTED] testified that [REDACTED] knew about [REDACTED] differing scientific opinions. Documentary evidence and witness testimony support that the OPPT senior science advisor also knew of [REDACTED] differing scientific opinions. Many of [REDACTED] differing scientific opinions were expressed during disposition meetings, which both the OPPT senior science advisor and [REDACTED] attended. [REDACTED] expressed differing scientific opinions in 2019 and continued to do so until [REDACTED] reassignment in October 2020. The timing between [REDACTED] differing scientific opinions and [REDACTED] reassignment was less than a year, which is a reasonable amount of time to conclude that the differing scientific opinions were a contributing factor in the personnel action.

## Nonselection for a [REDACTED] Position

After [REDACTED] FY 2020 performance evaluation and reassignment, but before [REDACTED] nonselection for a [REDACTED] position, [REDACTED] engaged in protected activities and made a protected disclosure

<sup>28</sup> 5 U.S.C. § 1221(e).

<sup>29</sup> The U.S. Merit Systems Protection Board has found time periods longer than a year between the protected disclosure and adverse action to be reasonable in establishing that a disclosure was a contributing factor. *See e.g., Redschlag v. Dep't of the Army*, 89 M.S.P.R. 589, ¶ 87 (2001) (holding that a suspension proposed 18 months after an employee's protected disclosure was a sufficient time period where a reasonable person could conclude that the disclosure was a contributing factor in the suspension).

when [REDACTED] provided information to the OIG in June and August 2021. [REDACTED] nonselection was due to a disqualification decision made by a human resources staffing specialist. The human resources staffing specialist testified that she did not know who [REDACTED] was prior to reviewing [REDACTED] application materials, nor did she have knowledge of [REDACTED] differing scientific opinions or OIG activities. Because the human resources staffing specialist did not have knowledge of [REDACTED] differing scientific opinions, protected activities, or protected disclosure, it is not reasonable to conclude that they were contributing factors in [REDACTED] nonselection.

In summary, because EPA management knew about [REDACTED] differing scientific opinions and because the personnel actions were taken less than a year after [REDACTED] expressed differing scientific opinions, we determined that [REDACTED] established by a preponderance of the evidence that [REDACTED] differing scientific opinions were a contributing factor in [REDACTED] FY 2020 performance evaluation and [REDACTED] reassignment to the [REDACTED]. [REDACTED] Hotline complaints to the OIG occurred after the performance evaluation and reassignment; therefore, [REDACTED] protected activities and protected disclosure were not a contributing factor in the personnel actions. Because the human resources staffing specialist did not know about [REDACTED] differing scientific opinions, protected activities, or protected disclosure, we determined that [REDACTED] could not establish by a preponderance of the evidence that [REDACTED] differing scientific opinions, protected activities, or protected disclosure were contributing factors in [REDACTED] nonselection for a [REDACTED] position.

### ***Would the Agency Have Taken the Personnel Actions Against [REDACTED] in the Absence of [REDACTED] Differing Scientific Opinions?***

Once a preponderance of the evidence establishes that one or more differing scientific opinions contributed to a personnel action taken against the complainant, the retaliation allegation is substantiated unless clear and convincing evidence establishes that the action would have been taken in the absence of the differing scientific opinion. To make this determination, our analysis weighs the following three factors: (1) the strength of the evidence in support of each action; (2) the existence and strength of any motive to retaliate on the part of the officials who were involved in the decision, referred to as *animus evidence*; and (3) any evidence that the employer has taken similar actions against employees who are not whistleblowers but are otherwise similarly situated, referred to as *comparators*.

After analyzing the three factors, we determined that the EPA could not establish by clear and convincing evidence that it would have rated [REDACTED] as “[REDACTED]” in [REDACTED] FY 2020 performance evaluation in the absence of [REDACTED] differing scientific opinions. Analysis of the same three factors led us to determine that the EPA could establish by clear and convincing evidence that it would have reassigned [REDACTED] to the [REDACTED] in the absence of [REDACTED] differing scientific opinions.

### ***FY 2020 Performance Evaluation***

[REDACTED] was rated as “[REDACTED]” in [REDACTED] FY 2019 performance evaluation but only “[REDACTED]” in [REDACTED] FY 2020 performance evaluation. [REDACTED] rating for three critical elements decreased in

■ FY 2020 evaluation. Despite ■ rating decline, ■ supervisor testified that the quality of ■ work did not decline from the previous year. ■ supervisor's comments for critical element one discussed ■ differing scientific opinions, and ■ testified that the differing scientific opinions were relevant to critical element four as well. ■ testified that no one explicitly told ■ to not consider ■ differing scientific opinions in ■ evaluation and that ■ might have received a different rating if ■ had been told that. For critical element one, ■ supervisor explained that the decline in ■ rating was caused by a ■. When assessing the timeliness of ■ work, ■ did not distinguish delays that were caused by differing scientific opinions from delays caused by other factors, nor did ■ receive documentation of these metrics. ■ received explicit feedback that senior managers were frustrated with the delays caused by differing scientific opinions and noted in ■ performance evaluation that "■". For the third critical element, ■ supervisor testified that ■ lower rating was due to a decrease in communications, though the decrease was not noted in ■ supervisory comments. ■ testified that ■ rating in the fourth critical element was attributable to ■ "back and forth ... disagreements" about "science issues related to risk assessments."<sup>30</sup>

In writing ■ FY 2020 performance evaluation, ■ supervisor relied on input from officials who expressed animus regarding ■ differing scientific opinions. ■ testified that ■ performance evaluation was based, in part, on feedback from the OPPT deputy director and the OPPT senior science advisor. The OPPT deputy director alleged that ■ failure to use her approach to assessments "could be considered insubordination." The OPPT senior science advisor called ■ and the other ■ human health assessors who expressed scientific disagreements the "tox[ic] ■." Further, ■ testified that the OPPT deputy director and OPPT senior science advisor were frustrated with the ■ assessors' differing scientific opinions because they caused delays. This was corroborated by ■, who testified that the OPPT deputy director and the OPPT senior science advisor complained about differing scientific opinions expressed by ■ and others during the FY 2020 performance period. In addition to relying upon input from officials who expressed animus, ■ also testified that ■ was under intense political pressure to complete assessments and recognized in ■ performance evaluation that differing scientific opinions contributed to delays of those assessments.

There are no apt comparators with which to evaluate ■ FY 2020 performance evaluation. The ■ had ■ human health assessors, including ■. While other new-chemicals human health assessors also reported to ■ supervisor, ■.

<sup>30</sup> ■ supervisor also attributed ■ lower rating for critical element four to ■ failure to submit ■ consistently. However, ■ supervisor testified that ■ used this issue as a reason to rate ■ lower in critical element three as well, despite ■ testimony that ■ tried to avoid "double counting" when doing performance ratings.



We find that the Agency's support for [REDACTED] performance rating is mostly based upon explicit references to [REDACTED] differing scientific opinions. After reviewing the Agency's support for [REDACTED] rating, the animus evidence, and the lack of comparators, we have determined that the Agency cannot establish by clear and convincing evidence that it would have rated [REDACTED] as "[REDACTED]" in the absence of [REDACTED] differing scientific opinions. Accordingly, [REDACTED] FY2020 performance rating violated the EPA's *Scientific Integrity Policy*.

## Reassignment to the [REDACTED]

[REDACTED] testified that [REDACTED] was originally hired in 2019 to do [REDACTED] work but ended up helping with new-chemicals assessments because of organizational needs. Documentary evidence shows that [REDACTED] supervisor planned to move [REDACTED] back to [REDACTED] work in early 2020 but that the political focus on the backlog prevented [REDACTED] from doing so. In the October 2020 reorganization of the OPPT, [REDACTED] was moved to a division that focused on [REDACTED], the [REDACTED].

Management involved in planning the reorganization expressed animus regarding [REDACTED]. In discussing which offices OPPT employees should be assigned to, the OPPT senior science advisor emailed the [REDACTED], stating that [REDACTED] should not be in the same unit as [REDACTED]. [REDACTED] believed that [REDACTED] was asked to separate the [REDACTED] assessors because others perceived them as "pot stirrers" who would "convene" and cause delays. The OPPT senior science advisor confirmed that he said the [REDACTED] human health assessors engaged in "group think" and were not collaborative. These [REDACTED] assessors were closely associated with one another and widely perceived by management as employees who expressed differing scientific opinions. Multiple [REDACTED] testified that the OPPT senior science advisor complained about these assessors' differing scientific opinions.

Comparator evidence shows that, in addition to [REDACTED] the other OPPT employees who worked on [REDACTED] were moved to the [REDACTED]. [REDACTED] specifically testified regarding another employee who was hired under the same [REDACTED] vacancy as [REDACTED] was. That employee was also initially assigned to RAD in 2019 and reassigned to the [REDACTED] in October 2020. [REDACTED] testified that all assessors who worked on [REDACTED] were moved to the [REDACTED].

We find that the support for moving [REDACTED] to the [REDACTED] and the comparator evidence outweighs the animus evidence. [REDACTED] testified that [REDACTED] was hired to do [REDACTED] work. As shown above, both [REDACTED] prior intentions and comparator placement demonstrate support for moving [REDACTED] to the [REDACTED]. After reviewing the Agency's support for [REDACTED] reassignment, the animus evidence, and the comparator evidence, we have determined that the Agency can establish by clear and convincing evidence that it would have reassigned [REDACTED] to the [REDACTED] in the absence of [REDACTED] differing scientific opinions.



## Conclusions

We determined that [REDACTED] expressed differing scientific opinions, which were a contributing factor in two personnel actions taken against [REDACTED] (1) [REDACTED] FY 2020 performance rating and (2) a reassignment to the [REDACTED]. We substantiated [REDACTED] allegations of retaliation with respect to [REDACTED] FY 2020 performance rating in violation of the EPA's *Scientific Integrity Policy*. We did not substantiate [REDACTED] retaliation allegations with respect to [REDACTED] reassignment to the [REDACTED].

## Recommendation

We recommend that the EPA administrator consider appropriate corrective action considering our findings.<sup>31</sup>

---

<sup>31</sup> If the inspector general of an agency determines that a supervisor committed a prohibited personnel practice under the Whistleblower Protection Act, the head of the agency in which the supervisor is employed shall propose suspending the supervisor for a period that is not less than three days. 5 U.S.C. § 7515(b)(1)(A)(i). While the EPA's *Scientific Integrity Policy* extends whistleblower protections to employees who express a differing scientific opinion, it does not state whether the Whistleblower Protection Act's mandatory suspension provision applies when these protections are violated.



## Whistleblower Protection

U.S. Environmental Protection Agency

*The whistleblower protection coordinator's role is to educate Agency employees about prohibitions against retaliation for protected disclosures and the rights and remedies against retaliation. For more information, please visit the OIG's whistleblower protection [webpage](#).*

### Contact us:



**Congressional Inquiries:** [OIG.CongressionalAffairs@epa.gov](mailto:OIG.CongressionalAffairs@epa.gov)



**Media Inquiries:** [OIG.PublicAffairs@epa.gov](mailto:OIG.PublicAffairs@epa.gov)



**EPA OIG Hotline:** [OIG.Hotline@epa.gov](mailto:OIG.Hotline@epa.gov)



**Web:** [epaoig.gov](http://epaoig.gov)

### Follow us:



**X (formerly Twitter):** [@epaoig](https://twitter.com/epaoig)



**LinkedIn:** [linkedin.com/company/epa-oig](https://linkedin.com/company/epa-oig)



**YouTube:** [youtube.com/epaoig](https://youtube.com/epaoig)



**Instagram:** [@epa.ig.on.ig](https://www.instagram.com/epa.ig.on.ig)



[www.epaoig.gov](http://www.epaoig.gov)