

U.S. OFFICE OF SPECIAL COUNSEL

RUTH A. ETZEL
3719 Cumberland Street, N.W.
Washington, D.C. 20016

Employee,

v.

U.S. ENVIRONMENTAL PROTECTION AGENCY
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Agency.

OSC No. _____

COMPLAINT

Preliminary Statement.

1. This is a Whistleblower Protection Act complaint against the U.S. Environmental Protection Agency (EPA) for retaliation against Ruth A. Etzel, which occurred as a result of Dr. Etzel’s promotion of a draft Federal Lead Strategy and her strong leadership to protect children’s health from environmental pollution despite obstruction from members of the Office of the EPA Administrator. Dr. Etzel made protected disclosures concerning both gross mismanagement and a substantial and specific danger to public health resulting from childhood lead poisoning. As set forth below, Dr. Etzel spearheaded the development of a new Federal Lead Strategy in the aftermath of the devastating childhood lead exposure crisis in Flint, Michigan, in 2014. Dr. Etzel continued to coordinate seventeen (17) federal agencies in the process of drafting the new strategy after the Presidential transition in 2017 and to promote the release of the completed strategy after EPA leadership delayed its final review by the Acting Administrator. In response, EPA retaliated against Dr. Etzel. Just before the Federal Lead Strategy was to be completed, the EPA placed Dr. Etzel on administrative leave without warning. In order to drive her out of EPA, it placed her on unauthorized investigative leave and fabricated an unwarranted and unsubstantiated initial rating of “1” for “Leading People” in Dr. Etzel’s FY 2018 Performance Review, which will lead to her termination as an SES employee. It has also initiated a bogus investigation into Dr. Etzel’s actions as far back as 2015 in order to justify her termination. Dr. Etzel had previously been cleared by the agency for some of these alleged actions. EPA has also denied her requests for annual leave and obstructed her ability to attend professional conferences to which she had been invited. These prohibited personal practices—in particular the move to terminate her employment—were in direct response to Dr. Etzel’s protected disclosures and therefore violate the Whistleblower Protection Act, 5 U.S.C. § 2301 *et seq.*

I. Dr. Etzel's Professional Background.

2. Over the course of her career, Dr. Etzel has established herself as a leading expert and pioneer in national and international investigations of environmental public health epidemics. Dr. Etzel earned her B.A. in biology summa cum laude and was elected a member of Phi Beta Kappa at the University of Minnesota in 1976. She then attended medical school at the University of Wisconsin, where she received her M.D. in 1980. After medical school, Dr. Etzel decided to pursue a career in the pediatric field and began a pediatric internship at the North Carolina Memorial Hospital in Chapel Hill, North Carolina. Subsequent to her completion of this three-year residency program in 1983, Dr. Etzel was selected to participate in the prestigious Robert Wood Johnson Clinical Scholars program, and enrolled in the University of North Carolina at Chapel Hill (UNC) to earn her Ph.D. in epidemiology.

3. Upon graduating from her Ph.D. program at UNC in 1985, Dr. Etzel joined the U.S. Public Health Service as an Epidemic Intelligence Service (EIS) Officer in the Center for Environmental Health at the Centers for Disease Control (CDC) in Atlanta, Georgia. During her career at the CDC, Dr. Etzel held increasingly senior positions within the National Center for Environmental Health, reflecting her stellar educational credentials and her record as an accomplished and highly respected commissioned officer. In her first year of CDC service, Dr. Etzel identified cotinine, which is a major metabolite of nicotine, as an effective marker to assess secondhand tobacco smoke exposure, and submitted a proposal for the CDC to develop the capacity to measure the presence of cotinine in biological specimens. As a direct result of Dr. Etzel's efforts, cotinine was introduced into the National Health and Nutrition Examination Survey, and was used to track national progress toward the public health objective of reducing exposure to tobacco smoke. In 1987, the CDC awarded Dr. Etzel the Don C. Mackel Memorial Award for her work solving an extensive outbreak of fatal parathion poisoning in Sierra Leone. Through her innovative investigation, Dr. Etzel identified pesticide-contaminated flour as the source of the epidemic and helped African authorities to prevent future episodes of contamination. Also in 1987, after she had completed the EIS Program, the CDC hired Dr. Etzel as a Medical Epidemiologist. In this capacity, she conducted an investigation of outbreaks of severe asthma in Barcelona, Spain, that threatened to disrupt the city's preparation for the 1992 Olympic Games. Through this investigation, Dr. Etzel determined the asthma epidemic was caused by the manner in which soybeans were unloaded in the city's port. As a result of her findings, the Spanish government implemented new regulations requiring the use of filters during ship unloading, which brought an end to the epidemic. In recognition of the impact of her study, Dr. Etzel received a U.S. Public Health Service Unit Commendation in 1990. In 1990, Dr. Etzel founded the Air Pollution and Respiratory Health Branch of the CDC's National Center for Environmental Health and assembled a staff of expert epidemiologists and public health advisors who provided guidance to state and local health officials about the health effects of air pollution. As the Chief of the Branch, she spearheaded the Center's program to prevent asthma by providing leadership and funding to U.S. health departments. In 1992, Dr. Etzel received two prestigious awards for her work in asthma prevention: the Arthur S. Flemming Award and a U.S.

Public Health Service Outstanding Service Medal “in recognition of the development and implementation of a national program to reduce the respiratory effects of air pollution.” During this time, Dr. Etzel also employed her air pollution and respiratory expertise internationally, as the sole Commissioned Officer in Kuwait after the first Gulf War, where she conducted investigations of the respiratory effects from exposure to burning oil wells. The results of this study were used by the governments of the United States, Kuwait, and Saudi Arabia in the aftermath of the first Gulf War. In recognition of this important study, Dr. Etzel was awarded a U.S. Public Health Service Commendation Medal “for extraordinary leadership, courage, and achievements in protecting the health of persons in the aftermath of the Gulf War” in 1993. Finally, in 1997, Dr. Etzel was promoted to Assistant Director for Special Projects in the Emergency, Refugee and International Health Branch of the CDC. Throughout her thirteen-year tenure at CDC, Dr. Etzel received numerous honors and awards from the U.S. Public Health Service and the U.S. Public Health Service Professional Association for her impressive and influential work, including five Outstanding Unit Citations, four Unit Commendations, two Commendation Medals, one Outstanding Service Medal, and two Clinical Society Open Awards “for the most significant contributions in original health research.”

4. In 1998, Dr. Etzel moved from Atlanta, Georgia, to Washington, D.C. to serve as the Director of the Human Health Sciences Division of the Office of Public Health and Science at the Food Safety and Inspection Service (FSIS) in the United States Department of Agriculture (USDA). As the first Public Health Service Commissioned Officer at the USDA, Dr. Etzel created the Division of Epidemiology and Risk Assessment in the FSIS to enhance the public health capacity of the Department of Agriculture. Under Dr. Etzel’s leadership, the USDA led the development of comprehensive risk assessments for *E. coli* and *Listeria* that were used as the basis for its formulation of critical federal food safety regulations. The U.S. Public Health Service gave Dr. Etzel a Unit Commendation for her “outstanding contributions to FDA and USDA/FSIS public health protection through the development of the *Listeria monocytogenes* risk assessment” in 2001.

5. In 2001, Dr. Etzel moved from Washington, D.C. to Anchorage, Alaska, to establish a Native health research program at Southcentral Foundation, an Alaska Native health organization that co-owns and manages the Alaska Native Medical Center. As the Research Director, Dr. Etzel hired and mentored young Alaska Native and American Indian people interested in pursuing public health research, developed research policies and procedures for the organization, and instituted a process for review and approval of all research by the Alaska Native Board of Directors. Dr. Etzel also spearheaded the participation of over 1,400 Native people in the first longitudinal cohort study of Alaska Native and American Indian people’s health. During her tenure at the Alaska Native Medical Center, Dr. Etzel received numerous honors and awards. She received two U.S. Public Health Service Unit Commendations in 2003 and 2004 for “sustained quality performance of duties during the renovation and expansion of the Anchorage Native Primary Care Clinic” and for “developing and implementing an innovative cardiovascular disease prevention program for Alaska Native women,” respectively. In 2007, the

U.S. Environmental Protection Agency awarded Dr. Etzel the Children’s Environmental Health Champion Award for outstanding leadership in protecting children from environmental health risks. Finally, in 2008, Dr. Etzel received the U.S. Public Health Service Distinguished Service Medal “for continuous visionary leadership and outstanding accomplishments in achieving public health objectives.” This is the highest award given by the U.S. Public Health Service.

6. In 2009, the World Health Organization (WHO) invited Dr. Etzel to come to Switzerland to work on children’s health issues. In Geneva, Switzerland, for three years, she served as a Medical Officer for Interventions for Healthy Environments in the WHO Department of Public Health and Environment. During that time, the Acting Dean of the University of Wisconsin-Milwaukee Joseph J. Zilber School of Public Health invited Dr. Etzel to help create a new school of public health. Thereafter, Dr. Etzel moved from Geneva to Milwaukee, Wisconsin, and taught as a tenured Professor of Epidemiology at the Zilber School of Public Health from 2012 through 2014. While there, she continued to be tapped for leadership positions: she was selected to serve on the Advisory Board for the Survey of the Health of Wisconsin in 2013 and appointed by the state Governor to the Board of Directors of the Wisconsin State Laboratory of Hygiene in 2014. Dr. Etzel had previously held adjunct faculty appointments in higher education. While working at the CDC, Dr. Etzel also served as a Clinical Assistant Professor of Pediatrics at the Emory University School of Medicine in Atlanta, Georgia, from 1987 to 1993. She currently holds four adjunct positions at internationally recognized institutions across the United States, including serving as a Professorial Lecturer in Environmental Occupational Health at the Milken Institute School of Public Health at the George Washington University since 2000, as an Adjunct Professor in the Department of Community and Preventive Medicine at Mount Sinai Medical School since 2003, as an Adjunct Professor in the Department of Population Health Services at the University of Wisconsin-Madison School of Medicine and Public Health since 2012, and as an Adjunct Professor in the Clinical and Translational Sciences Institute at the Medical College of Wisconsin in Milwaukee since 2013.

7. In the summer of 2014, Dr. Etzel received a call from the U.S. Environmental Protection Agency (EPA) asking if she would consider applying for the position of Director of the Office of Children’s Health Protection (OCHP) in Washington, D.C. Several months later, after participating in a telephone interview with a panel of EPA Senior Executives, Dr. Etzel was informed that she was a top candidate for the position. Shortly thereafter, she submitted her Senior Executive Service (SES) qualification paperwork and participated in two more interviews with then-EPA Administrator Gina McCarthy. On or around November 2014, the EPA offered Dr. Etzel the Director position and requested that she begin work in Washington, D.C., two weeks later. In December 2014, Zilber School of Public Health Dean and faculty agreed to grant Dr. Etzel a leave of absence from her duties as Professor in order to serve as the OCHP Director.

II. EPA Hired Dr. Etzel as Director of the Office of Children’s Health Protection During the Onset of the Flint Water Crisis.

8. On January 5, 2015, Dr. Etzel began working as the Director of the Office of Children’s Health Protection, which is located within the Office of the Administrator of the U.S. Environmental Protection Agency. The EPA established the OCHP in May 1997 after President Clinton signed the Executive Order on the Protection of Children from Environmental Health Risks and Safety Risks on April 21, 1997. Executive Order 13045 requires all federal agencies to make “identify[ing] and assess[ing] environmental health risks and safety risks that may disproportionately affect children” a high priority. The Order also charged the agencies with ensuring that their “policies, programs, activities, and standards” addressed these disproportionate risks.¹ *Id.* Pursuant to this directive, the mission of OCHP is “to make the environmental health protection of children a fundamental goal of public health and environmental protection in the United States and around the world.” The OCHP accomplishes this goal by: (1) “reduc[ing] negative environmental impacts on children through involvement in EPA rulemaking, policy, enforcement actions, research and applications of science that focuses on prenatal and childhood vulnerabilities;” (2) “protect[ing] children through safe chemicals management;” and (3) “coordinat[ing] community-based programs to eliminate threats to children’s health.”

9. Dr. Etzel, in her capacity as Director of the OCHP, is responsible for ensuring that the EPA implements the above-listed goals, in addition to the terms of Executive Order 13045 and the National Agenda to Protect Children’s Health from Environmental Threats, which the Agency adopted in September 1996. As Director, Dr. Etzel also serves as a Senior Advisor to the EPA Administrator, who is her direct supervisor. Beginning in early 2015, Dr. Etzel began attending monthly, one-on-one meetings with then-Administrator Gina McCarthy.

10. During one of their general monthly meetings, on March 30, 2015, Dr. Etzel informed then-Administrator McCarthy that OCHP was moving forward with a status update of all federal activities on childhood lead exposure in response to the rapidly developing water crisis in Flint, Michigan. In April 2014, the City of Flint made the decision to stop purchasing treated water from the Detroit Water and Sewerage Department (now known as the Great Lakes Water Authority) for its water system and begin purchasing water from the Karegnondi Water Authority (“KWA”). In order to save costs in the interim, the city decided to source and treat its own water supply from the nearby Flint River. However, this temporary measure did not include a treatment for reducing corrosion of the pipes used to transport the Flint River water, and instead periodically increased the amount of chlorine in the water to disinfect the system. In August 2014, EPA Safe Drinking Water Act (SDWA) data revealed that the city’s water violated

¹ Executive Order 13045 additionally established the Task Force on Environmental Health Risks and Safety Risks to Children to oversee and ensure its proper implementation in the Federal agencies and to “recommend to the President Federal strategies for children’s environmental health and safety.”

regulations for total fecal coliform bacteria. In December 2014, the water again violated the SDWA for exceeding the maximum contaminant levels of total trihalomethanes (TTHM), a group of four chemicals formed as a byproduct of the disinfection process. In response, in January 2015, the city warned its residents that the water contained byproducts of disinfectants and cautioned the elderly and parents of young children to consult with their doctors. Later that month, the contamination gained national attention when a group of residents brought jugs of discolored water to a community forum and local children began developing rashes. By February 2015, Flint residents began reporting concerns about lead contamination to the regional EPA office in Chicago, Illinois. On February 26, 2015, the Chicago office notified the Michigan Department of Environmental Quality (MDEQ) that it had detected dangerous levels of lead in the water of one Flint resident's home. During their March 2015 meeting, Dr. Etzel advised the Administrator that the President's Task Force on Environmental Health Risks and Safety Risks (hereinafter "the Task Force") had not updated the federal strategy on reducing childhood lead exposure since 2000, when it exclusively focused its prevention efforts on the impacts of lead dust and paint exposure. As Director of the OCHP, Dr. Etzel recognized the urgency with which federal agencies needed to revise this strategy to address an array of lead sources found in children's environments, including water, soil, and food, in light of the worsening crisis in Flint.

11. On May 20, 2015, Dr. Etzel met with then-Deputy Administrator Stanley Meiburg to propose a Principals' meeting of the Task Force. This meeting was held on October 9, 2015. Two weeks earlier, on September 24, 2015, a team of medical researchers led by Dr. Mona Hanna-Attisha released data to show that the percentage of children in Flint with lead poisoning had doubled, even tripled in some areas, since the city switched its water source. The Michigan Department of Health and Human Services verified this data on October 2, 2015. The following week, the MDEQ testing revealed that the water in three Flint schools contained dangerous levels of lead. During the October 9, 2015, meeting, EPA Administrator McCarthy and Department of Health and Human Services (DHHS) Secretary Sylvia Burwell directed Dr. Etzel and Sandra Howard from DHHS, as co-chairs of the Task Force Senior Steering Committee, to develop an action plan.

12. During a meeting with EPA Chief of Staff Matthew Fritz, and EPA Science Advisor Thomas Burke on August 9, 2016, Dr. Etzel proposed the EPA position itself as the lead agency in developing a new federal strategic plan to eliminate lead poisoning. On September 13, 2016, Dr. Etzel and Ms. Howard discussed the plan and completed a draft outline of the revised Federal Lead Strategy. As a result of Dr. Etzel's leadership, the reduction of childhood lead exposures and the elimination of associated health impacts were listed as key federal programs on the Task Force website as of November 22, 2016. One month later, on December 29, 2016, Dr. Etzel advised Chief of Staff Matthew Fritz that the OCHP would be promoting the elimination of childhood lead poisoning as an Administration transition priority for the EPA.

III. Dr. Etzel Continued to Spearhead the Revised Federal Strategy for the Prevention of Childhood Lead Exposure After the Presidential Transition.

13. As a career public servant, Dr. Etzel remained at the EPA after the Inauguration of President Trump on January 20, 2017. Prior to the Inauguration, she and Ms. Howard, the Task Force Senior Steering Committee co-chairs, led a subcommittee of dozens of scientists and policymakers working in 17 federal agencies to develop the vision, mission, goals, and objectives for the new Federal Lead Strategy. After its completion in March 2017, this plan served as the basis of the subcommittee's outline of the Federal Lead Strategy one month later.

14. In January 2017, Gina McCarthy left her post as the EPA Administrator. Thereafter, Michael Flynn served as the Acting Administrator until Scott Pruitt was sworn in as the permanent Administrator on February 17, 2017.² Michael Flynn stayed at EPA as Deputy Administrator until about April 2017. In or around October 2017, Helena Wooden-Aguilar was appointed the Acting Deputy Chief of Staff. Although Dr. Etzel's position description makes clear that her direct supervisor is the Administrator, in or around January 2018, Ms. Wooden-Aguilar told her that she would be her supervisor. In response, Dr. Etzel provided her job description to show that the Administrator is her proper direct supervisor. However, Ms. Wooden-Aguilar repeated her assertion that Dr. Etzel would report directly to her—which effectively demoted Dr. Etzel.

15. In July 2017, Dr. Etzel and Ms. Howard formed several writing teams to draft the Goals, Objectives, and Actions segments of the draft Federal Lead Strategy, which were reviewed and approved by the full Lead Subcommittee that summer. *See* Exhibit 2. Many of the Actions included in the draft Strategy were derived from the Task Force's November 2016 publication *Key Federal Programs to Reduce Childhood Lead Exposures and Eliminate Associated Health Impacts*. After the Lead Subcommittee completed the draft Federal Lead Strategy, the Senior Steering Committee published a request for public input to the draft in the Federal Register in the Fall of 2017. Dr. Etzel and Ms. Howard reviewed the results of this request—along with input from other outreach efforts to Alaska Native/American Indian people and to communities with environmental justice concerns—and provided this input to the appropriate Subcommittee writing teams for consideration in the development of specific actions for the revision of the draft.

16. In November 2017, EPA Administrator Scott Pruitt informed the OCHP that he was planning to prioritize prevention of childhood lead exposures. In February 2018 Administrator Pruitt and the Acting Secretary of DHHS convened a meeting of the Task Force Principals, which Dr. Etzel and Ms. Howard helped to organize. The Principals endorsed the goals that the Senior Steering Committee had developed and decided that it was a Task Force priority to move forward quickly with finalizing the draft Federal Lead Strategy. The Task Force

² Michael Flynn subsequently retired from federal service.

Principals' initial goal was to release the new Federal Lead Strategy at the National Environmental Health Association (NEHA) Annual Education Conference and the Department of Housing and Urban Development (HUD) Healthy Homes Conference on June 25, 2018, in Anaheim, California.

17. To accomplish the ambitious goals of the Task Force Principals, on April 6, 2018, Dr. Etzel and Ms. Howard sent the draft Federal Lead Strategy to the Senior Steering Committee members for briefings within their agencies, Departments, and offices. One week later, on April 12, 2018, Dr. Etzel and Ms. Howard convened a Senior Steering Committee meeting to discuss the outcomes of the intra-agency briefings, and to plan for revisions and incorporating comments. On April 30, 2018, the Committee sent the revised draft Federal Lead Strategy to the Office of Management and Budget (OMB) for the purpose of circulating it through an informal legislative review management (LRM) process. *See Exhibit 3.* This process resulted in additional suggestions and comments that Dr. Etzel and Ms. Howard addressed by instructing the Lead Subcommittee to prepare another revised version of the draft in May 2018 by: (1) sharpening the Introduction and Executive Summary to highlight what the Federal Strategy would achieve; (2) re-conceptualizing the goals in number and in substance (i.e., combining Goals 2 & 3 to focus on lead "hot spots"); and (3) clarifying the focus on the most exposed children, in part by modifying the introductory language to focus on top actions.

18. In early June 2018, employees at the Department of Housing and Urban Development (HUD) informed Dr. Etzel, Ms. Howard, and the Lead Subcommittee that they had changed their plans regarding the proposed release of the new Federal Lead Strategy in June, 2018, in Anaheim, California. As a result, Mr. Pruitt and other Task Force Principals discussed a possible release date later in 2018 in Washington, D.C., in order to allow greater participation of the other Task Force member agencies, Departments, and White House offices.

19. On July 3, 2018, Dr. Etzel, Ms. Howard (DHHS), and Michael Firestone (Acting Deputy Director of OCHP) met with Eric Rosenfeld and Margo Schwab, of OMB, to address the Office's review of the most recent draft Federal Lead Strategy. Under Dr. Etzel's leadership, the Lead Subcommittee promptly made the changes requested by the OMB representatives during the meeting in order to return the final draft to the OMB for the final LRM review as soon as possible. On July 5, 2018, Dr. Etzel sent an email to Ms. Wooden-Aguilar advising her that, if she concurred, the Task Force Senior Steering Committee co-chairs were ready to return the latest draft to the OMB for review on July 5 or 6, 2018. Dr. Etzel never received a response to her request.

20. On July 6, 2018, Mr. Pruitt publicly resigned from his position as EPA Administrator. At the time of Mr. Pruitt's resignation, Dr. Etzel was advised not to send the draft Federal Lead Strategy back to OMB until a new Acting Administrator was selected and had an opportunity to review it. Former Deputy Administrator Andrew Wheeler was promoted to Acting

Administrator in July 2018.³ Pursuant to Ms. Wooden-Aguilar's directive, Dr. Etzel made multiple requests to the Acting Deputy Chief of Staff to brief Mr. Wheeler on the draft Federal Lead Strategy. However, Ms. Wooden-Aguilar did not allow Dr. Etzel herself to brief the Acting Administrator or the Acting Deputy Administrator directly about the initiative. As a result, the Office of the Administrator never provided any input or guidance to OCHP on the draft Federal Lead Strategy.

21. In late-July 2018, the members of the Senior Steering Committee and Lead Subcommittee received a letter from two U.S. Senators, requesting information about the status of the Federal Lead Strategy. The Senior Steering Committee members, including Ms. Howard (DHHS) and Warren Friedman (HUD), drafted a response, which Dr. Etzel promptly circulated to Ms. Wooden-Aguilar, Haley Hughes (EPA National Lead Coordinator), and Nancy Grantham (Principal Deputy Associate Administrator of the EPA Office of Public Affairs).

22. On August 1, 2018, Dr. Etzel and Mr. Firestone met with Ms. Wooden-Aguilar for a general meeting. Ms. Wooden-Aguilar informed them that she had not arranged a briefing with the Acting Administrator. During the meeting, Ms. Wooden-Aguilar asked Dr. Etzel and Mr. Firestone for a comprehensive spreadsheet of the comments the OCHP had received on the draft Federal Lead Strategy. As all the comments had already been incorporated into the final draft nearly four weeks earlier, Dr. Etzel suggested that OCHP provide Ms. Wooden-Aguilar with a short synopsis of the actions OCHP had taken. Ms. Wooden-Aguilar agreed to this alternative, while OCHP staff worked on the comprehensive spreadsheet of changes to the draft. Dr. Etzel proposed September 24, 2018, as the new date for the public release of the Federal Lead Strategy.

23. In the last week of August 2018, Dr. Etzel met for coffee with Haley Hughes (EPA national lead coordinator) to discuss the status of the draft Federal Lead Strategy. During this meeting, Dr. Etzel told Ms. Hughes her concern that the EPA had not yet responded to the letter it received from two U.S. Senators one month earlier. Dr. Etzel also told Ms. Hughes that her counterpart at HUD had already sent the Department's response and offered to send a copy of the HUD Secretary's response letter to her. Dr. Etzel reminded Ms. Hughes that she had sent a draft response letter to Ms. Wooden-Aguilar, Ms. Hughes, and Ms. Grantham for their review shortly after the EPA received the Senators' letter.

24. On September 5, 2018, Acting Deputy Administrator Henry Darwin invited Dr. Etzel to a discussion on the draft Federal Lead Strategy, to take place on September 10, 2018, in Mr. Darwin's office. However, Mr. Darwin canceled this meeting without explanation just two days later on September 7, 2018. That day, Dr. Etzel's scheduler received an invitation for Dr. Etzel to meet with Mr. Darwin on September 8, 2018. However, the scheduler declined the invitation, as Dr. Etzel would not be in the office that day. Mr. Darwin made no further effort to

³ On November 16, 2018, the Administration announced the intent to nominate Mr. Wheeler to serve as the EPA Administrator, but has not yet sent the nomination to the U.S. Senate.

reschedule the lead strategy meeting.

25. On the evening of September 12, 2018, Dr. Etzel received an email message from Ms. Wooden-Aguilar addressed to Dr. Etzel and Mr. Firestone. In the email, Ms. Wooden-Aguilar asked whether anyone from the OCHP had said that the Federal Lead Strategy was finished. Although Dr. Etzel found the email odd, both she and Mr. Firestone confirmed to Ms. Wooden-Aguilar confirming that they did not recall anyone from the OCHP stating that the draft strategy was finished.

26. After Dr. Etzel's second proposed release date of September 24, 2018 had passed, in the last week of September 2018, she proposed as a potential release date of October 26, 2018, to Ms. Wooden-Aguilar. Dr. Etzel further advised her that, in order to achieve this proposed release date, it would be necessary for OCHP to send the revised strategy to OMB by September 28, 2018. Dr. Etzel explained that this deadline would allow OMB to send the draft for the second round of LRM review on or about October 1, 2018. Furthermore, if these reviews were completed in a timely manner, OCHP could prepare the final edits to the draft Federal Lead Strategy based on the LRM review by about October 12, 2018. Dr. Etzel explained that this timeline would make it possible for the EPA Office of Public Affairs to reformat the final document for public release on or about October 19, 2018, in preparation for the proposed release on or about October 26, 2018.

A. The Retaliatory Placement of Dr. Etzel on Administrative Leave.

27. On September 25, 2018, Ms. Wooden-Aguilar's office called Dr. Etzel's scheduler and asked whether they would set up a meeting for 4:00 p.m. Dr. Etzel advised her scheduler that the appropriate and customary way to set up a meeting was for the Acting Deputy Chief of Staff's scheduler to issue the invitation for a meeting and hold the meeting in the Acting Deputy Chief of Staff's office. Dr. Etzel further asked her scheduler to ascertain the purpose of the meeting. Ms. Wooden-Aguilar falsely told Dr. Etzel's scheduler that it was "just a general meeting" and that Ms. Wooden-Aguilar insisted on meeting in Dr. Etzel's office because "she had another meeting in the building."

When Ms. Wooden-Aguilar arrived in Dr. Etzel's office at 4:00 p.m. on September 25, 2018, she briefly admired Dr. Etzel's office décor, but did not discuss any substantive issues. Instead, Ms. Wooden-Aguilar handed Dr. Etzel a two-page memorandum and summarily advised her that she was placing her on administrative leave. Exhibit 7. Ms. Wooden-Aguilar would not disclose the basis for placing Dr. Etzel on leave and only stated that she would be in touch. Ms. Wooden-Aguilar also denied Dr. Etzel's request for permission to bring some of her work home with her. She then requested Dr. Etzel's EPA badge, EPA credit card, office keys, and EPA iPhone. Dr. Etzel was concerned that the EPA would not be able to communicate with her without her iPhone or access to her government email account. Dr. Etzel suggested that Ms. Wooden-Aguilar contact her via regular mail and she readily agreed to do so. Ms. Wooden-Aguilar then said "I'll walk you out." She did not allow Dr. Etzel to say goodbye to the OCHP staff. Once outside the OCHP office suite, Dr. Etzel saw two men, who appeared to be guards in

civilian clothes, waiting for them. Ms. Wooden-Aguilar nodded to the men and they fell in behind Dr. Etzel as the group walked to the door exiting the West Building. When they reached the exit, Ms. Wooden-Aguilar informed Dr. Etzel that she had another meeting in the building and promptly left Dr. Etzel at the door. She did not come outside the building with her.

28. As demonstrated by the facts above, when Ms. Wooden-Aguilar placed Dr. Etzel on administrative leave on September 25, 2018, the Senior Steering Committee of the President's Task Force on Environmental Health Risks and Safety Risks to Children ("Senior Steering Committee") was very close to sending the Federal Lead Strategy back to the Office of Management and Budget (OMB), if Acting Administrator Wheeler would have signed off on it. Therefore, the EPA removed Ms. Etzel to avoid the public embarrassment of the Acting Administrator of the EPA refusing to endorse the initiative to prevent childhood exposure to dangerous levels of lead.

29. By letters dated October 9, 2018 and October 15, 2018, which Dr. Etzel received on October 18, 2018,⁴ Ms. Wooden-Aguilar notified Dr. Etzel that when her 10-work-day administrative leave period expired, Ms. Wooden-Aguilar would place her on "investigative leave for up to 30 work days" pursuant to 5 U.S.C. § 6329b(b). She also ordered Dr. Etzel to appear at an interview with an EPA factfinder on October 19, 2018.

30. As of October 18, 2018, the investigative leave provision of 5 U.S.C. § 6329b(b) was not in effect because the statute separately requires that that OPM and the Agency issue regulations implementing the statute. *Id.* at § 6329b(h). While a notice of proposed rule had been issued, such regulations was not finalized or implemented, and therefore the investigative leave provision could not be applied. *See Public Citizen v. Nuclear Regulatory Commission*, 901 F.2d 147, 157-58 (D.C. Cir. 1990) (agency action was not enforceable where statute "directs the Commission to 'promulgate' its regulations or regulatory guidance," and agency failed to do so); *Ethyl Corp. v. EPA*, 306 F.3d 1144, 1149-50 (D.C. Cir. 2002) (statute required EPA to enact implementing regulations, which EPA failed to do, so EPA's actions were not enforceable). Accordingly, Ms. Wooden-Aguilar had no authority to place Dr. Etzel on investigative leave.

31. On October 18, 2018, Dr. Etzel, through counsel, notified Ms. Wooden-Aguilar that investigative leave status was improper because the regulations had not been passed, and requested that the leave designation be withdrawn immediately. Dr. Etzel also informed Ms. Wooden-Aguilar and EPA counsel that she could not attend the interview scheduled for October 19, 2018, as it only gave her one day notice from the date she received the letter.

32. Also on October 18, 2018, EPA counsel responded on behalf of Ms. Wooden-Aguilar and agreed to reschedule the October 19, 2018 interview.

⁴ A UPS Envelope containing the two letters (one dated October 9, 2018 and one October 15, 2018) was left on Dr. Etzel's front porch (which she rarely uses) and did not require a signature. Dr. Etzel never received a separate envelope with the October 9, 2018 letter at an earlier time.

33. Neither Ms. Wooden-Aguilar nor EPA counsel responded to the request that Dr. Etzel be taken off “investigative leave,” which is not legally authorized, but Ms. Wooden-Aguilar made clear in future emails that Dr. Etzel remained on investigative leave. Dr. Etzel remains on investigative leave as of the date of this Complaint. Even if the statute were in effect, EPA has violated the statute by leaving Dr. Etzel on investigative leave well past the 30 day investigative leave period that the statute authorizes.

B. The Retaliatory Adverse Review of Dr. Etzel’s Performance in Fiscal Year 2018.

34. On October 19, 2018, without checking with Dr. Etzel or her counsel regarding her schedule, Ms. Wooden-Aguilar wrote Dr. Etzel and ordered her to appear for an interview on October 22, 2018. Dr. Etzel, through counsel, responded that she was unavailable on October 22, 2018, because she would be going out of the country to attend meetings at the invitation of the World Health Organization and thus requested annual leave. Ms. Wooden-Aguilar had known about the event for months and EPA counsel knew about the events from prior conversations with Dr. Etzel’s counsel. Despite this fact, Ms. Wooden-Aguilar withheld a decision on Dr. Etzel’s annual leave request and EPA counsel demanded proof that Dr. Etzel would be out of the country on October 22, 2018, which Dr. Etzel subsequently provided. Still, EPA counsel demanded that Dr. Etzel cancel her travel plans and appear on October 22, 2018, and, at the same time, Ms. Wooden-Aguilar continued to withhold decision on Dr. Etzel’s leave request. Dr. Etzel again stated that she could not attend, and requested to take annual leave for the day. She asked that Ms. Wooden-Aguilar provide her with a decision regarding her leave request by 10:00 a.m. on October 22, 2018.

35. Ms. Wooden-Aguilar delayed her decision on the leave request until October 23. At that time, she stated she would grant Dr. Etzel’s request for leave from October 23 to October 31, but claimed without basis that Dr. Etzel was Absent Without Leave on October 22, 2018. Also on October 23, 2018, Ms. Wooden-Aguilar rescheduled the investigative interview for November 1, 2018. *See* Exhibit 8. Ms. Wooden-Aguilar also instructed Dr. Etzel that her Fiscal Year (FY) 2018 performance review would be conducted immediately following the interview. She also stated that she would not approve any further requests for annual leave from Dr. Etzel.

36. On November 1, 2018, Dr. Etzel attended the investigative interview. Much of the interview focused on years-old “allegations” by employees that Dr. Etzel either supervised or were within her chain of command, and asked about charges that Dr. Etzel mishandled the telework and leave policy in the office. Many of these issues had already been investigated years earlier, and Dr. Etzel was specifically exonerated of any wrongdoing by former Deputy Chief of Staff John Reeder. The EPA Grievance policy states that any employee grievances must be brought to the attention of the supervisor within 15 days—not years later as these grievances were.

37. After the interview with LER counsel, Dr. Etzel walked to Ms. Wooden-Aguilar’s office on or around 2:30 p.m. When she arrived, Ms. Wooden-Aguilar abruptly cancelled the performance review meeting and instead directed Dr. Etzel to submit a self-assessment to her.

Additionally, Ms. Wooden-Aguilar rescheduled the performance review for the following day, November 2, 2018, at 2:00 p.m. Dr. Etzel completed her self-assessment and sent it to Ms. Wooden-Aguilar on November 2 at approximately 1:30 p.m., although she was impeded in preparing the self-evaluation because she did not have access to her calendar or business records. When she later arrived at the Acting Deputy Chief of Staff's office at 2:00 p.m., Ms. Wooden-Aguilar again cancelled the performance review and stated that she wanted to reschedule it for November 8, 2018, which would give Dr. Etzel more time to complete her self-assessment. Dr. Etzel informed Ms. Wooden-Aguilar that she had already submitted the self-assessment and that she would prefer to do the performance review as scheduled. Ms. Wooden-Aguilar denied her request and instead rescheduled the performance review for a third time.

38. On November 8, 2018, Dr. Etzel and Ms. Wooden-Aguilar finally met to conduct the performance review and Ms. Wooden-Aguilar presented Dr. Etzel with a memorandum containing her SES Executive Performance Agreement Summary Rating. The calculation of Dr. Etzel's annual summary rating is based on Ms. Wooden-Aguilar's evaluation of Dr. Etzel's performance, from Level 1 to Level 5, in five "critical elements," including: (1) "Leading Change," (2) "Leading People," (3) "Business Acumen," (4) "Building Coalitions," and (5) "Results Driven." Exhibit 9. As the Executive Performance Agreement cover sheet explains, if an SES member receives an initial rating of "Level 1" ("1") for her performance in any of the five critical elements, her overall Initial Summary Rating is "Level 1 Unsatisfactory." Under federal law, "any senior executive receiving an unsatisfactory rating . . . shall be reassigned or transferred within the Senior Executive Service, *or removed from the Senior Executive Service.*" 5 U.S.C. § 4314(b)(3) (emphasis added). After reviewing the Ms Wooden-Aguilar's memorandum, Dr. Etzel was stunned to learn that she had been given an initial rating of "1" for the second critical element, "Leading People," as this rating came without any warning and was unfounded.

39. Although Ms. Wooden-Aguilar stated in her memorandum that she had discussed Dr. Etzel's purported "communication challenges" during a meeting with Dr. Etzel on April 25, 2018, Ms. Wooden-Aguilar never addressed any concerns with Dr. Etzel regarding her "inability to foster cooperation, teamwork, and resolve conflicts." In contrast to Ms. Wooden-Aguilar's assertions, during Dr. Etzel's mid-year Performance Assessment and Recognition System (PARS) review on April 25, 2018, Ms. Wooden-Aguilar indicated that Dr. Etzel's performance was satisfactory and did not raise any performance problems. *See* Exhibit 5. Furthermore, at this meeting, Dr. Etzel advised Ms. Wooden-Aguilar that the OCHP had made terrific progress in meetings with an organizational management consultant and that the OCHP employees were much more engaged due to Dr. Etzel's implementation of ten all-staff sessions. She further reported that she had led the development of an OCHP draft strategy and action plan that aligned with the Administrator's strategic goals among with a list of other accomplishments. Ms. Wooden-Aguilar reviewed the comprehensive list and indicated that what Dr. Etzel had achieved with the OCHP during the last 6 months was "good." Ms. Wooden-Aguilar then signed the mid-year review of the PARS performance plan. During the meeting, Ms. Wooden-Aguilar did not

raise any performance issues, did not provide a written assessment of Dr. Etzel's performance, and did not make any recommendation that Dr. Etzel improve her performance in the area of leadership. Indeed, although the SES Performance Management Guidelines for FY 2018 require that "it is incumbent upon the senior executive and his/her supervisor/rating official to discuss in a timely manner all issues that arise relating to performance" throughout the year, Ms. Wooden-Aguilar had not raised any performance issues with Dr. Etzel prior to her November 2018 end-of-year performance review. Moreover, since she became Dr. Etzel's supervisor, Ms. Wooden-Aguilar never mentioned that she had any issues with Dr. Etzel's performance in any area, including leadership, in any conversation or email communication to her.

40. In addition to Ms. Wooden-Aguilar's failure to provide Dr. Etzel any warning of her adverse review before November 8, 2018, the Acting Deputy Chief of Staff's initial rating of Dr. Etzel's leadership is unsubstantiated by the underlying facts of Dr. Etzel's direction of the Office of Children's Health Protection. In her November 8 performance review, Ms. Wooden-Aguilar included several examples of times she alleged Dr. Etzel displayed "performance deficiencies." Exhibit 9. Ms. Wooden-Aguilar's account of those instances is retaliatory as they are either wholly fabricated or significantly misleading. For instance, Ms. Wooden-Aguilar states in her memorandum that, on April 13, 2018, Dr. Etzel came into her office to discuss the roles and responsibilities of the National Lead Coordinator in an accusatory manner and that Dr. Etzel was visibly upset and raised her voice during the interaction. However, this is patently false. In fact, Dr. Etzel requested clarity regarding the roles and responsibilities of the National Lead Coordinator by telephoning her office and asked for a meeting to address her concerns. Ms. Wooden-Aguilar initially told Dr. Etzel that she was unable to meet with her, but later agreed to allow Dr. Etzel to come to her office to discuss the topic. During the short meeting, Dr. Etzel repeated her request for clarification of the roles and responsibilities of the national lead coordinator and explained her serious concern that there appeared to be significant overlap between the authority and duties of that role and her own role as OCHP Director. Earlier that day, during a Task Force Senior Steering Committee meeting, she learned that the EPA National Lead Coordinator had been conducting bilateral discussions about the draft Federal Lead Strategy with HUD without involving Dr. Etzel or her OCHP staff. As a result of these exchanges, HUD had presented a shortened version of the Federal Lead Strategy that co-chairs Dr. Etzel and Ms. Howard had not seen before. Therefore, Dr. Etzel requested that Ms. Wooden-Aguilar schedule a meeting between EPA Advisor Mr. Albert "Kell" Kelly and the EPA National Lead Coordinator to ensure improved clarity and communication moving forward. Ms. Wooden-Aguilar provided Dr. Etzel no guidance during this meeting, did not attempt to address her concerns, and refused to engage in any meaningful discussion about the issue. Additionally, no concerns regarding Dr. Etzel's conduct at this meeting were raised by Ms. Wooden-Aguilar at that time or during the mid-year PARS meeting less than two weeks later. However, Dr. Etzel left the meeting with the distinct feeling that Ms. Wooden-Aguilar was dismissive and did not take her concerns seriously. After the meeting, Ms. Wooden-Aguilar never scheduled a follow-up meeting with Dr. Etzel, Mr. Kelly and the National Lead Coordinator. Instead, Ms. Wooden-

Aguilar sent an email to Dr. Etzel at 5:07 p.m. on April 13, 2018, in which she falsely stated that there was no overlap between the two roles.

41. In her November 8 performance review, Ms. Wooden-Aguilar described at length an assessment of Dr. Etzel's leadership performance by organizational development consultant Catherine Allen. Exhibit 9. Ms. Allen was retained by EPA in July 2017 to help improve the management and working relationships within the Office's Program Implementation and Coordination Division. Later, at Dr. Etzel's request, Ms. Allen also consulted with OCHP about improving the management and working relationships in the Regulatory Support and Science Policy Division. In her capacity as consultant, Ms. Allen worked intensively with Dr. Etzel and the OCHP managers and staff during the spring of 2018. She completed her work in or around April 2018. She did not provide Dr. Etzel or OCHP managers with any final report. During the time she was a consultant to OCHP, Ms. Allen communicated to Dr. Etzel that she believed the work Dr. Etzel was doing in OCHP was helping to improve the environment and staff engagement in the Office. In fact, she specifically wrote two detailed email messages to Dr. Etzel regarding how well Dr. Etzel was responding to her guidance. Dr. Etzel forwarded at least one of these email messages to Ms. Wooden-Aguilar when she received it to show that she and her staff were making good progress with the consultant. Ms. Allen did not communicate to Dr. Etzel any of the concerns contained in her September 13, 2018, memorandum to Ms. Wooden-Aguilar at any time. Dr. Etzel only learned of the contents of this performance review during her November 8, 2018 performance review meeting with Ms. Wooden-Aguilar. Ms. Allen wrote her memorandum 6 months after the consultancy ended, in response to Ms. Wooden-Aguilar's request for "additional information/observations around OCHP's Senior management" less than two weeks before Dr. Etzel was placed on administrative leave, indicating that Ms. Wooden-Aguilar was seeking negative information about Dr. Etzel in order to terminate her.

42. As described *supra*, Ms. Wooden-Aguilar did not discuss with Dr. Etzel any concerns about her purported "communication challenges" or alleged "inability to foster cooperation, teamwork, and resolve conflicts" during the progress review nor at any other time during FY 2018, as Ms. Wooden-Aguilar falsely indicated in her November 8, 2018 performance review. Instead, Ms. Wooden-Aguilar consistently suggested that Dr. Etzel's performance and the achievements of the OCHP were on track. This is further supported by the commendations Dr. Etzel has received for her performance in the area of leadership while at the EPA. For example, in July 2018, EPA formally nominated Dr. Etzel to serve on the CDC's Lead Exposure and Prevention Advisory Committee, a highly prestigious Federal Advisory Committee to provide advice to the Director of the CDC. On August 20, 2018, a little over one month before she was placed on administrative leave, Dr. Etzel received a cash award from the EPA for her strong leadership in the development of the draft Federal Lead Strategy as co-chair of the Senior Steering Committee of the President's Task Force on Environmental Health Risks and Safety Risks to Children. *See* Exhibit 6. Additionally, Dr. Etzel has dedicated her career at the EPA to improving the credibility and visibility of the OCHP after a long period of inconsistent and short-term leadership prior to her employment. This included Dr. Etzel's launch of the first OCHP

Strategy for Protecting Children’s Environmental Health and her active engagement with the Children’s Health Protection Advisory Committee, and constructive collaboration with an organizational consultant to improve the performance and teamwork of the OCHP Division Directors and staff.

43. Ms. Wooden-Aguilar’s groundless initial rating of Dr. Etzel’s leadership performance as a “Level 1” has already had the effect of compelling an overall “Level 1 Unsatisfactory” summary rating in Dr. Etzel’s FY 2018 performance review. Under federal law, this unwarranted rating requires the EPA to reassign, transfer, or remove Dr. Etzel from the Senior Executive Service. 5 U.S.C. § 4314(b)(3). Therefore, Dr. Etzel has reasonable grounds to believe that the EPA will terminate her as a result of Ms. Wooden-Aguilar’s retaliatory, adverse performance review, and therefore seeks an order of a stay of any personnel actions for forty-five (45) days, pursuant to the Office of Special Counsel’s investigatory authority under 5 U.S.C. § 1214(b)(1)(A)(i).

C. The Retaliatory Delay and Refusal to Grant Dr. Etzel’s Annual Leave Requests.

44. After Dr. Etzel was placed on administrative leave, she requested that the EPA grant her annual leave time to fulfill commitments she had previously made to attend and speak at professional meetings and conferences in the Fall of 2018. Dr. Etzel requested to be able to attend these events in her personal capacity because of her personal commitment to the field of children’s environmental health. Dr. Etzel requested and received approval from the EPA Ethics Law Office to attend the events in her personal capacity. However, Ms. Wooden-Aguilar interfered with her ability to attend these events multiple times.

45. First, in July 2018, Dr. Etzel had been invited by the World Health Organization (WHO) to present a session on the topic of children’s environmental health at an International Education Course on Environmental Preventive Medicine in Nice, France, from October 23 to October 28, 2018. This was a course for medical students co-organized by Chiba University, University of Nice-Sophia Antipolis and the WHO. Following the course, Dr. Etzel was invited to serve as the co-chair of a World Health Organization meeting on “Pollution free environment for healthy generations.” This meeting was scheduled to occur from October 29 to October 30, 2018, in Geneva, Switzerland. In late July 2018, Dr. Etzel submitted the formal invitation from the WHO to the EPA Ethics Law Office, which subsequently sent formal permission to Dr. Etzel to accept the invitation and to accept an airline ticket to travel to the conference.

46. After Dr. Etzel wrote to the WHO organizers to tell them that she had been placed on administrative leave in late September 2018, the WHO organizers responded immediately to invite her to participate in the meetings in her personal capacity. Exhibit 10. However, on October 11, 2018, without Dr. Etzel’s knowledge, the EPA wrote to the WHO to inform them that she would no longer be able to attend the course in Nice or the meeting in Geneva. The WHO thereafter contacted Dr. Etzel to confirm whether this was the case and Dr. Etzel reiterated her intent to attend the events in her personal capacity, and not as the Director of the EPA Office of Children’s Health Protection, as she was on administrative leave. The organizers were

pleased that she still wished to participate and issued a second formal invitation to her to attend in her personal capacity. The EPA Ethics Law Office informed Dr. Etzel, through undersigned counsel, that she could attend the event in her personal capacity so long as she made clear to attendees that she did not represent the EPA at the event. The EPA Ethics Law Office also told Ms. Wooden-Aguilar that Dr. Etzel could attend the event in her personal capacity. As discussed above, although the EPA had known about these commitments since at least July 2018, on Thursday, October 18, 2018, Ms. Wooden-Aguilar ordered Dr. Etzel to appear at an investigative interview during the time she knew Dr. Etzel would be traveling. Ms. Wooden-Aguilar further withheld granting Dr. Etzel's leave request until after Dr. Etzel missed the investigative interview because of her travel plans. Even though she knew the EPA Ethics Law Office had approved Dr. Etzel's travel, Ms. Wooden-Aguilar found Dr. Etzel Absent Without Leave.

47. Second, Ms. Wooden-Aguilar refused to give Dr. Etzel permission to take annual leave to attend and give two invited presentations in her personal capacity at the annual meeting of the American Academy of Pediatrics (AAP), which was scheduled to take place on November 5, 2018. *See* Exhibit 12. Although the EPA Ethics Law Office had approved Dr. Etzel's invitational travel to the AAP meeting several months before, and again approved her to attend in her personal capacity after she was placed on administrative leave, Ms. Wooden-Aguilar notified Dr. Etzel on Friday, November 2, 2018, at 4:40 p.m. that she would not be allowed to take the annual leave to attend the AAP meeting. This made no sense as Dr. Etzel had already made hotel and plane reservations, which she then had to cancel. She also experienced the professional embarrassment of having to inform the moderator of the session, less than three days in advance of the meeting, that she would not be able to deliver her two scheduled presentations. Moreover, this specific meeting was particularly important to Dr. Etzel because it marked the release of the fourth edition of AAP's *Pediatric Environmental Health* book, which she edited.

48. Third, on November 7, 2018, Dr. Etzel requested via email that Ms. Wooden-Aguilar grant her two days of annual leave on November 13 and November 14, 2018. Dr. Etzel planned to attend the annual meeting of the American Public Health Association in San Diego, on November 11-14, 2018. The EPA Ethics Law Office approved her to attend in her personal capacity. Because Ms. Wooden-Aguilar did not reply to her email message, Dr. Etzel asked her whether she had made a decision regarding her request during her FY 2018 performance review on November 8, 2018. In response, Ms. Wooden-Aguilar said that she did not have an answer for Dr. Etzel but would send her answer by email that evening. Dr. Etzel received no answer that evening, but received an email from Ms. Wooden-Aguilar the following day informing her that she would provide an answer to the request for annual leave by noon on Friday, November 9, 2018. To date, Ms. Wooden-Aguilar has not provided an answer to Dr. Etzel's request for annual leave. As a result, Dr. Etzel had to leave the meeting early and missed the last two days of the APHA meeting. She had to purchase a one-way airline ticket to return from San Diego to Washington, D.C. on the evening of November 12, 2018, at significant personal expense.

49. The Agency has never provided a justification of its denial of her use of her annual leave time, especially given that Dr. Etzel is not permitted to do EPA-related work while on administrative leave. There is simply no authority, and no benefit to the EPA, for Ms. Wooden-Aguilar to deny Dr. Etzel leave to attend these professional events in her personal capacity. The only possible explanation for Ms. Wooden-Aguilar's actions is retaliation against Dr. Etzel for her protected activities.

IV. The Environmental Protection Agency Retaliated Against Dr. Etzel After She Continued to Pursue the Protection of Children's Environmental Health.

50. The EPA retaliated against Dr. Etzel, initially by obstructing her ability to complete the Senior Steering Committee's goal of completing the Federal Lead Strategy and successfully stopping the public release of the Strategy. However, in the last week of September 2018, Dr. Etzel continued to pursue the completion of the initiative by proposing to Ms. Wooden-Aguilar a timeline for Acting Administrator Wheeler and the OMB to review the completed draft strategy before a reasonable release date of October 26, 2018. Immediately thereafter, the EPA retaliated against Dr. Etzel for promoting the Federal Lead Strategy by placing her on administrative leave on September 25, 2018. The EPA subsequently further retaliated against Dr. Etzel by fabricating an unsubstantiated adverse performance review, by denying her access to her electronic calendar and e-mail messages to refute the allegations made in her FY 2018 performance review, and by delaying and refusing to grant her reasonable use of her annual leave time to participate in conferences in public health in her personal capacity.

V. Dr. Etzel Made Protected Disclosures Under 5 U.S.C. § 2302(b)(8)(A).

51. A protected disclosure is any disclosure of information by an employee or application which the employee reasonably believes evidences 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)(A).

52. As discussed in more detail *supra*, Dr. Etzel coordinated seventeen federal agencies in the completion of a revised Federal Lead Strategy for the first time in over a decade, in response to the Flint water crisis which exposed children to dangerous levels of lead. This crisis revealed the exigency of supplying state and local authorities with practicable tools for the prevention of lead exposure in children's environments. In preparation for the Presidential transition in 2017, Dr. Etzel positioned this initiative as a top priority for the Office of Children's Health Protection and continued to work towards the timely release of the revised Federal Lead Strategy in her dual capacities as OCHP Director and co-chair of the Senior Steering Committee of the President's Task Force on Environmental Health Risks and Safety Risks to Children. However, after the installation of Acting Administrator Wheeler, EPA leadership placing multiple obstacles in the way of the Senior Steering Committee to prevent and delay the release of the Federal Lead Strategy, including requiring the Acting Administrator to review the draft strategy before allowing Dr. Etzel to submit the draft to the OMB for final approval. When the Acting Deputy Chief of Staff's delay in sending the final draft of the Federal Lead Strategy to

the Acting Administrator forced the Senior Steering Committee to miss the initial proposed release date in June, 2018, Dr. Etzel proposed additional possible release dates in September 2018 and October 2018. Afterward, the EPA placed Dr. Etzel on administrative leave on September 25, 2018, without warning or justification.

53. Shortly after the EPA placed Dr. Etzel on administrative leave, she publicly disclosed her belief that the EPA wrongfully retaliated against her efforts to protect children from lead exposure to the several members of the press. First, on October 15, 2018, the Emmy Award-winning television show “CBS This Morning” aired an interview with Dr. Etzel including her experience being placed on administrative leave directly after promoting the release of the Federal Lead Strategy.⁵ Second, on October 16, 2018, CNN broadcast a second interview with Dr. Etzel explaining how EPA had sidelined her over her efforts to prevent childhood lead exposure.

VI. The EPA Took Prohibited Personnel Actions against Dr. Etzel Because of Her Protected Disclosures.

54. An adverse employment action, including any significant change in duties, responsibilities, or working conditions, and any decision concerning pay and benefits, is a prohibited personnel action under 5 U.S.C. § 2302(a)(2)(A)(ix) and (xi). Here, the EPA took prohibited personnel actions against Dr. Etzel, including (1) placing her on administrative leave beginning September 25, 2018, for an undetermined length of time, prohibiting her from contacting any EPA employees or accessing any of her records, and subjecting her to a baseless investigation; (2) imposing an unsubstantiated initial rating of “1” for “Leading People” in her FY 2018 review, which had the effect of giving her an “Unsatisfactory” rating for the year; and (3) delaying and refusing to grant her reasonable annual leave time requests to participate in pre-approved public events in her personal capacity after Dr. Etzel made protected disclosures regarding her placement on administrative leave to members of the press. These actions were all taken in an effort to punish Dr. Etzel, and terminate her.

VII. Dr. Etzel’s Protected Disclosures Caused the Retaliation Against Her.

55. Dr. Etzel can readily show that her protected disclosures caused the retaliation against her through the close temporal proximity of her disclosures to the retaliatory actions. EPA retaliated against Dr. Etzel in a less than two week period after she was encouraging EPA management to move forward with the Federal Lead Strategy. Courts have held that a gap of up to one year between a protected disclosure and an adverse action is actionable, and therefore Dr. Etzel can easily establish a temporal proximity between her protected activity and EPA’s prohibited personnel actions. *See, e.g., Kewley v. Dept. of Health & Human Serv.*, 153 F.3d 1357, 1363 (Fed. Cir. 1998) (prohibited personnel practice where adverse action occurred within one year of protected disclosure); *Wadhwa v. Dept. of Veterans Affairs*, 110 M.S.P.R. 615, 622

⁵ CBS contacted the EPA on October 10, 2018, prior to the interview airing, regarding Dr. Etzel. Accordingly, the EPA knew by that date, if not before, that Dr. Etzel had made protected disclosures.

(2009), *aff'd*, 353 Fed. Appx. 435 (Fed. Cir. 2009) (“Six months is well within the range of time between a disclosure and a personnel action from which an inference of causation arises.”). Similarly, courts have held that evidence of retaliatory animus is also powerful evidence of a prohibited personnel practice. *See, e.g., Whitmore v. Dept. of Labor*, 680 F.3d 1353, 1371 (Fed. Cir. 2012) (“any motive to retaliate”); *Fellhoelter v. Dept. of Agriculture*, 568 F.3d 965, 971 (Fed. Cir. 2009) (evidence of “the existence and strength of any motive to retaliate on the part of the agency officials who were involved in the decision”); *Valerino v. Dept. of Health & Human Serv.*, 7 M.S.P.B. 347, 348, 7 M.S.P.R. 487, 489-90 (1981) (“the employer’s reaction to the protected activity”).

56. That the EPA’s prohibited personnel actions were motivated by Dr. Etzel’s protected disclosures is further confirmed by the EPA’s attempts to prevent Dr. Etzel from making further protected statements to the press regarding her placement on administrative leave; and by delaying and refusing to grant her requests to use her annual leave time to participate in public events in her personal capacity, for which Dr. Etzel received prior approval from EPA ethics officers.

57. The placement of Dr. Etzel on administrative leave was retaliatory, because the EPA Acting Administrator, Chief of Staff, and Acting Deputy Chief of Staff want this comprehensive Federal Lead Strategy not to move forward, and the way they have achieved this goal is by removing Dr. Etzel from the Agency. To that end, Acting Administrator Wheeler effectively stopped all progress on the Federal Lead Strategy through the actions taken by the Chief of Staff, Ryan Jackson, and the Acting Deputy Chief of Staff, Ms. Wooden-Aguilar on September 25, 2018, to place Dr. Etzel on administrative leave without basis. Furthermore, although Ms. Wooden-Aguilar claimed that the Federal Lead Strategy was an important priority, neither she nor any others in leadership positions in the Office of the Administrator ever provided any input on the draft, and Ms. Wooden-Aguilar refused to arrange any OCHP briefings for the Acting Administrator and she prohibited OCHP staff from requesting these briefings directly. Moreover, although Ms. Wooden-Aguilar endeavored to obstruct the ability of the Senior Steering Committee co-chairs to release a finalized Federal Lead Strategy by delaying sending the draft to the OMB for a final review, OCHP staff and managers successfully overcame all of the obstacles that she had placed in their path. As a result, she stopped progress on the Federal Lead Strategy by placing Dr. Etzel on administrative leave, thereby preventing her from completing her responsibilities as Director of the OCHP and leaving the initiative in limbo.

58. The decision to give Dr. Etzel an unwarranted adverse performance review six weeks after placing her on administrative leave without notice or explanation was also retaliatory as it is neither supported by Dr. Etzel’s underlying personnel record nor justified by Dr. Etzel’s interactions with Ms. Wooden-Aguilar throughout FY 2018 and it will lead to the termination of Dr. Etzel’s employment, unless the Office of Special Counsel intervenes. Not only does Dr. Etzel have a stellar career in the federal service, but also EPA in July 2018 nominated her to represent EPA on CDC’s prestigious Lead Exposure and Prevention Advisory Committee and

gave her a cash award for her leadership only weeks before the negative performance review. The performance review was not preceded by any warning—even in the mid-year review in April 2018. Additionally, Ms. Wooden-Aguilar’s refusal to grant Dr. Etzel reasonable access to her electronic calendar and e-mail messages is retaliatory, as it has obstructed her ability to refute the incorrect and misleading allegations contained in Ms. Wooden-Aguilar’s November 8, 2018 performance review and, thereby, adequately defend against her predetermined termination.

59. The EPA’s refusal to grant Dr. Etzel timely approval for her annual leave time requests during her placement on administrative leave was also retaliatory, because Dr. Etzel requested the leave time to attend events in her personal capacity that were previously approved by the EPA Ethics Law Office. Moreover, the temporal proximity between Dr. Etzel’s public statements to the press in her personal capacity regarding the circumstances surrounding her removal, and the efforts to delay the resolution of her leave requests, establish that the EPA was attempting to silence her from making similar protected disclosures in the future.

60. Similarly, EPA subjected Dr. Etzel to a baseless investigation regarding alleged conduct from years earlier. The temporal proximity between the investigation and her protected activities further establishes EPA’s retaliatory motivations.

61. These actions are retaliatory because they were intended to deter Dr. Etzel from engaging in protected activities, including the promotion of the Federal Strategy to prevent exposure to lead sources found in children’s environments, including housing, water, soil, and food within her capacity as Director of the Office of Children’s Health Protection. Moreover, the EPA retaliated against Dr. Etzel through its efforts to obstruct her participation in professional meetings and conferences in her personal capacity, and as a consequence, thwart her ability to make protected disclosures.

62. Moreover, the EPA is unable to show that it would have taken the personnel actions against Dr. Etzel absent her protected conduct, as demonstrated by her positive performance reviews throughout her tenure at the OCHP and consistent record of high achievement for the stated goals of the Office. Dr. Etzel’s strong performance as Director of OCHP is further demonstrated by her consistent achievements of EPA mission measures and exceptional leadership of OCHP staff and external organizations and committees.

63. Dr. Etzel’s peers and colleagues have been vocal in their support of her notable performance as Director of the OCHP. After Ms. Wooden-Aguilar placed her on administrative leave, over 120 organizations, led by the American Academy of Pediatrics, signed a letter of support for Dr. Etzel and the Office of Children’s Health Protection that was sent to the Acting Administrator. Moreover, at the October 2018 meeting of the Children’s Health Protection Advisory Committee in Washington, D.C., dozens of public groups testified about Dr. Etzel’s strong leadership of the Office of Children’s Health Protection. Two distinguished pediatricians wrote an Op-Ed about Dr. Etzel’s leadership of OCHP that was published in the New York Times in or about early October, 2018. In late October 2018, the International Society for Children’s Health and the Environment notified Dr. Etzel that she is the first recipient of the

Herbert L. Needleman Award for her work battling to protect children from environmental chemicals and persisting in the face of opposition. The Society will present Dr. Etzel with the award in Merida, Mexico, in January 2019.

Request for Stay

64. Dr. Etzel specifically requests that OSC issue a stay, because of the likelihood that she will be terminated in the very near future (*supra*), which will cause irreparable harm to her. The Special Counsel is authorized to seek a stay of a personnel action pending an OSC investigation where the OSC has reasonable grounds to believe that the action is the result of a prohibited personnel practice (PPP). *See* 5 U.S.C. § 1214(b)(1)(A)(i); *see also Special Counsel v. Dep't of Veterans Affairs*, 84 M.S.P.R. 314, 316 (1999) (MSPB granted OSC's request for a 45-day stay, finding reasonable grounds to believe that the agency failed to extend employee's employment in retaliation for filing grievances). Both of the criteria that OSC considers in seeking a stay are satisfied here: First, there are reasonable grounds to believe that the personnel action that is about to be taken (her removal) constitutes a prohibited personnel practice in retaliation for her protected conduct; and second, absent a stay, Dr. Etzel will be subjected to a removal or other significant personnel action which will result in serious immediate economic and reputational harm that is irreparable. Although Dr. Etzel has initiated the internal appeal of her performance evaluation, that appeal is likely to be exhausted very soon, so that the agency can then issue a thirty-day notice of removal, resulting in her removal within 45 days or less. Unlike other members of the Senior Executive Service who have previously served in the civil service and would therefore revert to their civil service grade, Dr. Etzel, who has no previous civil service, would be removed from government service.

CONCLUSION

65. Dr. Etzel continued to promote the completion of the new Federal Lead Strategy to prevent childhood lead exposure in her capacity as the co-chair of the Senior Steering Committee of the President's Task Force on Environmental Health Risks and Safety Risks to Children after both the Presidential transition and the subsequent resignation of former EPA Administrator Scott Pruitt. In furtherance of this goal, Dr. Etzel requested a final briefing about the draft strategy with Acting Administrator Wheeler in an effort to complete the strategy in a timely manner after EPA leadership repeatedly delayed its completion. Soon thereafter, Dr. Etzel disclosed these facts to members of the press in her personal capacity after the EPA placed her on administrative leave without warning. Her comments were published by the nationally broadcast news outlets CNN and CBS. These constituted protected discussions under the Whistleblower Protect Act.

66. Dr. Etzel suffered adverse personnel actions when her supervisors in the Office of the Administrator of the EPA took actions to obstruct her ability to complete the draft Federal Lead Strategy, to place her on administrative leave, to fabricate an unwarranted adverse

performance review, and to delay or refuse to grant her annual leave requests to attend pre-approved public events in her personal capacity. These actions were intended to retaliate against Dr. Etzel for her protected conduct, and drive her out of her job.

Requested Relief.

Dr. Etzel requests the following relief:

1. OSC issue a stay, pursuant to 5 U.S.C. § 1214(b)(1)(A)(i), to prevent the EPA from taking any further adverse employment actions against her, including termination of her employment based on her SES performance review rating of “1” for “Leading People” and continued denial of annual leave requests;
2. OSC issue an order that EPA take no further steps to interfere with Dr. Etzel’s ability to carry out the mission of the Office of Children’s Health Protection in her capacity as Director, including the participation and leadership of the interagency Federal Lead Strategy on behalf of the EPA;
3. OSC order the EPA to reimburse Dr. Etzel the reasonable attorney’s fees and costs that she has incurred in pursuing this matter;
4. OSC order EPA to compensate Dr. Etzel for the emotional distress and reputational harm she has endured as a result of the retaliation against her; and
5. OSC order the EPA to remove the November 8, 2018, FY 2018 Performance Review from Ms. Wooden-Aguilar to Dr. Etzel, and all related documents, from her official personnel files.

Respectfully submitted,

/s/ Lynne Bernabei

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