

**UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
OFFICE OF REGIONAL OPERATIONS**

RUTH A. ETZEL,

Appellant,

v.

**ENVIRONMENTAL PROTECTION
AGENCY,
Agency.**

DOCKET NUMBER

DC-1221-19-0827-W-2

DATE: April 30, 2021

APPELLANT’S PREHEARING STATEMENT

Appellant Dr. Ruth Etzel submits this Prehearing Statement. Appellant first lays out the **Statement of Facts**, which outlines the unsupported and retaliatory nature of the actions that the Environmental Protection Agency (EPA) took to remove her from the Senior Executive Service (SES) and to reduce her pay by ten percent, as well as to give her an unsatisfactory performance evaluation, place her on administrative leave, refuse to grant annual leave to speak at professional conferences, and transfer her to a position where she was initially placed in a cubicle and to this day has not been provided adequate meaningful work that utilizes her expertise and abilities. Appellant then addresses **Remaining Discovery Issues** and two **Key Legal Issues**. She then lists her eight planned hearing **Witnesses** and finally the more than 60 **Exhibits** she anticipates introducing.

Appellant also notes her separate Motion for Issuance of Hearing Subpoenas and Other Witness Assistance for the non-agency witnesses Catherine Allen, Reginald Allen, and Douglas Benevento, filed herewith. She also notes her pending Motion to Rule on Order to Show Cause Regarding Ten Percent Pay Reduction, filed on April 28, 2021. AF Tab 19.

A. STATEMENT OF FACTS

Background Facts

Ruth Etzel, MD, PhD, is a pediatrician and epidemiologist who was formerly the Director of the EPA's Office of Children's Health Protection. Prior to that position, she had a highly distinguished career in public health. At the time of her appointment to EPA in 2015, she was serving as a Professor of Epidemiology at the University of Wisconsin and as Adjunct Professor at several other universities. She served for about 13 years as a medical epidemiologist with the Centers for Disease Control and Prevention's (CDC) National Center for Environmental Health, where she worked on matters including second-hand smoke, conducted research to find the cause of several major disease outbreaks nationally and internationally, and founded and directed the CDC's Air Pollution and Respiratory Health Branch. She also served as Director of the Human Health Sciences Division at the USDA's Food Safety and Inspection Service, as Research Director at the Alaska Native Medical Center, and as Medical Officer for Interventions for Healthy Environments of the World Health Organization. She received the U.S. Public Health Service Distinguished Service Medal "for continuous visionary leadership and outstanding accomplishments in achieving public health objectives," the highest-level award given by the U.S. Public Health Service. She also received the Arthur S. Flemming Award, given to only 10 federal government employees each year. In 2021, the Academic Pediatric Association honored her with the prestigious Public Policy and Advocacy Award.

At the Office of Children's Health Protection, Dr. Etzel became concerned that too many children in the U.S. were still being exposed to lead, a highly toxic substance. She launched a multi-agency initiative to create a strategy to accelerate the reduction of children's exposure to lead from sources in air, water, soil, paint, and food. When the effort to produce a comprehensive

Federal Lead Strategy became stalled under former Administrator Andrew Wheeler, she continually advocated for its completion. This process unfolded during the lead in drinking water crisis in Flint, Michigan, which was demonstrating the very real threats from lead to children's health. Dr. Etzel made strong pleas within EPA to take action to assist the many communities in the United States where children were continuing to be exposed to lead. Her requests were ignored or denied.

Dr. Etzel's Disclosures and EPA's Retaliation Against Her

Initially, it should be noted that below in this Prehearing Statement are the Summaries of Expected Testimony of seven witnesses whom Appellant plans to call in the hearing. As re-capped in their Summaries, they, along with testimony from Dr. Etzel herself, will confirm this narrative regarding the background facts, disclosures, and retaliation involved here. Appellants' numerous Exhibits submitted herewith will further bolster these facts.

In August 2018, Dr. Etzel made disclosures concerning EPA's failure to timely respond to a letter from two Senators inquiring about the progress of the Federal Lead Strategy. In September 2018, Dr. Etzel was put on administrative leave pending an investigation of supposed misconduct. EPA later admitted the investigation did not find any cause for discipline and that there was not sufficient evidence to support the allegations that had been made against Dr. Etzel (see Summary of Expected Testimony of Helena Wooden-Aguilar).

In October 2018, while she was on administrative leave, Dr. Etzel appeared on two national television programs to reveal that EPA had dropped the ball on tackling children's lead exposure, meaning "our kids will continue to be poisoned." She also said that EPA sidelined her to "get rid of its chief lifeguard." Reflecting the extraordinary support and respect for Dr. Etzel, a group of over 100 public health and advocacy organizations wrote to the EPA Administrator in support of

Dr. Etzel to express their alarm over her placement on administrative leave. Several members of Congress did the same, but all to no avail.

A Lead Action Plan was later released in December 2018, in a much-weakened form with virtually no teeth. Dr. Etzel was later demoted out of the SES and moved out of any work on children's health or lead contamination, and any significant work at all, under the pretext of a phony poor performance evaluation concerning her "leadership skills." There was never any claim that Dr. Etzel, or the Office of Children's Health Protection under her leadership, was not highly productive. In fact, as detailed below, right up until the time of her poor performance evaluation, Dr. Etzel received awards and recognition for her work, particularly on the Federal Lead Strategy. After her demotion out of the SES, the EPA contrived a plan to extend Dr. Etzel's SES detail for a short period so that it could purport to reduce her SES her pay by 10%, which reduction carried over to her new GS-15 position.

Dr. Etzel appealed her adverse performance evaluation and pay reduction. She challenged her placement on administrative leave and her pay reduction as illegal. Both of these challenges were accepted by the administrative judge as protected disclosures, among others. Nevertheless, the agency transferred her to EPA's Office of Water in a position as a biologist that did not utilize her expertise in children's health, initially placed her in a cubicle, and to this date she has not been given assignments commensurate with her training and abilities (see Summary of Expected Testimony of Deborah Nagle).

As a manager, Dr. Etzel had inherited a historically divided Office of Children's Health Protection and worked for years to reduce the divisions. During Dr. Etzel's tenure from 2015-2018, the Office of Children's Health Protection was highly productive without unusual management problems. Her performance reviews for FY 2016 and FY 2017 showed at least fully

successful ratings in all elements of her performance, and overall ratings of “commendable” (level 4 out of 5) each year. Dr. Etzel especially excelled in producing results, and was rated as “outstanding” (level 5 out of 5) in that category each of those years.

In October 2017, Helena Wooden-Aguilar, then Acting Deputy Chief of Staff, became Dr. Etzel’s supervisor. In November 2018, after Dr. Etzel, as indicated above, made disclosures concerning the failure to timely respond a congressional letter asking for the status of the Federal Lead Strategy, appeared on two nationwide television programs critiquing EPA’s failure to protect children from lead poisoning, and challenged her administrative leave as illegal, Ms. Wooden-Aguilar gave Dr. Etzel a performance rating of “unsatisfactory” (level 1) in the critical element of “leading people” for FY2018 (see Summary of Expected Testimony of Helena Wooden-Aguilar). She still rated Dr. Etzel as “commendable” (level 4) on the critical element of “results driven,” specifically citing her work on the Federal Lead Strategy. Dr. Etzel’s recognized achievements co-leading an interagency effort involving 17 agencies and offices obviously required superior leadership abilities and performance. Only one month prior to the end of the 2018 fiscal year, in August 2018, Dr. Etzel received a Superior Accomplishment Recognition Award for leadership in the development of the Federal Lead Strategy. However, under EPA SES regulations, the level 1 rating on one element had the effect of compelling an overall level 1 rating, which Ms. Wooden-Aguilar used to demote her out of the SES.

To add insult to injury, after the demotion, Ms. Wooden-Aguilar also acted to reduce Appellant’s pay by 10%. Normally, an SES official who is demoted out of the SES due to poor performance is entitled to maintain their most recent SES rate of pay in their new position. To circumvent this requirement, Ms. Wooden-Aguilar purported to extend Dr. Etzel’s SES detail to the Office of Water so she could reduce her pay while she was still in the SES, even though the

decision to demote her out of the SES had already been made and her new GS-15 position had been assigned. The pay reduction process was not completed while Dr. Etzel was still in the SES, but was implemented while a request for reconsideration to the EPA Administrator, provided for in the regulations, remained pending. The reduced rate then carried over to her new GS-15 position (see Summary of Expected Testimony of Douglas Benevento).

Dr. Etzel's poor performance rating in the area of leading people (and therefore overall) was wholly unjustified and retaliatory (see Summaries of Expected Testimony of Martha Berger and Reginald Allen). The deciding official in her personnel matter, Helena Wooden-Aguilar, was not qualified to be in her position and did not behave objectively when she was the acting Deputy Chief of Staff for EPA beginning in late 2017 (see Summary of Expected Testimony of Reginald Allen). The reason she was brought into that position was because she became close to a confidant of former Administrator Scott Pruitt, Millan Hupp, and upper management became convinced that Ms. Wooden-Aguilar would be willing to carry out the Administrator's wishes, which were to clear the agency of any leadership officials who did not fit the ideology and support the decisions of the Agency's top leadership, including the actions that ultimately led to Mr. Pruitt's and Ms. Hupp's resignations in the summer of 2018 due to ethics scandals. Mr. Allen was forced out by Ms. Wooden-Aguilar in early 2018, and Dr. Etzel and others were likewise forced out of EPA's leadership because their actions were perceived as disloyal to top EPA leadership, and not for legitimate reasons concerning their performance.

In Dr. Etzel's November 8, 2018 performance review, Ms. Wooden-Aguilar included several examples of Dr. Etzel's alleged "performance deficiencies." They are either wholly fabricated or significantly misleading, demonstrating the retaliatory nature of the review. For example, Dr. Etzel did not approach Ms. Wooden-Aguilar in an agitated, accusatory manner in a

meeting on April 13, 2018, concerning the roles and responsibilities of the National Lead Coordinator, but merely sought to clarify the roles. Even if she had behaved as alleged, the relevance of such a communication incident between these two senior officials to “leading people” is highly questionable. As another example, Ms. Wooden-Aguilar also claimed that she had been told that Dr. Etzel stated in a meeting on September 12, 2018, that the Federal Lead Strategy was complete (when it wasn’t), while noting that Dr. Etzel denied making such a statement. Other evidence, which Ms. Wooden-Aguilar disregarded, documented that Dr. Etzel did not make that statement. In her deposition, Ms. Wooden-Aguilar testified that she took no position on whether or not the statement was made. Yet, she used it to justify an unsatisfactory rating leading to Dr. Etzel’s loss of her position as the Director of the Office of Children’s Health Protection.

Ms. Wooden-Aguilar also relied on a communication involving Dr. Hayley Hughes, then the National Lead Coordinator, as an allegedly key indicator of Dr. Etzel’s poor leadership. Yet, Dr. Hughes herself agreed that the incident Wooden-Aguilar referred to was just the “normal course of business” in a bureaucracy and not “unusual” (see Summary of Expected Testimony of Hayley Hughes). In other words, Helena Wooden-Aguilar went out of her way to exaggerate the minor incident’s significance, demonstrating her need to stretch and distort the truth in order to find problems with Dr. Etzel’s leadership.

Ms. Wooden-Aguilar also falsely claimed that Dr. Etzel had not worked with a contractor hired to assist with organizational issues in the Office of Children’s Health Protection, although she had. Ms. Wooden-Aguilar relied heavily on a supplemental report produced by the contractor under suspicious circumstances. It was written in mid-September of 2018 at the special request of Ms. Wooden-Aguilar and an agency Human Resources official, 3½ months after the contractor finished her work in late May, but only two weeks before Dr. Etzel was placed on administrative

leave. The contractor did not share the special report, which was not part of the initial contract, with Dr. Etzel at any time. The contractor made negative statements about Dr. Etzel in the special report that were not mentioned in her final report earlier in May of that year. She testified in her deposition that she did not want to be in the position of writing this report, and that it was not something she normally did in her business, because her job was to help people and leaders be successful (see Summary of Expected Testimony of Catherine Allen). Dr. Etzel only learned of the existence of this supplemental report during her November 8, 2018, performance review meeting with Ms. Wooden-Aguilar. The testimony will show that Ms. Wooden-Aguilar, and possibly others in the Agency, were seeking negative information about Dr. Etzel in order to remove her from her position (see Summary of Expected Testimony of Reginald Allen).

Also conflicting with the allegation that Dr. Etzel's performance in FY2018 was unsatisfactory, in July 2018, EPA formally nominated her 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. Further, on August 20, 2018, only 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.

Evidence of Retaliatory Animus

The record is replete with evidence of retaliatory animus toward Dr. Etzel, supporting a conclusion that the personnel actions taken against her were retaliation for her protected activities, and that the Agency cannot prove by clear and convincing evidence that it would have taken the same personnel actions in the absence of her disclosures. *See* 5 U.S.C. § 1221(e)(2). A

brief outline of some of this evidence includes irregular and illegal procedures such as: 1) the illegal placement on extended “investigative” leave and regulatory violations in connection with her pay reduction discussed below, 2) the placement of Dr. Etzel on administrative and then investigative leave for six months and commencing an investigation based on a “confidential” “High Level Summary of Observations” submitted by one of Dr. Etzel’s supervisory reports that did not meet the requirements for a grievance of any other official agency avenue for complaint, 3) reliance in the unsatisfactory performance evaluation leading to Dr. Etzel’s demotion and pay reduction in large part on the report of a paid consultant rather than the observations of the rating official, 4) requesting the paid consultant to provide more information about Dr. Etzel’s leadership several months after the consultant’s work was finished and a final report submitted that did not provide grounds for the unsatisfactory rating, 5) not providing Dr. Etzel with the consultant’s supplemental report or allowing her to respond until after it was used to support her unsatisfactory rating, and 6) forcing the consultant to provide to EPA a “360” evaluation of Dr. Etzel even though the consultant had promised Dr. Etzel that it would remain confidential, as per her usual practice. In addition, evidence shows that EPA public relations officials and senior management conspired to publicly attack Dr. Etzel and undermine her credibility, including telling the press that serious reports had been made against her by staff, even though the allegations of that staff member were then under investigation and ultimately found to be unsubstantiated; and making statements like, “This is our opportunity to strike,” concerning a proposed response to a reporter’s inquiry about Dr. Etzel’s job status.

The record also evidences that the agency took several actions with the apparent intention of humiliating Dr. Etzel and undermining her career and professional stature. These actions were completely unnecessary to achieve any legitimate aim of EPA, even assuming, contrary to

fact, that Dr. Etzel was deficient in leadership abilities and needed to be removed from a managerial role. For example, while she was on administrative leave, Ms. Wooden-Aguilar and possibly other agency officials delayed or denied Dr. Etzel's requests for leave to speak at professional conferences, and even charged her with absence without leave (AWOL) when she was unable to get leave approved to attend such a conference. Placing Dr. Etzel in a cubicle and failing to assign her adequate meaningful work in the Office of Water were intended to humiliate her and thwart her career. EPA's failure to employ Dr. Etzel's expertise in children's health, the prohibition of her working on anything to do with lead exposure, and denying her requests as a public health and preventive medicine expert to assist with the coronavirus epidemic were vindictive actions that actually harmed EPA as well as Dr. Etzel, by failing to take advantage of the skills and abilities of an undisputedly highly qualified professional.

In sum, the actions taken against Dr. Etzel, including her removal from her SES position and as Director of the Office of Children's Health Protection for retaliatory reasons, violated both the fundamental principles of the merit system and whistleblower protections. They cannot be sustained.

B. AGREED MATERIAL FACTS

Appellant's counsel and agency counsel exchanged proposals for agreed materials facts in the two days before this filing, but they were unable to settle on agreed facts.

C. REMAINING DISCOVERY ISSUES

No discovery issues are pending.

D. KEY LEGAL ISSUES

The protected disclosures that Judge Weiss earlier accepted for the hearing are:¹

- 1) Appellant's disclosure in August 2018 regarding the agency's alleged delay in responding to a Congressional inquiry;
- 2) her disclosures on October 15, 2018, during an interview with CBS This Morning and October 16, 2019, during an interview with CNN, regarding the agency's resistance to her efforts to safeguard children from lead exposure and its failure to protect children's health;
- 3) her disclosure on October 18, 2018, that her placement on investigative/administrative leave was "illegal"; and
- 4) her disclosure in June 2019 that the agency "unlawfully" reduced her rate of pay.

The personnel actions Judge Weiss accepted are:

- 1) her placement on administrative leave on September 25, 2018;
- 2) her rating of "1" for leading people on her FY 2018 performance review;
- 3) the agency's delay and refusal to grant her annual leave, resulting in her placement on absence without leave (AWOL) status on October 22, 2018;
- 4) her March 21, 2019, removal from the SES;
- 5) her assignment to a cubicle and the agency's continued failure to provide her with a position description and duties, beginning in March 2019; and
- 6) a 10% reduction in her rate of pay on May 3, 2019.

The primary legal issue is whether Dr. Etzel has made a *prima facie* case that the accepted personnel actions were taken against her in retaliation for the accepted disclosures, and thus were prohibited personnel practices under 5 USC § 2302(b)(8) and in violation of the Whistleblower Protection Act. If a *prima facie* case is established, the legal question becomes whether the agency can prove by clear and convincing evidence that it would have taken the same actions in the absence of the disclosures.

In addition to the fundamental question of whether EPA violated whistleblower protections by improperly retaliating against Dr. Etzel, two distinct legal issues are presented involving EPA's

¹ March 27, 2020, Order of Ronald J. Weiss in prior appeal docket, DC-1221-19-0827-W-1, AF Tab 23.

placement of her on extended leave and its reduction of her pay by ten percent. The illegal and irregular procedures used to take these actions are also evidence of retaliation.

1) Was it illegal for EPA to place Appellant on Administrative Leave and then convert it to a lengthy Investigative Leave?

By letters dated October 9, 2018, and October 15, 2018, which Dr. Etzel received on October 18, 2018, Ms. Wooden-Aguilar notified Dr. Etzel that when her ten-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). Ms. Wooden-Aguilar renewed this “investigative leave” one time. The Agency appeared to acknowledge that it could not legally keep Dr. Etzel on administrative leave for more than ten days, but it nevertheless kept her on leave, incorrectly claiming that it could do so under the statutory provision for “investigative leave.” Dr. Etzel remained on “investigative leave” until Ms. Wooden-Aguilar directed that the investigative leave would end on March 21, 2019, after the investigation into the alleged misconduct that occasioned her placement on administrative leave was completed and found that the allegations were not substantiated. Thus, she was on “investigative leave” not for 30 days but for **five months**, and was on a combination of administrative and investigative leave for nearly **six months** (September 25, 2018 to March 21, 2019).

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, the regulations were neither finalized nor implemented, and therefore the investigative leave provision could not be applied by EPA. *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 agency failed to do, so EPA's actions were not enforceable). Accordingly, Ms. Wooden-Aguilar had no authority to place Dr. Etzel on investigative leave.

On October 18, 2018, Dr. Etzel, through counsel, notified Ms. Wooden-Aguilar that investigative leave status was improper because the regulations had not been promulgated, and requested that the leave designation be withdrawn immediately. Neither Ms. Wooden-Aguilar nor EPA counsel responded to the request that Dr. Etzel be taken off investigative leave that was not legally authorized, but Ms. Wooden-Aguilar made clear in future emails that Dr. Etzel remained on investigative leave. Even if the statute, 5 U.S.C. § 6329b(b) were in effect then, EPA would have violated it by leaving Dr. Etzel on investigative leave well past the 30-day investigative leave period that the statute authorized. This is further evidence of improper retaliation against her.

2) Was EPA's ten percent reduction of Appellant's pay illegal?

Because the SES regulations require that an employee who is removed from the SES for performance reasons receive the rate of pay currently in effect immediately before removal from the SES, 5 C.F.R. 359.705(3), Dr. Etzel should have received the same rate of pay in her new GS-15 position as she had been receiving in her SES position before demotion. EPA violated and circumvented this requirement by extending Dr. Etzel's SES detail even after it had decided to demote her to a GS-15, and then reducing her pay by 10% under SES regulations, so that the rate of pay that transferred over to her GS-15 position would be 10% lower. This "end run" around the regulations was highly irregular, and in fact illegal. It was done to further punish Dr. Etzel for her protected disclosures. This matter is fully addressed in the pending Motion to Rule on Order to Show Cause Regarding Ten Percent Pay Reduction, filed on April 28, 2021. Tab 19. The

inescapable conclusion from that motion and the undisputed facts cited in it provide further evidence of improper retaliation by the agency.

E. APPELLANT'S WITNESSES

In addition to herself, Appellant plans to call seven hearing witnesses listed below in alphabetical order. None are related to her. The current EPA staff among these are: Ms. Berger, Dr. Hughes, Ms. Nagle, and Ms. Wooden-Aguilar. See also the Motion for Issuance of Hearing Subpoenas and Other Witness Assistance filed herewith. Appellant reserves the right to seek leave to call other witnesses. Dr. Etzel herself will testify regarding all matters in this case, including her protected activities and the retaliatory personnel actions taken against her and all surrounding circumstances. Her testimony will tend to prove that she was the victim of whistleblower retaliation with regard to all of the personnel actions accepted by Administrative Judge Weiss.

Summaries of Expected Testimony:

Catherine Allen, former EPA contractor: (NOTE: she will need to be served with a hearing subpoena for Appellant's case-in-chief unless the witness and parties make some other joint arrangement.) She has knowledge of the "climate assessment" of the Program Implementation and Coordination Division (PICD), and later the Regulatory Support and Science Policy Division (RSSPD) and immediate office in the Office of Children's Health Protection, directed by Appellant. Ms. Allen conducted that assessment in 2017 and 2018 and it was referenced as a reason for the unsatisfactory Performance Evaluation of Appellant by Ms. Wooden-Aguilar, although it lacked support for Ms. Wooden-Aguilar's allegations. Ms. Allen is expected to elaborate on Dr. Etzel making substantial strides to improve the functioning of the Office of Children's Health Protection and on Ms. Allen's reluctance to provide an additional memo focusing on Dr. Etzel's leadership several months after her work on the climate assessment had been completed, and to provide EPA with the "360" assessment of Dr. Etzel, despite her promise to Dr. Etzel that it would remain confidential. She is expected to testify consistent with her deposition taken by Appellant on August 31, 2020. She may testify as to other related matters.

Ms. Allen's testimony will tend to prove that Dr. Etzel's lowered performance evaluation, demotion and pay reduction were not independently justified and were retaliatory.

Reginald Allen, former Acting Deputy Chief of Staff, Office of the Administrator, EPA: (NOTE: he will need an Order from Judge Alexander directing his new agency that he should testify.) (Currently Associate Administrator, United States Department of Transportation, Federal Transit Administration, <https://www.transit.dot.gov/about/officials/biographies/reginald-e-allen>.) It

should be noted that Mr. Allen was a reluctant witness. Appellant's counsel first tried to contact him in December of 2020 because that was when they first learned he might have relevant information concerning Dr. Etzel's performance and the reasons for the actions taken against her by Helena Wooden-Aguilar. They unsuccessfully tried in December of 2020 and again in February 2021 to reach Mr. Allen, but he did not contact them back by telephone until April 19, 2021, after their third attempt.

Mr. Allen, a retired Army colonel, joined EPA in 2015, shortly after Dr. Etzel. He served as Director of the Office of Administrative and Executive Services in the Office of the EPA Administrator, and was promoted to the position of Acting Deputy Chief of Staff in 2017. He worked with Appellant extensively during 2017-18 and when he served as Deputy Chief of Staff he was Dr. Etzel's supervisor. He thought Dr. Etzel was very competent and a great "ambassador" for children's health nationally and internationally. As such, he thought she was the perfect person to lead the Office of Children's Health Protection. He never formed an impression that she was unable to manage the Office, rather, to his knowledge, she tackled the pre-existing problems in the Office appropriately. Mr. Allen formed the opinion that the deciding official in Dr. Etzel's personnel matters, Helena Wooden-Aguilar, was not qualified to be in her position and did not behave objectively when she replaced him as the Deputy Chief of Staff for EPA in late 2017. Specifically, Mr. Allen believed that the only reason Ms. Wooden-Aguilar was brought into that position was because she got close to Millan Hupp, a close confidant of former EPA Administrator Scott Pruitt, and EPA upper management became convinced that Ms. Wooden-Aguilar would be willing to carry out Mr. Pruitt's wishes, which were to clear the agency of any leadership officials who did not fit the ideology and support the decisions of the Agency's top leadership, including the actions that ultimately led to Mr. Pruitt's and Ms. Hupp's resignations in the summer of 2018 due to ethics scandals. Mr. Allen, who was forced out in early 2018, and Dr. Etzel and others were forced out of EPA's leadership by Ms. Wooden-Aguilar because their actions were perceived as disloyal to top EPA leadership, and not for legitimate reasons concerning their performance.

Based on his extensive experience in leadership and management, Mr. Allen found Ms. Wooden-Aguilar's approach to him was vindictive and believes she also treated Dr. Etzel poorly. Mr. Allen may also testify to other matters related to Dr. Etzel and his interactions with her and his interactions with other EPA officials concerning her.

Mr. Allen's testimony will tend to prove that Dr. Etzel's placement on administrative leave, lowered performance evaluation, demotion and pay reduction were not independently justified and were retaliatory.

Douglas Benevento, former EPA Associate Deputy Administrator: (NOTE: he will need to be served with a hearing subpoena for Appellant's case-in-chief unless the witness and parties make some other joint arrangement.) He has knowledge of his consideration of and decision on Appellant's request for reconsideration of her ten percent pay reduction and the surrounding circumstances of EPA's consideration of her disclosure of the legal defects in the pay reduction. He is expected to testify consistent with his deposition taken by Appellant on July 23, 2020. He may testify as to other related matters.

His testimony is expected to confirm numerous underlying facts that prove that the pay reduction was illegal.

Martha Berger, Senior Policy Analyst, EPA Office of Children's Health Protection. She worked with Appellant the entire time that Appellant was at the Office of Children's Health Protection. She thought Dr. Etzel was competent, very qualified, and a good leader. Ms. Berger had worked in Federal agencies for 25 years and it was a complete shock to her that Dr. Etzel was demoted the way that she was. She saw no warning signs.

Ms. Berger recalls an unusual incident regarding Helena Wooden-Aguilar shedding light on her motivation regarding Appellant. Ms. Wooden-Aguilar had assigned an attorney to do an investigation regarding a 360 Degree evaluation of Dr. Etzel by superiors, peers, and subordinates. In that process Ms. Berger had declined to do an interview with the investigator because she had not actually participated in the 360 Degree evaluation. One night at home she got a call from Ms. Wooden-Aguilar strongly questioning her as to why she was not doing the interview and in essence compelling Ms. Berger to do the interview with the investigator of Dr. Etzel. Ms. Berger may also testify to other matters related to Dr. Etzel.

Ms. Berger's testimony will tend to prove that Dr. Etzel's poor performance evaluation, demotion and pay reduction were not independently justified and were retaliatory.

Hayley Hughes, then National Lead Coordinator, EPA: She has knowledge of Appellant's disclosures concerning EPA's failure to respond to a July 2018 letter from two U.S. Senators requesting information on the status of the Federal Lead Strategy. Appellant's concerns about the delay in the response were disclosed to her. She also has knowledge about the development of the Federal Lead Strategy, her interactions with Appellant related to it, and Appellant's efforts to expedite it. She has other knowledge related to facts relied on by Helena Wooden-Aguilar in her November 8, 2018, performance review of the Appellant. For example, certain interactions that Ms. Wooden-Aguilar characterized as key indicators of poor leadership by Dr. Etzel were characterized by her as "not unusual" and just the "normal course of business" in a bureaucracy. She is expected to testify consistent with her deposition taken by Appellant on July 23, 2020. She may testify as to other related matters.

Dr. Hughes' testimony will tend to prove that Dr. Etzel's poor performance evaluation, demotion and pay reduction were not independently justified and were retaliatory.

Deborah Nagle, Director of the EPA Office of Science and Technology. Ms. Nagle was Dr. Etzel's supervisor when she was first transferred to the Office of Water. She was aware in 2019 that Dr. Etzel had made whistleblowing disclosures. She was further aware as Dr. Etzel's supervisor that she was a competent scientist and successfully completed the assignments given to her, with high quality. She was aware of Dr. Etzel being assigned to work in a cubicle, which was unknown for any SES official, and that for an extended period there was not an adequate number of work assignments for her. Ms. Nagle will testify that she was told by her Deputy Assistant Administrator that Dr. Etzel should not be given any assignments related to lead contamination, which was one of her areas of long-standing special expertise. Ms. Nagle is expected to testify

consistent with her deposition taken by Appellant on August 18, 2020. She may testify as to other related matters.

Ms. Nagle's testimony will tend to prove that Dr. Etzel's placement and treatment in the Office of Water were retaliatory.

Helena Wooden-Aguilar, then Acting Deputy Chief of Staff, Office of the Administrator, EPA: She has knowledge of Appellant's protected disclosures as well as her own retaliatory activities against the Appellant including:

- her September 25, 2018, placement of Appellant on administrative and then investigative leave,
- the repeated EPA delays in releasing the Federal Lead Strategy and Appellant's efforts to expedite it,
- the fact that Appellant and others drafted a response to the July 2018 letter from two U.S. Senators on the Federal Lead Strategy, which draft she received, but it was not acted upon in a timely fashion,
- her delay and refusal to grant Appellant's request for annual leave to speak at the World Health Organization, resulting in her placing Appellant into AWOL status on October 22, 2018,
- her November 8, 2018, performance review of Appellant with "1" in one of the five critical elements,
- her resulting March 21, 2019, removal of Appellant from the SES, and
- the genesis and legal failures as disclosed by Appellant surrounding her ten percent pay reduction.

Ms. Wooden-Aguilar also has knowledge of the reasons behind her own promotion to Acting Deputy Chief of Staff by former Administrator Scott Pruitt. She also has knowledge of how Mr. Pruitt and his confidants relied on her to "clean house" of EPA leadership officials, including the Appellant, not deemed sufficiently loyal or aligned with EPA top management. She is expected to testify consistent with her deposition taken by Appellant on July 28, 2020. She may testify as to other related matters.

Ms. Wooden-Aguilar's testimony will tend to prove that all of the personnel actions accepted by Judge Weiss were retaliation for Dr. Etzel's protected disclosures.

F. APPELLANT'S EXHIBITS - A through MMM.

These 64 exhibits do not include the Agency File or the deposition transcripts and exhibits. They are in chronological order through Exh. NN, then they become non-chronological. **Additionally Appellant requests that both parties be permitted to add to their exhibits the deposition transcripts and all of the deposition exhibits for witnesses that are approved by Judge Alexander to testify at the hearing.** This will be the most feasible way to present the depositions to each witness for use in their direct or cross-examinations.

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Exh. GG - email from Helena Wooden-Aguilar to Etzel, May 9, 2019

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Exh. II - letter to Andrew Wheeler from Bernabei and Kabat law firm, May 24, 2019

Exh. JJ - request for personnel action, reinstatement to competitive service, May 26th, 2019

Exh. KK - email from Helena Wooden-Aguilar to Etzel, May 30, 2019

Exh. LL – Performance Appraisal for Etzel, July 17, 2019

Exh. MM – Douglas Benevento, Decision on Reconsideration Request, November 30, 2019

Exh. NN – Bernabei and Kabat billing invoices for Etzel, November 17, 2018, through August 5, 2019 (portions of Descriptions are redacted to preserve attorney/client privilege)

Exh. OO - invitation from the American Academy of Pediatrics for Etzel trip to Orlando on November. 5, 2018

Exh. PP - Federal Register Notice re Helena Wooden-Aguilar on SES Review Board, November 13, 2018

Exh. QQ - 360 Feedback Comment summaries for Dr. Etzel

Exh. RR - series of Michael Ellement emails re Etzel leave request for Orlando trip, November 2018

Exh. SS – two Helena Wooden-Aguilar emails re Etzel’s investigative leave, December 19 and 28, 2018

Exh. TT – Academic Pediatric Association Public Policy and Advocacy award notice letter to Etzel, April 2, 2021

Exh. UU - EPA Order re Administrative Grievance System, April 2, 2001, rev.’d July 20, 2018

Exh. VV - outline – Federal Strategy to Address Lead Hazards in Children’s Environments, March 9, 2017

Exh. WW - email from Etzel to self recounting meeting with Wooden-Aguilar re need for clarification of roles, April 13, 2018

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Exh. YY - email to Etzel from Twanna Lesperance announcing Special Act Cash Award from Wooden-Aguilar, June 19, 2018

Exh. ZZ - Notification of EPA Personnel Action, cash award to Etzel, August 20, 2018

Exh. AAA - Timeline for Developing and Completing the Federal Lead Strategy (FLS), September 5, 2018

Exh. BBB - email from Etzel to Hayley Hughes with attachment “Completing the Federal Lead Strategy,” September 6, 2018

Exh. CCC - email from Hayley Hughes to Etzel acknowledging receipt of plans to complete Federal Lead Strategy, Sept 11, 2018

Exh. DDD – email from Wooden-Aguilar to Firestone and Etzel, September 19, 2018

Exh. EEE – article on interview of Etzel on CBS Morning News, October 15, 2018

Exh. FFF – screenshot indicating Etzel’s CNN interview with Jake Tapper, October 16, 2018

Exh. GGG - invitation from World Health Organization to Etzel to education meeting, October 19, 2018

Exh. HHH - invitation from American Public Health Association to Etzel to speak at annual meeting, November 5, 2018

Exh. III - email from Wooden-Aguilar to Etzel on providing investigative report, April 18, 2019

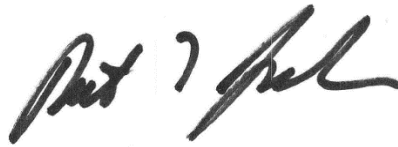
Exh. JJJ - follow-up email from Wooden-Aguilar to Etzel on providing investigative report, April 29, 2019 [note: next letter combination is skipped]

Exh. LLL – Ruth Etzel CV

Exh. MMM – The OCHP FY-19 Strategic Plan, September 24, 2018

Respectfully submitted,

Dated this 30th day of April, 2020.



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