



U.S. OFFICE OF SPECIAL COUNSEL

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The Special Counsel

February 27, 2003

The President
The White House
Washington, D.C. 20500

Re: OSC File No. DI-01-1150

Dear Mr. President:

In accordance with 5 U.S.C. § 1213(e)(3), I am transmitting a report from the Honorable Linda J. Fisher, Deputy Administrator of the Environmental Protection Agency (EPA), sent to me on behalf of the Honorable Christine Todd Whitman pursuant to 5 U.S.C. § 1213(c) and (d). The report sets forth the findings and conclusions of the Administrator's review of disclosures of information allegedly evidencing violations of law, rule or regulation, abuses of authority, and substantial and specific dangers to the public health and safety, arising out of actions by EPA officials at the Flura Chemical Removal Action Site (Flura) in Newport, Tennessee.

The whistleblower, Mr. Christopher Militscher, is an On-Scene Coordinator who has worked for EPA for over 19 years. He has extensive experience in the technical and legal issues surrounding the clean up of hazardous waste sites. Mr. Militscher consented to the release of his name.

Mr. Militscher's allegations were referred for investigation to Administrator Whitman on June 27, 2001. EPA conducted an investigation and sent a report to this office on November 9, 2001. Additional information was received on September 30, 2002 and on December 10, 2002. Mr. Militscher declined to comment on the agency's report.

We have carefully examined the original disclosures and reviewed the agency's response. Pursuant to 5 U.S.C. § 1213(e)(2), I have determined that the findings in the agency's report include all of the information required by statute and appear reasonable.

The Whistleblower's Disclosures

As an On-Scene Coordinator, Mr. Militscher supervised EPA sites and served as the technical lead for clean-up operations. He directed EPA contractors, ensured that the sites and clean-up operations complied with the Occupational Health and Safety Act as well as EPA and Department of Transportation (DOT) regulations. He also directed chemical sampling,

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responded to hazardous materials spills or releases, enforced the site-specific safety plans and conducted outreach activities to local and state groups.

The Flura site, the subject of Mr. Militscher's disclosures, is under the jurisdiction of the Emergency Response and Removal Branch, EPA Region IV, Atlanta, Georgia. Flura is a large, complex site of over 34 acres with thousands of badly-deteriorated chemicals. An EPA assessment concluded that Flura constituted an imminent threat to the public health, welfare and environment due to the potential release of hazardous substances. Accordingly, in March 2000, EPA issued a cease and desist order to Flura's owner under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6901 *et. seq.* in March 2000. In April 2000, EPA took *de facto* ownership of the facility and the chemical substances, and hazardous wastes at the site. EPA then began an emergency response and removal action. EPA identified and sampled the substances and arranged for recycling to the manufacturer where appropriate and consistent with RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9621. It also treated and disposed of hazardous and non-hazardous substances and waste.

Mr. Militscher alleged that Dean Ullock, the present lead On-Scene Coordinator at the Flura site, acted in a reckless manner in the management and handling of hazardous substances and materials designated as waste under the CERCLA. He also alleged that Mr. Ullock violated laws, rules and regulations governing the treatment and transportation of such substances. In addition, Mr. Militscher alleged that Mr. Ullock abused his authority, that his actions created a substantial and specific danger to the health and safety of individuals working at the Flura site and to the general public, and that he is unqualified to hold the position of On-Scene Coordinator.

Mr. Militscher was an On-Scene Coordinator at Flura from April 2000 to mid-March 2001. During that time, he worked with Michael Taylor, the previous Lead On-Scene Coordinator. He also served as the Lead On-Scene Coordinator in Mr. Taylor's absence. After Mr. Taylor's reassignment in October 2000, EPA appointed Mr. Ullock as the Lead On-Scene Coordinator in January 2001. Due to Mr. Militscher's expertise, his supervisor requested that he continue at Flura. As requested, Mr. Militscher continued at the site as Mr. Ullock's mentor on technical, financial and regulatory issues until mid-March 2001.

Upon receipt of the OSC's letter of June 27, 2001, the EPA Office of the Inspector General conducted an investigation. The investigation involved staff members from EPA's Office of Investigations and Engineering and Science and the Department of Transportation Office of the Inspector General. The investigation included a review of EPA's records and response activity at the Flura site along with interviews of witnesses identified by Mr. Militscher from EPA, the U.S. Coast Guard, and EPA contractor personnel. One of Mr. Militscher's allegations was partially substantiated. Mr. Militscher's allegations and EPA's report are described more fully below.

1. Violations of Safety Regulations at the Flura Facility

Mr. Militscher alleged that, on three occasions during February of 2001, Mr. Ullock violated the Flura Chemical Site Health and Safety Plan (Safety Plan) issued pursuant to 29 C.F.R. § 1910.120, as well as provisions of the Code of Federal Regulations, 40 C.F.R. §§ 300.150 and 300.400. He also alleged that Mr. Ullock engaged in reckless or negligent behavior.

The first incident occurred on February 7, 2001, while several employees were consolidating chemicals in the main building. Mr. Militscher asked Mr. Ullock and Dave Andrews, a contractor, to transport 20 containers from Laboratory No. 10 to the former lunchroom for further characterization. When they did not return after approximately 15 minutes, Mr. Militscher gave the junior On-Scene Coordinator a radio in case of an emergency and left the area to find Mr. Ullock and Mr. Andrews.

According to Mr. Militscher, he found Mr. Ullock and Mr. Andrews in Laboratory No. 7 moving a very large, heavy, glass container in a wheelbarrow. The 100-pound container was labeled perchloro methyl mercaptan, described as a malodorous, toxic, fuming liquid. Mr. Militscher stated that he was alarmed that the container was being moved, unsecured, in a wheelbarrow. According to Mr. Militscher, in order to comply with proper safety procedures, toxic and hazardous substances like perchloro methyl mercaptan must generally be firmly secured and stable when moved.

Mr. Militscher assisted Mr. Ullock and Mr. Andrews to ensure that a spill did not occur. Pursuant to the Safety Plan, Mr. Militscher notified other on-site personnel by radio of the unplanned and unscheduled movement of perchloro methyl mercaptan. According to Mr. Militscher, the failure to properly secure the container created a danger to the public health and safety because a spill would have required evacuation of the site, the nearby community, and several miles downwind from the facility.

EPA's report notes that the Safety Plan is a general or "boilerplate" document and does not regulate specific actions such as the movement of chemical containers from one site to another. Mr. Andrews and Mr. Ullock stated that they moved the container in a secure manner. They noted that the wheelbarrow was lined with an absorbent material and stacked in Styrofoam. According to EPA, these procedures are appropriate for moving containers containing hazardous materials and consistent with the Occupational Safety and Health Guidance Manual for Hazardous Waste Site Activities which was incorporated into the Flura safety plan by reference. Moreover, Mr. Andrews and Mr. Ullock moved the container together to ensure that no spill occurred.

During his interview, Mr. Andrews stated that perchloro methyl percaptan was not harmful to humans. Upon further inquiry by OSC, EPA noted that Mr. Andrews' statement was incorrect. EPA explained that perchloro methyl percaptan is toxic and considered "immediately dangerous" to human health at an exposure level of 10 parts per million. No information was provided on the toxicity of the container that was moved. Given this information, EPA did not substantiate the allegation that safety procedures or regulations were violated or that a danger to public health and safety had been created.

The second incident occurred on February 20, 2001. Mr. Militscher was mentoring Mr. Ullock and three junior On-Scene Coordinators. Mr. Ullock and Mr. Andrews were bulking inorganic solids in Laboratory No. 22. Mr. Militscher stated that he instructed them to proceed with caution and to verify the chemical compounds before bulking them into 55-gallon drums. He stated that sampling data and other chemical references must be used to identify the chemicals and determine how they should be bulked or treated.

Mr. Militscher left Laboratory No. 2 to oversee additional bulking operations. He periodically returned to check on Mr. Ullock and Mr. Andrews. He cautioned them repeatedly to advise him if they were unsure of the identity of any of the compounds. Mr. Ullock and Mr. Andrews assured him that the bulking was being conducted properly. Mr. Andrews later informed Mr. Militscher that a mistake might have been made in the bulking process. According to Mr. Militscher, Mr. Andrews stated that he had forgotten that barium was a hazardous waste under RCRA.

The RCRA regulations, at 40 C.F.R. § 260 et seq., prohibit mixing hazardous substances, such as barium, with non-hazardous materials, for treatment or disposal. Mr. Militscher learned from Mr. Ullock and Mr. Andrews that six one-pound containers of hazardous waste had been improperly bulked for disposal and added to a drum of non-hazardous waste. Consequently, the entire drum was contaminated increasing the amount of hazardous waste from 6 pounds to 500 pounds.

Mr. Militscher's allegation regarding this improper bulking was substantiated in part. According to EPA's report, Mr. Andrews admitted his mistake mixing the six containers of hazardous waste with non-hazardous materials. Mr. Ullock was not present when this occurred. The report finds that Mr. Andrews' actions resulted in additional waste and caused EPA to incur additional charges to treat the waste. Accordingly, the report concluded, the error was made by a contractor. Further, there is no evidence that it was the result of reckless conduct by Mr. Ullock.

On February 22, 2001, a third incident occurred involving the chemical treatment of five pesticide/herbicides and toxic compounds.¹ Mr. Militscher held a lengthy safety and instruction meeting on the procedures for treating the chemicals, including explanations of their chemistry, physical states, colors, how to treat the chemicals, and the tasks assigned to each individual. Mr. Militscher explained in detail why only five chemicals were being treated. He also demonstrated the treatment and explained why only hydrogen peroxide was used in the process.

Mr. Militscher left the area briefly to retrieve some additional testing materials. Upon his return, he observed Mr. Ullock pouring a substance of bright, orange crystals into the drums. Mr. Militscher was alarmed because none of the chemicals scheduled for treatment had these characteristics. He asked Mr. Ullock to identify the orange compound. Before Mr. Militscher could test the substance for identification, the drum exploded, spewing a heavy brown liquid. No one was hurt in the incident, but the liquid spewed within one foot of Mr. Militscher's face.

After the explosion when Mr. Militscher asked Mr. Ullock what the orange compound was, Mr. Ullock reportedly responded that it might be "dichromate." The compound was later identified as potassium dichromate (a rocket fuel). Mr. Ullock also added lead chloride, a toxic substance, which was not scheduled for treatment at that time.

According to Mr. Militscher, despite his instruction and repeated warnings, Mr. Ullock had not recognized the chemical as different from those being treated, had not taken steps to identify it, and had created a dangerous situation for the employees. The cleanup caused a partial evacuation of on-site personnel and delayed other planned site operations.

EPA's report notes that during his interview, Mr. Ullock admitted that he poured potassium dichromate, a rocket fuel, into a drum thereby causing a chemical reaction with the drum's contents that spewed chemical materials in the immediate area. He stated that the chemical treatment of pesticides was done in the same room that had been used for solidifying metal compounds the previous day. During the process of staging the pesticides for treatment, some of the metal compounds were apparently accidentally included with the pesticides. According to Mr. Ullock, no one checked the identification of the staged chemicals. He stated that Mr. Militscher directed the pesticide treatment process and instructed him to pour the pesticide compounds into the drums. He noted that other personnel were tasked with handing him chemicals that he was to empty into the drums. One of the chemicals handed to him was the potassium dichromate which produced the chemical reaction and sprayed some of the personnel.

¹The compounds involved were hexamethylphosphoramide, benzo(a)pyrene, sodium fluoroacetate, paraformaldehyde and malathion.

EPA's report noted that all personnel were wearing protective clothing; the area was contaminated and cleanup was required. The report concluded that a number of factors contributed to this incident and that there was no evidence that it was attributable to reckless conduct on Mr. Ullock's part.

2. Violations of the Off-Site Rule, 40 C.F.R. § 300.440

The goal of the Off-Site Rule is to prevent substances considered waste under CERCLA, from contributing to present or future environmental problems. To that end, wastes from CERCLA-funded response actions may only be shipped to and handled by waste management facilities that operate in compliance with RCRA or applicable federal and state requirements. Mr. Militscher alleged that Mr. Ullock violated the Off-Site Rule and that, as a result hazardous wastes were transferred to facilities that are not certified by EPA to dispose safely of them.

Mr. Militscher alleged that in April 2001, Mr. Ullock ordered six cylinders of fluorine, a CERCLA hazardous waste, to be shipped to the Texla Gas Company (Texla) facility in Sulphur, Louisiana. The fluorine was sold to Flura by its manufacturer, the Air Products Company (Air Products). BOC Gas Group (BOC) later acquired Air Products; Texla is a BOC contractor. Mr. Militscher stated that neither BOC nor Texla were approved by EPA for the receipt and treatment of CERCLA hazardous wastes.

Mr. Militscher alleged that Mr. Ullock improperly characterized the fluorine cylinders (and possibly other hazardous materials) as recyclable in order to avoid having to comply with the regulations on treatment and disposal of hazardous materials. According to Mr. Militscher, at least two criteria must be met in order to characterize waste materials, such as fluorine, as recyclable, and return them to the manufacturer for re-use: 1) the manufacturer must be willing to take the material and must have the capability to handle it, and 2) the product must have some value.

Mr. Militscher alleged that neither condition was met in this instance and that the fluorine cylinders were considered waste by EPA. In fact, prior to Mr. Ullock's intervention, the fluorine gas was scheduled for treatment as waste at Flura.

In addition, Mr. Militscher alleged that BOC was not willing to take the cylinders back and had no use for them. He stated that during discussions in March and April 2001, Mr. Ullock pressured BOC to accept the fluorine cylinders as recyclable items. Mr. Militscher alleged that Mr. Ullock warned BOC that if it did not take the fluorine the company would be named as a potentially responsible party in a legal action brought by EPA for recovery of the cost of treating and disposing of the fluorine.

BOC is not authorized to handle hazardous substances, such as fluorine, under the Off-Site Rule. Thus, according to Mr. Militscher, Mr. Ullock gave a very hazardous substance to a company that did not have a use for it and had not been approved to dispose of it.

Similarly, Mr. Militscher alleged that Mr. Ullock planned to ship 29 large cylinders of hydrogen fluoride, a compressed gas, to Spectra Gases (Spectra) in New Jersey. Hydrogen fluoride is also a CERCLA hazardous substance, and according to Mr. Militscher, Spectra was not an authorized treatment or disposal facility. Mr. Militscher alleged that the cylinders did not meet the criteria for recyclable materials and that this shipment also violated the Off-Site Rule.

EPA's report notes that on April 1, 2001, Mr. Ullock wrote a memorandum to the file on the issue of Off-Site shipment of recyclable materials found at Flura. The memorandum included a justification for shipping the fluorine and hydrogen fluorine cylinders to other facilities. The justification cites the safety concerns presented by handling these gases at the facility for both the on-site personnel and the surrounding community, and states that off-site treatment would save approximately \$300,000. The memorandum also stated that the condition of the cylinders had been reviewed and EPA attorneys and DOT had been consulted regarding the transportation and disposal of the materials.

Further, the report stated that in cases, such as this one, where the original owner of the cylinders can be identified in a clean-up/removal action, the cylinders should be returned to the original owner. According to the report, because the cylinders were returned to BOC and Spectra, the original owners, the Off-Site Rule does not apply. EPA cited its interviews with Mr. Ullock and EPA contractors George Mick of CMC Corporation and Ray Willis of EarthTech as support for this position.

The report also noted that Mr. Ullock and Mr. Militscher disagreed on the proper method for handling the cylinders. Mr. Militscher preferred to treat the cylinders on-site. The agency asserts that Mr. Ullock appears to have taken the requisite steps for returning the cylinders by consulting with and receiving the endorsement of management, legal counsel and technical experts on the proper disposition of the cylinders. The consensus of the EPA personnel with whom Mr. Ullock consulted was that the on-site treatment of fluorine could be dangerous and expensive. Given these factors, returning the cylinders to the original vendor was determined to be the appropriate course of action. Mr. Ullock also sought and received signed agreements from both BOC and Spectra, the recipients of the cylinders, ensuring they would comply with applicable state and federal laws regarding the use of the cylinders and gases they contain.

EPA's report stated that BOC agreed to accept the cylinders and picked them up. BOC personnel inspected the cylinders and sent them to Texla for recycling. In addition, BOC personnel interviewed during the investigation deny being pressured, as Mr. Militscher alleged,

to accept receipt of the cylinders. Similarly, the report finds that the proposed shipment of hydrogen fluorine cylinders to the original vendor, Spectra Gases, appears appropriate. Mr. George Mick, an employee of CMC Construction Company responsible for contract work at Flura, stated that there was no indication that Spectra officials were pressured into accepting receipt of the cylinders.

With respect to the allegation that the condition of the cylinders was not properly evaluated prior to shipment, the report stated that Mr. Ullock relied on technical advice from EPA environmental scientists in pursuing the recycling option. The report also pointed out that Mr. Ullock appeared to take the necessary steps to evaluate the condition of the cylinders, identify their manufacturers, and determine if the manufacturers would accept them. The examination of the six fluorine cylinders indicated that they were in good condition, properly labeled and had the correct date information. Based on the information summarized above, EPA did not substantiate the allegations.

3. Violations of Department of Transportation Regulations

Mr. Militscher alleged that Mr. Ullock violated DOT regulations governing the shipment of hazardous materials and or toxic substances. These regulations, which set forth specific guidelines for the shipment of hazardous substances, are included in 49 C.F.R. §§ 173.301, 173.302 and 40 C.F.R. § 263.

The reference material provided by Mr. Militscher on fluorine gas, stated that it is extremely toxic, corrosive and reactive.² As noted above, Mr. Ullock approved the shipment of six cylinders of fluorine gas in early April 2001, to Texla, the BOC contractor. Mr. Militscher alleged that the fluorine was shipped from the Flura facility in Newport, Tennessee, to the Texla facility in Sulphur, Louisiana, via truck on the interstate highway system under a straight Bill of Lading. The shipment traveled several hundred miles from Newport, Tennessee, to Knoxville, Tennessee, from Knoxville, Tennessee, to Chattanooga, Tennessee and then from Chattanooga, Tennessee to Sulphur, Louisiana.

²In the event of a leak or a spill, the materials note that an area approximately .4-1.7 miles would need to be evacuated. Fluorine can cause severe burns upon contact or if inhaled. Exposure to elevated concentrations of this gas may lead to conditions such as blindness or pulmonary hemorrhage; fatal systemic reactions are also possible. The byproducts of fluorine combustion are toxic, but water and other traditional firefighting measures cannot extinguish an explosion generated by fluorine. In fact, Mr. Militscher noted that the Newport, Tennessee, fire department would not respond to the Flura site in the event of a fluorine spill because of the danger posed by this and other chemicals present. EPA has been required to contract for its "independent" fire-fighting capabilities.

Mr. Militscher alleged that the fluorine was not packaged or shipped in accordance with the regulations for the shipment of hazardous substances, nor was it specifically listed as a hazardous substance on the Bill of Lading. He alleged that appropriate safety precautions were not taken, such as overpacking the cylinders with helium blankets, and that it was unclear whether the truck drivers knew the cargo was hazardous, whether the fluorine was being stored at Texla indefinitely, whether or not it would be properly treated, or whether it would be transported to yet another facility.

Mr. Militscher's second allegation involved the condition of cylinders prior to shipment. Under 40 C.F.R. § 173.34, the transportation regulations require, among other things, that the pressure of cylinders be measured, that cylinders be properly marked and that records be kept of who measured the cylindrical pressure and when the measurement was taken. The regulations also require that the pressure on the cylinders be retested periodically and that visual inspections of the cylinders be made to ensure no leaking is occurring.

In this case, Mr. Militscher stated that some of the hydrostatic test dates on the fluorine cylinders had expired and were due for retesting.³ He also alleged that the cylinders were not sampled to confirm their contents. He stated that the Flura site did not have the equipment necessary to test the pressure in the cylinders so no regular testing took place. As a result, no determination was made as to whether the fluorine cylinders were properly pressurized for shipment prior to the actual shipment. Thus, shipping cylinders with expired hydrostatic dates and failing to test cylinder pressure, appeared to be another way in which EPA officials were violating laws, rules and regulations and creating a substantial and specific danger to public health and safety.

Mr. Militscher also alleged that Mr. Ullock was planning to ship 29 cylinders of the compressed gas, hydrogen fluoride. The reference material on hydrogen fluoride states that it is a toxic, corrosive, non-flammable liquefied gas.⁴ It was Mr. Militscher's belief that as many as two-thirds of those cylinders were beyond the hydrostatic test date and that Mr. Ullock intended to transport the hydrogen fluoride to Spectra Gases in a manner that violated DOT regulations and caused a substantial and specific danger to public health and safety.

³The hydrostatic test date is the last date the valve was inspected to ensure valve safety and cylinder integrity for movement or shipping.

⁴Skin contact can lead to severe burns, inhalation can cause inflammation of the lungs or circulatory collapse, ingestion can cause burns and systemic effects that can be fatal. If hydrogen fluoride is released or spilled, the affected area must be evacuated.

Finally, Mr. Militsher alleged that Mr. Ullock has not followed EPA's approved scope of work contained in the two action memoranda for this site. He contended that the cylinders in question as well as other cylinders on-site are and can be safely and efficiently treated at Flura.

EPA's report identified three regulations governing the shipment of these materials: 1) 49 C.F.R. § 173.34(e)1(ii) requiring that cylinders being transported in commerce be inspected and retested, 2) 49 C.F.R. § 173.40(d) requiring that cylinders containing hazardous substances must be overpacked in a box if the cylinder has a wall thickness of less than 2.03 mm and if it does not have fitted valve protection, and 3) 49 C.F.R. § 301(c) prohibiting a container for which a periodic retest is due from being charged and shipped until the retest has been conducted. Gary Crowson, Production Manager and Environmental Response Team Leader for BOC Gases who was interviewed as part of this investigation, stated that because the cylinders were thicker than 2.03 mm and contained a fitted valve protection, it was not necessary to overpack them in a box for shipping.

EPA provided copies of the Straight Bill of Lading which show that the substances were identified as hazardous. Also included was a copy of the BOC Hazardous Materials Shipping Manifest signed by the driver indicating that he was fully aware of the contents of the truck. In addition, the report noted that placards on the trucks indicated the cargo was hazardous.

The report stated the cylinders were otherwise in good condition, properly labeled, stenciled, and dated. The report also described the actions that Mr. Ullock took in determining whether the cylinders could be transported to other facilities. Mr. Ullock stated that he contacted DOT and requested an interpretation of the regulations governing the shipment of hazardous substances. The report stated that Ben Supko, DOT Information Specialist for Hazardous Materials, confirmed that DOT advised Mr. Ullock on the regulations. Specifically, DOT advised that transportation of hazardous substances in cylinders with expired inspection and testing dates was permissible as long as the contents would not be offered in commerce.

Based on this information, the report concluded that the shipment of the fluorine cylinders complied with DOT transportation regulations. While the cylinders could not be offered for commerce with the expired hydrostatic test dates it was permissible to ship them to the owner for recycling. The owner is then responsible for retesting the cylinders and updating the hydrostatic test dates. The cylinders can then be offered into commerce and resold after they have been retested and refilled. Given the information gathered during the investigation, the allegation was not substantiated.

Conclusion

Based on the representations made in the report and as stated above, I have determined, pursuant to 5 U.S.C. § 1213(e)(2), that the findings in the agency's report include all of the information required by statute and appear to be reasonable.

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As required by 5 U.S.C. § 1213(e)(3), a copy of the report has been sent to the Chairmen of the Senate Committee on Environment and Public Works and the House Committee on Resources. We have also filed a copy of the report in our public file and closed the matter.

Respectfully,

A handwritten signature in black ink, appearing to read "Elaine Kaplan", with a stylized flourish at the end.

Elaine Kaplan

Enclosures