

PROVIDING ENVIRONMENTAL WHISTLEBLOWERS WITH TWENTY-FIRST CENTURY PROTECTIONS

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ABSTRACT

This article examines the strengths and weaknesses of the employee protection provisions contained in the major federal environmental statutes and makes recommendations for needed improvements. With these improvements, the United States can realize the benefits that well-protected employees can contribute to public health and environmental protection.

1. Richard Condit is Senior Counsel at the Government Accountability Project (GAP) in Washington, D.C. His practice focuses on whistleblower protection, government and corporate transparency and environmental justice. The author would like to thank his colleagues at GAP who are tirelessly dedicated to the cause of protecting those courageous individuals who come forward to expose corruption and wrong-doing. The author also wishes to thank GAP Staff Attorney Kasey Dunton for the research he prepared in support of portions of this article.

INTRODUCTION

From the early 1970s and into the 1980s, Congress enacted six major federal environmental laws.² They include such landmark legislation as the Clean Water Act (CWA), Clean Air Act (CAA), the Resource Conservation and Recovery Act (RCRA), and the Superfund law.³ These laws are the basis for the environmental protections that exist today, and are responsible for significant overall improvements in the quality of our nation's water, air, and land.⁴ As a result of the passage and implementation of these laws and their corresponding regulatory structures, public health benefits have followed.⁵ Significant research developments regarding the environment and the connections between environmental contaminants and individual's health, particularly children's health, were stimulated by our nation's commitment to clean water, clean air, and the control and cleanup of hazardous waste.⁶

The comprehensive nature of these laws, necessitated by the extent of our nation's environmental problems, made it clear from the start that government regulators would need to not only support, but also frequently push those companies and individuals who control the sources of pollution in order to meet statutory objectives. When a push was needed, often times affected

2. See Toxic Substances Control Act (TSCA), 15 U.S.C. § 2601 (1986) (enacted as Act of 1976); Clean Water Act (CWA), 33 U.S.C. § 1251 (1973), (enacted as Federal Water Pollution Control Act of 1948, amended in 1972 and 1977); Safe Drinking Water Act (SDWA), 42 U.S.C. § 300(f) (1996) (enacted in 1974); Resource Conservation & Recovery Act (RCRA), 42 U.S.C. § 6901 (1984) (enacted in 1976); Clean Air Act (CAA), 42 U.S.C. § 7401 (1973) (enacted as Act of 1970, significantly amended in 1977); Comprehensive Environmental Response, Compensation & Liability Act (CERCLA or Superfund), 42 U.S.C. § 9601 (2002) (originally enacted as Act of 1980).

3. See 15 U.S.C. § 2601; U.S.C. § 1251; 42 U.S.C. § 300(f); 42 U.S.C. § 6901; 33 U.S.C. § 7401; 42 U.S.C. § 9601.

4. See *40 Years of Achievements, 1970-2010*, U.S. ENVTL. PROT. AGENCY, <http://www.epa.gov/40th/achieve.html> (last visited Dec. 8, 2011) (describing how the EPA was established to help reduce existing and prevent future environmental damage); ASPEN INST., EPA 40TH ANNIVERSARY: 10 WAYS EPA HAS STRENGTHENED AMERICA, http://www.aspeninstitute.org/sites/default/files/content/docs/events/EPA_40_Brochure.pdf (last visited Dec. 29, 2010) (recounting how young people today are able to swim in natural waterways without risking their health, when twenty years ago doing so would have posed a major health hazard). See also, William D. Ruckelshaus & Christine Todd Whitman, *A Siege Against the EPA and Environmental Progress*, WASH. POST, Mar. 24, 2011, http://www.washingtonpost.com/opinions/a-siege-against-the-epa-and-environmental-progress/2011/03/23/ABSuyeRB_story.html (last visited November 1, 2011) (explaining the importance of preventing severe budget cuts to the EPA).

5. See Ruckelshaus, *supra* note 4 (noting that by regulating air pollution, the EPA has turned lakes and rivers from public health concerns to resources for drinking water and public recreation).

6. See, e.g., U.S. ENVTL. PROT. AGENCY, OFFICE OF RESEARCH & DEVELOPMENT, RESEARCH PLANS, *available at* <http://www.epa.gov/ord/htm/multi-yearplans.htm> (last visited Dec. 3, 2011) (laying out the EPA's multi-year research plans in the areas of clean air, drinking water, ecosystem services, endocrine disruptors, global change, human health, human health risk assessment, land research, safe pesticides/safe products, and water quality).

residents and environmentally aware organizations were expected to provide it. These environmental laws empowered impacted residents and organizations to bring lawsuits to enforce statutory and regulatory standards and to force the U.S. Environmental Protection Agency (EPA) to follow through on its duties mandated by the laws.⁷ The support needed to bring these lawsuits would, in part, come from employees of companies and organizations who might witness environmental threats or violations. To protect employees who might assist in the enforcement of the environmental laws, Congress included provisions in all six of the major environmental statutes that enabled employees to fight back if they were subjected to retaliation for revealing potential environmental violations.⁸ In theory, the provisions provide sufficient protections for members of the workforce who help enforce environmental standards and encourage employees' participation in efforts to ensure protection of our environment. Employee protection from retaliation is not just intended to cover employees working in environmental cleanup, but also workers such as auto mechanics who store and dispose of solvents; factory workers in facilities that vent contaminants into the air; and employees whose employers have permits to store, dispose of, or release chemicals into the environment.⁹

ENVIRONMENTAL PROTECTION AND FOOD AND WATER CONTAMINATION

For most people, environmental protection pursued through structures established by the major federal environmental statutes and their implementing regulations presents a dizzying array of seemingly esoteric rules and requirements. For each of the federal environmental laws on the books, there are often hundreds of regulations promulgated over a number of years in an effort to address a multitude of situations.¹⁰ Additionally, each state that is given authority to implement the laws may generate another set of complementary statutes with corresponding regulations.¹¹ Looking at the many pages of federal or state regulations governing the protection of our environment, and listening to the army of paid lobbyists and lawyers who argue over the regulations—it is easy to lose sight of what Congress was trying to achieve.

7. See, e.g., RCRA, 42 U.S.C. § 6972 (2006) (allowing private citizens to sue the U.S. government, or any instrument or agency of the government, that is allegedly in violation of RCRA or that is handling hazardous materials in a way that might pose an imminent and substantial danger to health or the environment).

8. See, e.g., RCRA, 42 U.S.C. § 6971 (2006) (providing for the protection of a whistleblowing employee); CAA, 42 U.S.C. § 7622 (2006) (elaborating on the prohibition against discriminating against any whistleblowing employee).

9. See CWA, 33 U.S.C. § 1367 (2006) (protecting a broad array of employees who alert the EPA to violations of the Clean Water Act).

10. See, e.g., 40 C.F.R. § 60–98 (2011) (air), § 104–149 (water), § 240–282 (solid & hazardous wastes), § 300–374 (Superfund), § 700–799 (TSCA).

11. See, e.g., N.Y. COMP. CODES R. & REGS. tit. 6, §§ 190–941 (2011) (regulating projects for water quality improvement, air quality improvement, wetlands restoration, and solid waste recovery and management).

Despite the complexity of environmental regulation, a substantial part of what Congress has tried to achieve by creating and funding major environmental laws through the EPA is to protect and improve the quality of our air and water. Clean air is needed to ensure that each breath we take is not contaminated with unhealthy particulates or toxic chemicals, while clean water is needed for drinking, to support food sources, and for recreation.¹²

It is easy for most of us to see the connection between our health and the ill effects of drinking contaminated water or inhaling dirty air.¹³ But what might be less apparent is the connection between pesticides and herbicides and the health consequences that result from human exposure to, and incidental ingestion of, such pollutants. Even less obvious is the role that toxic air pollutants play in contaminating soil, crops, and domestic animals. For example, the most notable toxic air pollutant is mercury, which may be released from an incinerator or coal-fired power plant in one state, but may end up contaminating the waters

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12. As the EPA has noted in its overview of the importance of water quality criteria: Many types of microscopic plants and animals, such as plankton, water beetles, and insects that live in or on the water, serve as food for small fish. Small fish are eaten by larger fish which, in turn, are consumed by even larger fish. These large fish may ultimately be consumed by humans. All life along the food chain is dependent on the water environment and it is for this reason that the quality of the nation's surface waters must be protected.

Basic Information: Water Quality Criteria, U.S. ENVL PROT. AGENCY, <http://water.epa.gov/scitech/swguidance/standards/criteria/basic.cfm> updated (last visited Dec. 21, 2011).

13. For example, an expert on the deleterious impact of pollution on children's health has opined: "Environmental and occupational exposures have been recognized to be potent causes of human cancer for more than two hundred years. Asbestos, benzene, the benzidine-based dyes, beryllium, 1,3-butadiene, chromium, ethylene oxide, ionizing radiation, nickel, nitrosamines, polycyclic aromatic hydrocarbons (PAH's), plutonium, radium, 2,3,7,8-tetrachlorodibenzo-dioxin and wood dust are among the environmental and occupational carcinogens that have been identified through astute clinical observation and confirmed through toxicological and epidemiological research." Philip J. Landrigan, Professor, Mount Sinai School of Medicine, Testimony Before the President's Cancer Panel: Childhood Cancer and the Environment, East Brunswick, N.J., Sept. 16, 2008, at 1, 16, available at http://www.mountsinai.org/static_files/MSMC/Files/Patient%20Care/Children/Childrens%20Environmental%20Health%20Center/President%20Cancer%20Panel_9.16.08.pdf (last visited Dec. 23, 2011).

and fish in another state.¹⁴ Nevertheless, the impact of air emissions of certain toxic chemicals on the food chain was not meaningfully recognized by EPA until the latter part of the 1980s.¹⁵ This is alarming considering the dangerous levels of contamination throughout our food chain that could potentially result from the cumulative collection of toxins and particulates emitted into the air.

The scientific evidence of the contamination of our food chain by toxic chemicals has developed significantly during the years following passage of the original Clean Air Act and other environmental laws. For example, the U.S. Food and Drug Administration (FDA) tests approximately 280 typical food products in the U.S. food supply to determine the amount of pesticides, chemical contaminants, and nutrients present.¹⁶ From these results, the FDA estimates the extent of the exposure to harmful chemicals that the average American receives from the foods in her diet.¹⁷ Data collected between 2006 and 2008 shows that there are a variety of every day foods that are contaminated

14. EPA describes the progression of mercury through the food-chain as follows:

When mercury falls in rain or snow, it may flow into bodies of water like lakes and streams. When it falls out of the air as dry deposition, it may eventually be washed into those bodies by rain. Bacteria in soils and sediments convert mercury to methylmercury. In this form, it is taken up by tiny aquatic plants and animals. Fish that eat these organisms build up methylmercury in their bodies. As ever-bigger fish eat smaller ones, the methylmercury is concentrated further up the food chain. This process is called "bioaccumulation."

Methylmercury concentrations in fish depend on many factors, including mercury, the concentration in water, water pH and temperature, the amount of dissolved solids and organic matter in the water, and what organisms live in the water. Methylmercury concentrations in fish may also be affected by the presence of sulfur and other chemicals in the water. Because of these variables, and because food webs are very complex, bioaccumulation is hard to predict and can vary from one water body to another.

However, in a given water body, the highest concentrations of methylmercury are generally found in large fish that eat other fish. The concentrations of methylmercury in large fish can be over a million-fold larger than in the surrounding water.

Human Exposure, ENVTL PROT. AGENCY, <http://www.epa.gov/mercury/exposure.htm#3> (last visited Dec. 11, 2011).

15. See Matthew Lorber et al., *Evaluating Terrestrial Food Chain Impacts Near Sources of Dioxin Release in U.S. EPA Risk Assessments*, 48 *ORGANOHALOGEN COMPOUNDS* 264, 264 (2000) (asserting that in the late 1980s, research established that humans are primarily exposed to dioxin-like compounds through consuming animal food products).

16. U.S. Food and Drug Administration, *Total Diet Study—Study Design*, FDA, <http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/TotalDietStudy/ucm184232.htm> (last visited Dec. 12, 2011).

17. *Id.*

with mercury, volatile organic compounds (VOCs),¹⁸ and various pesticides or pesticide residues.¹⁹

Similarly, in the EPA's ongoing study of human health and ecological risks of exposure to dioxin-like compounds,²⁰ the Agency makes clear that the primary means of human exposure is through the food chain. Dioxin-like compounds enter the human food chain via "air-to-plant-to-animal and water/sediment-to-fish."²¹ The EPA describes the process as follows:

Vegetation receives these compounds via atmospheric deposition in the vapor and particle phases. The compounds are retained on plant surfaces and bioaccumulated in the fatty tissues of animals that feed on these plants In the aquatic food chain, dioxins enter water systems via direct discharge or deposition and runoff from watersheds. Fish accumulate these compounds through their direct contact with water, suspended particles, and bottom sediments and through their consumption of aquatic organisms.²²

Once released, dioxin-like compounds and other toxic chemicals can remain in the environment for years and bioaccumulate. Thus, these chemicals pose a significant threat to human health and the environment.

The risks of exposure to toxic chemicals through food, water, air, or skin contact is particularly dangerous for children. According to Professor Philip Landrigan of Mount Sinai School of Medicine:

18. U.S. Food and Drug Administration, *Total Diet Study—Pesticides*, <http://www.fda.gov/Food/FoodSafety/FoodContaminantsAdulteration/TotalDietStudy/ucm184658.htm> (last visited Dec. 26, 2011) (explaining that volatile organic compounds tested include such chemicals as benzene, toluene, tetrachloroethylene (TCE), styrene, and chloroform).

19. *Id.*

20. "The term 'dioxin' is commonly used to refer to a family of toxic chemicals that share a similar chemical structure and induce harm through a similar mechanism. Dioxins have been characterized by EPA as likely human carcinogens and are anticipated to increase the risk of cancer at background levels of exposure Examples of dioxins include polychlorinated biphenyls (PCBs), polychlorinated dibenzo dioxins (PCDDs), and polychlorinated dibenzo furans (PCDFs)." *Dioxin*, ENVTL. PROT. AGENCY, <http://cfpub.epa.gov/ncea/CFM/nceaQFind.cfm?keyword=Dioxin> (last visited Dec. 12, 2011)

21. *Exposure and Human Health Reassessment of 2,3,7,8-Tetrachlorodibenzo-p-Dioxin (TCDD) and Related Compounds National Academy Sciences (NAS) Review Draft*, ENVTL. PROT. AGENCY, ENVTL. PROT. AGENCY, 4–11 (2003), http://www.epa.gov/ncea/pdfs/dioxin/nas-review/pdfs/part3/dioxin_pt3_ch04_oct2004.pdf (last visited Dec. 12, 2011).

22. *Id.* at 4–12.

Children are exposed to toxic and carcinogenic chemicals through many routes—air they breathe, water they drink, foods they eat, medications they consume, and environments they inhabit, including their homes, day care centers, schools, and motor vehicles. Children have unique routes of exposure with no parallel among adults, for example, exposure *in utero* through transplacental transfer, and exposure postnatally via breast milk.²³

An analysis undertaken by the National Academy of Sciences (NAS) in 1993, *PESTICIDES IN THE DIETS OF INFANTS AND CHILDREN*,²⁴ established that children are uniquely vulnerable to toxic exposures in the environment because human development is complex, delicate, and therefore all too easily disrupted by environmental exposures.²⁵ The NAS found this vulnerability to have four sources.²⁶ Children have disproportionately heavy exposures to many chemicals.²⁷ Children's metabolic pathways, especially in fetal life and in the first months after birth, are immature.²⁸ Infants and children are therefore slow to detoxify and excrete many environmental chemicals and thus more vulnerable to them.

These special vulnerabilities make the exposure of children to toxic chemicals through the food chain or other routes particularly troubling. For example, data from the National Cancer Institute (NCI) indicates that the incidence of certain cancers in children has significantly increased. Professor Landrigan explains that increases in incidence have occurred for three major malignancies of children and young adults, according to Surveillance Epidemiology and End Result data from the National Cancer Institute:

1. *Leukemia*. Leukemia is the most common childhood cancer. Incidence of leukemia in [zero] to [fourteen] year-old U.S. children increased from 3.3 per 100,000 in 1975 to 5.1 per 100,000 in 2005, [a] 55% increase. Acute lymphocytic leukemia increased in the same years from 2.2 to 4.0 per 100,000, [a] 81% increase.

23. See Landrigan, *supra* note 13, at 2 (noting that attempts to mitigate exposure to sources of carcinogens must consider the risks that children face exclusively).

24. NAT'L RES. COUNSEL, *PESTICIDES IN THE DIETS OF INFANTS AND CHILDREN* (Nat'l Academy of Sciences 1993), available at <http://www.nap.edu/openbook.php?isbn=0309048753> (last visited Dec 15, 2011).

25. See Landrigan, *supra* note 13, at 2.

26. See *id.*

27. See *id.*

28. See *id.*

2. *Primary Brain Cancer.* This is the second leading cancer of children. Incidence of cancer of the brain and nervous system in [zero] to [fourteen] year-old children increased from 2.3 per 100,000 in 1975 to 3.2 per 100,000 in 2005, [a] 39% increase.
3. *Testicular Cancer.* Incidence of testicular cancer in white men (most of them adolescents and young adult males) increased from 4.3 per 100,000 to 7.0 per 100,000 in 2005, a 51% increase. Among black men in the same years, both the absolute incidence and the rate of increase were much lower—from 0.9 to 1.3 per 100,000.

The cause of these reported increases in incidence is not known. . . . An unresolved question is whether these increases in incidence of childhood cancer could be due, at least in part, to exposures to carcinogens in the environment.²⁹

The prevalence of such potentially deadly diseases provides support for increased vigilance in protecting the food chain, air, and water from toxins.

Considering what is at stake, the importance of enforcement of environmental standards cannot be overstated. Aggressive regulation, driven by the latest science and focused on preventing exposure to and the ingestion of toxic chemicals, is essential to improving air and water quality and reducing contamination of the food chain. Additionally, vigilant citizens and employees from the industries and businesses that may release dangerous chemicals are needed to ensure that the regulatory standards that protect our food chain and water supply are enforced. Unfortunately, employees in industries and businesses that release toxic chemicals into the environment or who are responsible for the cleanup of contamination are poorly protected by the rights and procedures presently provided in the federal environmental laws. The well-intentioned, but outdated employee protection provisions contained in federal environmental statutes must be changed if more employees are going to be encouraged to come forward and help budget-strapped federal and state agencies adequately protect public health and the environment.

29. See *id.* (emphasis in original.)

ENVIRONMENTAL STATUTES WITH EMPLOYEE PROTECTION PROVISIONS

Each of the six major federal environmental statutes contains an employee protection provision.³⁰ For the most part, each provision shares a common purpose—to protect whistleblowing employees from retaliation should they seek to have the law properly enforced. For example, the Clean Water Act employee protection provision states:

No person shall fire, or in any other way discriminate against, or cause to be fired or discriminated against, any employee or any authorized representative of employees by reason of the fact that such employee or representative has filed, instituted, or caused to be filed or instituted any proceeding under this chapter, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.³¹

In this way, Congress sought to protect employees who provide information concerning a possible violation of environmental standards from discrimination by their employers. Likewise, any worker who provides information relating to an alleged violation of a pollution control law committed by his employer or who initiates a proceeding to enforce a pollution control law against an employer is thus protected from discrimination.

To this end, Section 1367 of the Clean Water Act not only prohibits firing or discrimination, but also provides an administrative procedure under which the employee or his representative can seek redress for any violation of this prohibition. Under this procedure, the Secretary of Labor is charged with investigating discrimination charges brought under the CWA, and will issue findings and a decision.³² If the Secretary finds a violation, she then issues orders to abate it, which could include, where appropriate, the rehiring of the employee to his former position with back pay. Also, the person committing the violation must pay the costs incurred by the employee to obtain redress, which may include attorneys' fees.³³ Ultimately, the Secretary's decision is subject to judicial review.³⁴ Crucially, because the protections provided were

30. TSCA, 15 U.S.C. § 2622 (2006); CWA, 33 U.S.C. § 1367 (2006); SDWA, 42 U.S.C. § 300j-9(i) (2006); RCRA, 42 U.S.C. § 6971 (2006); CAA, 42 U.S.C. § 7622 (2006); and CERCLA, 42 U.S.C. § 9610 (2006). These six laws have become the beach head for forty-seven whistleblower statutes. For a comprehensive guide to their provisions and how to use them, *see generally* TOM DEVINE & TAREK F. MAASARANI, *THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE: A HANDBOOK FOR COMMITTING THE TRUTH* (Berrett-Koehler Publishers 2010) (providing advice for individuals considering blowing the whistle, including where to find necessary information and what legal options exist for whistleblowers).

31. 33 U.S.C. § 1367 (2006).

32. *Id.*

33. *Id.*

34. *Id.*

designed to prohibit discrimination in employment, Congress directed that complaints of retaliation and discrimination be investigated and adjudicated by the Department of Labor.³⁵

Complaint and Adjudication Process

The process by which an environmental whistleblower who has been the victim of retaliation begins with the whistleblower filing a complaint with the Occupational Safety and Health Administration (OSHA) Area Office for the location where the alleged retaliation or discrimination took place.³⁶ OSHA has ten area or regional offices located throughout the United States.³⁷ Although the regulations allow a complaint to be filed either orally or in writing,³⁸ the OSHA WHISTLEBLOWER INVESTIGATIONS MANUAL states that complaints should be filed in writing.³⁹ Likewise, the best practice is to file the complaint in writing and in a manner such that the sender can prove the complaint was sent and received. Moreover, the regulations permit the complaint to be filed via facsimile.⁴⁰

In terms of timing, complaints must be filed within thirty days of learning that alleged discrimination occurred.⁴¹ Under exceptional circumstances, this very short statute of limitations may be extended,⁴² but such extensions are rarely granted.⁴³

35. *Id.* Within the Department of Labor, whistleblower cases are processed in three stages. The Occupational Health and Safety Administration conducts the initial investigation of environmental whistleblower complaints. The Office of Administrative Law Judges adjudicates the complaints that are taken to hearing. The Administrative Review Board reviews cases that are appealed and makes a final decision for the agency. *See* 29 C.F.R. § 24 (2011)..

36. 29 C.F.R. § 24.103(c) (2011). In general, the Department of Labor's regulations spell out the process. *See id.*

37. *See The Whistleblower Protection Program*, U. S. DEP'T OF LABOR, <http://63.234.227.130/dep/oa/whistleblower/index.html> (last visited Nov. 15, 2011) (instructing that the complaint should be filed with the OSHA office located in the geographic region where the employee lives or worked).

38. 29 C.F.R. § 24.103(b) (2011).

39. OCCUPATIONAL SAFETY AND HEALTH ADMIN., OSHA INSTRUCTION: WHISTLEBLOWER INVESTIGATIONS MANUAL, 11-3 (Aug. 22, 2003), http://www.osha.gov/OshDoc/Directive_pdf/DIS_0-0_9.pdf (last visited on November 14, 2011). As the Manual is somewhat outdated, and because the regulations were revised in 2011, the regulations will control.

40. 29 C.F.R. § 24.103(d) (2011) (2011).

41. *See* 33 U.S.C. § 1367(b) (2006); 42 U.S.C. § 300j-9(i)(2)(A) (2006); 42 U.S.C. § 2622(b)(1) (2006); 42 U.S.C. § 6971(b) (2006); 42 U.S.C. § 7622(b)(2) (2006); 42 U.S.C. § 9610(b) (2006).

42. 29 C.F.R. § 24.103(d) (2011).

43. *See, e.g., Prybys v. Seminole Tribe of Florida*, ARB No. 96-064 at 8, ALJ No. 95-CAA-15 (Dep't of Labor Nov. 27, 1996) (deferring to Congress's determination that a thirty day statutory limitations period, although "extremely brief" in the eyes of a court, "must be scrupulously observed"). Note that Department of Labor whistleblower case decisions can be readily located on the Department's Office of Administrative Law Judge's (OALJ) web site: <http://www.oalj.dol.gov/>.

When the complaint is filed, OSHA is required to provide a copy to the employer.⁴⁴ The copy provided to the employer may be redacted in accordance with the Privacy Act⁴⁵ or other confidentiality laws.⁴⁶ In the vast majority of cases, however, there is little, if any, information that will be redacted from the copy of the complaint provided to the employer.

In terms of OSHA's investigation of the complaint, three of the employee protection provisions mandate that investigations of whistleblower complaints be completed within thirty days, while the others leave open the timing for completion of the investigation.⁴⁷ Nevertheless, in practice, investigations are rarely, if ever, completed within thirty or even sixty days. Most investigations of factually complex cases can take ninety days or more, and many OSHA whistleblower investigations have taken more than six months or even years to complete.

To be successful, the employee must show in the complaint, and through any interview she may provide to OSHA, that the employer "knew or suspected that the employee engaged in protected activity and that the protected activity was a motivating factor in the adverse action."⁴⁸ However, even if the employee establishes a prima facie case, under environmental statutes passed in the 1980s, the complaint will be dismissed if the employer can demonstrate by a "preponderance of the evidence . . . that the [employer] would have taken the same adverse action in the absence of the [employee's] protected activity."⁴⁹ Yet, more recent corporate whistleblower laws, including amendments to the Energy Reorganization Act for nuclear power and nuclear weapons whistleblowers, have increased the employer's burden for establishing an "independent justification" for taking a personnel action to "clear and convincing evidence."⁵⁰

44. 29 C.F.R. § 24.104(a) (2011).

45. 5 U.S.C. § 552a(k)(2) (2006).

46. 29 C.F.R. § 24.104(a) (2011).

47. 15 U.S.C. § 2622(b)(2)(A) (2006), 42 U.S.C. § 300j-9(i)(2)(B)(i) (2006), 42 U.S.C. § 7622(b)(2)(A) (2006), ("[T]hirty days of the receipt of such complaint, the Secretary shall complete such investigation and shall notify in writing the complainant (and any person acting in his behalf) and the person alleged to have committed such violation of the results of the investigation conducted pursuant to this subparagraph"). However, RCRA, CERCLA and CWA do not provide a deadline for the investigative phase. *See* 33 U.S.C. § 1367(b) (2006), 42 U.S.C. § 6971(b) (2011), 42 U.S.C. § 9610(b) (2006) (mandating that "the Secretary of Labor shall cause such investigation to be made as he deems appropriate"). Despite the distinctions in the language of the employee protection provisions regarding the timing of the investigation, the Labor Department's regulations specify that the Assistant Secretary will issue a written determination "within 30 days of filing of the complaint." 29 C.F.R. § 24.105(a) (2011).

48. 29 C.F.R. § 24.104(e)(3) (2011).

49. 29 C.F.R. § 24.104(e)(4) (2011).

50. 42 U.S.C. § 5851(b)(3)(B) (2006).

When the investigation has been completed and the evidence has been evaluated, OSHA issues an order either finding a violation and awarding relief or notifying the parties that it found no wrongdoing.⁵¹ The relief that may be awarded to a successful complainant includes reinstatement, back pay, back benefits, changes to terms and conditions of employment, and compensatory damages.⁵² Attorneys' fees and the costs of litigation are also available.⁵³ Exemplary damages⁵⁴ may be awarded, but only in cases brought under the Safe Drinking Water Act and Toxic Substances Control Act.⁵⁵

If the employee or employer wishes to contest OSHA's investigatory determination, she must do so within thirty days of receipt of the decision.⁵⁶ Additionally, the request for a hearing must be in writing and state whether the objection is to the findings or the decision.⁵⁷ If a timely objection is filed, then the order is stayed and an evidentiary hearing is scheduled. But if the objection is not timely, then the order becomes the final decision of the Department of Labor and is no longer subject to judicial review.⁵⁸

If properly requested, a hearing is conducted as a bench trial before a Department of Labor Administrative Law Judge (ALJ).⁵⁹ The pre-trial process includes discovery and motions practice.⁶⁰ However, because there is a question of whether the Department of Labor has been granted statutorily

51. 29 C.F.R. § 24.105(a) (2011).

52. 29 C.F.R. § 24.105(a)(1) (2011).

53. *Id.*

54. Exemplary damages are awarded to punish and deter reckless or wanton conduct. *Johnson v. Old Dominion Sec.*, 86-CAA-3, 86-ERA-4, 86-ERA-5, at 11 (Dep't of Labor May 29, 1991). For example, in a particularly extreme case, the Administrative Law Judge explained:

[I]t is hard to conceive of something as heinous as an agency of the Federal Government surreptitiously paying an opposing party's [*i.e.*, an employee's'] attorney so much money that the attorney in effect becomes its agent rather than the opposing party's, apparently in an effect to prevent violations of environmental protection statutes from being discovered and/or to mitigate the punishment for those violations. This is conduct that shocks the conscience, and which must be deterred in no uncertain terms.

Beliveau v. Naval Undersea Warfare Ctr., ALJ Nos. 97-SDW-1, 97-SDW-4, at 44 (Dep't of Labor June 29, 2000). The ALJ awarded \$281,115.50 in exemplary damages. *Id.* at 44-45.

55. 29 C.F.R. § 24.105(a)(1) (2011).

56. 29 C.F.R. § 24.106(a) (2011).

57. *Id.*

58. 29 C.F.R. § 24.106(b) (2011).

59. 29 C.F.R. § 24.107 (2011).

60. *See id.*

based subpoena power for these proceedings, persons or entities who are not parties to the case may not be compelled to testify or produce documents.⁶¹

Once the hearing is completed and the record is closed, the ALJ will issue a recommended decision granting relief or dismissing the case.⁶² The case may be decided on a motion to dismiss or motion for summary decision.⁶³ When the ALJ's recommended decision is issued, any party that wants to seek review of the decision must file a petition for review with the Administrative Review Board (ARB) within ten business days of the date of the ALJ's decision.⁶⁴

A timely request for ARB review renders the ALJ's recommended decision inoperative.⁶⁵ If the petition for review is not timely or the ARB denies review of the decision, then the ALJ's decision becomes the agency's final decision. If the ARB accepts the petition for review, it "will review the factual findings of the ALJ under the substantial evidence standard, according to the regulation."⁶⁶ However, in practice, both the ALJ's factual findings and conclusions of law are reviewed *de novo*.⁶⁷ If the employer is deemed to have violated the law, then the ARB will award relief, but will deny the complaint if it finds no violation.⁶⁸

In terms of the timing of ARB review, regulations and several of the laws specify that the Secretary of Labor has ninety days from the filing of the complaint in which to issue a final decision.⁶⁹ In practice, however,

61. The Administrative Review Board has issued conflicting rulings over whether the Labor Department has subpoena power under the six environmental laws and related statutes. *See Childers v. Carolina Power and Light Co.*, ARB No. 98-077, ALJ No. 1997-ERA-32, at 12-13 (Dep't of Labor Dec. 29, 2000) (asserting that the agency's authority to hold an adjudicatory hearing gives it an implied power to issue subpoenas to compel witness attendance despite other cases holding to the contrary). For a case holding that the Labor Department was not granted subpoena power by the employee protection provisions of the six environmental laws, *see Bobreski v. EPA*, 284 F. Supp. 2d 67, 75-78 (D.D.C. 2003) (concluding that the plain meaning of the environmental statutes reveal that Congress had no intention of giving subpoena authority to the Secretary of Labor). In an earlier, unpublished decision involving a whistleblower case brought under the CWA, the court held that the employee protection provision did not grant subpoena power, reasoning in part that "Congress did not intend to authorize the issuance of subpoenas for purposes of carrying out other sections of the Act, including the whistleblower position." *Immanuel v. U.S. Dep't of Labor*, 139 F.3d 889 *6 (4th Cir. 1998) (unpublished). Thus, the authority to compel testimony or information via subpoena under these laws is open to debate.

62. *See* 29 C.F.R. § 24.109 (2011) (explaining that the ALJ's decision is comprised of findings, conclusions, and an order regarding remedies).

63. *See, e.g.*, 29 C.F.R. § 18.40 (2011) (stipulating that any party can make a motion for a summary decision on a part or all of the proceeding at least twenty days before the hearing date).

64. 29 C.F.R. § 24.110(a) (2011).

65. 29 C.F.R. § 24.110(b) (2011).

66. *Id.*

67. *See Williams v. Baltimore City Pub. School Sys.*, ARB No. 01-021, ALJ No. 00-CAA-15, slip op. at 1 n.3 (Dep't of Labor May 30, 2003) (explaining that the board determines all facts and conclusions *de novo*); *see also* 5 U.S.C. § 557 (b) (2006) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . .").

68. 29 C.F.R. § 24.110(d)-(e) (2011).

69. *See, e.g.*, 15 U.S.C. § 2622(b)(2)(A) (2006); 29 C.F.R. § 24.110(c) (2011); 42 U.S.C. § 300j-9(2)(b)(i) (2006); 42 U.S.C. § 7622(b)(2)(A) (2006).

such decisions usually take more than ninety days to hand down, from the complaint's filing. Thus, the chance that a case may go through all three stages of the Department of Labor process within ninety days is unlikely; in reality, delays of one to two years or more are common.

Judicial review of a final decision of the ARB is initiated by filing a petition for review before the U.S. Court of Appeals for the circuit where the alleged violation occurred or where the employee resided on the date(s) of the violation.⁷⁰ In most instances, the time limit for filing a petition for review is sixty days. However, several of the environmental laws specify time limits that range from ninety to 120 days.⁷¹

The record before the ALJ and ARB form the basis for the Court of Appeals' review. The court will review the case under standards established by the federal Administrative Procedure Act⁷² and case law. The Court of Appeals reviews the record to determine whether the ARB acted arbitrarily, capriciously, abused its discretion, or otherwise acted outside the law.⁷³

After examining the investigatory and adjudicatory processes of whistleblower protections under the major environmental laws, it is important to consider the critical, substantive areas of the employee protection provisions and the case law that has interpreted them.

PROTECTED ACTIVITIES

Am I protected? That is the question that most employees contemplate before blowing the whistle. It is also the question that many employees contemplate after their employer retaliates against them for blowing the whistle. The employee protection provisions in the environmental laws have been interpreted to cover two major classes of protected activities. The first class involves commencing a proceeding, testifying, assisting, or taking other action in a formal legal proceeding to further the purpose of the environmental law(s) at issue.⁷⁴ The second class of protection involves more informal communications, such as warning the employer about a suspected violation of an environmental law, or regulation or permit issued thereunder; refusing to

70. 29 C.F.R. § 24.112(a) (2011).

71. See 29 C.F.R. § 24.112(a)–(d) (2011) (creating exceptions to the stated 60-day limit under the Federal Water Pollution Control Act, Solid Waste Disposal Act, and Comprehensive Environmental Response, Compensation and Liability Act, which specify different time limits for filing a petition).

72. 5 U.S.C. § 706 (2006) (outlining the scope of judicial review for the Court of Appeals).

73. The U.S. Fourth Circuit Court of Appeals has determined that the Administrative Procedure Act empowers federal courts to “overturn an administrative agency’s decision only if it is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law,’ or ‘unsupported by substantial evidence’” pursuant to 5 U.S.C. § 706(2)(A)–(E) (2006) (evidence “pursuant to *Knox v. U.S. Dep’t of Labor*, 434 F.3d 721, 723–24 (4th Cir. 2006). Likewise, courts review the ARB’s interpretation of the governing statute using the deferential standard set forth in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984) (reviewing the ARB’s interpretation of the Clean Air Act).”

74. 29 C.F.R. § 24.102(b) (2011).

engage in an activity made unlawful by an environmental law(s); or testifying or preparing to testify in a Congressional, federal, or state proceeding regarding any provision or proposed provision of the subject environmental law(s).⁷⁵ How do these standards apply in the real world? The types of protected acts vary almost as widely as the employers covered by environmental laws. However, over the years, case precedent has established a fairly specific set of standards used to determine which employee concerns are protected. Some examples of protected actions include:

- Threatening to file an environmental citizen's suit.⁷⁶
- Contacting EPA officials to confirm reporting requirements under CERCLA.⁷⁷
- Reporting a carpet cleaning company's regulatory violation and destruction of evidence.⁷⁸
- Complaining of a gas odor on the job.⁷⁹
- Expressing a general workplace safety concern that would have an environmental impact.⁸⁰
- Perceiving wrongful conduct in the development and submission of data and reports to the government.⁸¹
- Expressing the concern that asbestos from indoor renovations may be escaping into the ambient air.⁸²
- Complaining about co-worker lighting a cigarette in an area where hydrogen gas from waste storage tanks is vented.⁸³

75. 29 C.F.R. § 24.102(c) (2011).

76. *Crosby v. Hughes Aircraft Co.*, 85-TSC-2 (Dep't of Labor Aug. 17, 1993) (final admin. review).

77. *Dodd v. Polysar Latex*, 88-SWD-00004 (Dep't of Labor Sept. 22, 1994) (final admin. review).

78. *McMahan v. Cal. Water Quality Control*, 90-WPC-1 (Dep't of Labor July 16, 1993) (final admin. review).

79. *Monteer v. Casey's Gen. Stores, Inc.*, 88-SWD-1 (Dep't of Labor Feb. 27, 1991) (final admin. review).

80. *Hermanson v. Morrison and Knduson Corp.*, 94-CER-2 (Dep't of Labor June 28, 1996).

81. *Abu-Hjeli v. Potomac Elec. Power Co.*, 89-WPC-1 (Dep't of Labor Sept. 24, 1993) (final admin. review).

82. *Knox v. United States Dep't of Labor*, 434 F.3d 721, 725 (4th Cir. 2006).

83. *Nathaniel v. Westinghouse Hanford Co.*, 91-SWD-2 (Dep't of Labor Feb. 1, 1995).

- Raising concerns about whether contaminated soil should be land-filled.⁸⁴
- Reporting paint overspray and paint fumes released into the ambient air.⁸⁵
- Petitioning congressional subcommittees about alleged diminished RCRA regulation by the EPA, and complaining internally about inadequate and inappropriate regulation.⁸⁶
- Reporting a possible environmental hazard to a local fire department.⁸⁷

Although an employee action may generally seem to fall under the umbrella of a particular environmental law, the employee has the burden of showing that she had a reasonable belief that the issue being raised may be a violation of one of the environmental laws, regulations, or permits. As the ARB has explained:

An employee who makes a complaint to the employer that is ‘grounded in conditions constituting reasonably perceived violations’ of the environmental acts, engages in protected activity. Similarly, expressing concerns to the employer that constitute reasonably perceived threats to environmental safety is protected activity under the environmental whistleblower protections.

The employee need not prove that the hazards he or she perceived actually violated the environmental acts. Nor must an employee prove that his assessment of the hazard was correct. And we have also held that an employee need not prove that the condition he or she is concerned about has already resulted in a safety breakdown. On the other hand, a complaint that expresses only a vague notion that the employer’s conduct might negatively affect the environment is not protected. Nor is a complaint that is based on numerous assumptions and speculation.⁸⁸

84. *Oliver v. Hydro-Vac Svcs., Inc.*, 91-SWD-00001 (Dep’t of Labor Nov. 1, 1995).

85. *Smith v. W. Sales & Testing*, ARB No. 02-080, ALJ No. 01-CAA-17 (Dep’t of Labor Mar. 31, 2004).

86. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 88-SWD-2 (Dep’t of Labor Feb. 28, 2003).

87. *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1 (Dep’t of Labor Apr. 28, 2000).

88. *Erickson v. EPA*, ARB Nos. 04-024, 04-025, ALJ Nos. 03-CAA-11, 19, 04-CAA-1, slip op. at 7-8 (Dep’t of Labor Oct. 31, 2006). *See also* *Dixon*, ARB No. 06-147, 160, ALJ No. 2005-SDW-008, slip op. at 9 (Dep’t of Labor Aug. 28, 2008) (stating, “[o]n the other hand, a complaint that expresses only a vague notion that the employer’s conduct might negatively affect the environment or that is based on ‘numerous assumptions and speculation’ is not protected”) (citations omitted).

For example, in a case where the issue of protected activity turned on the employee's concerns about whether a certain substance was hazardous, the Secretary of Labor applied a reasonableness standard:

The structure and purpose of the Act strongly support the adoption of a reasonableness test for determining whether an employee complaint about the treatment of a particular substance is protected under the whistleblower provision of the Act. As [] noted above, substances are hazardous wastes under the Act either because the EPA 'lists' them as such, or because they meet certain statutory and regulatory criteria. Most of the substances which are listed under RCRA are not identifiable by persons without a chemistry background. . . . It is unreasonable to expect the average lay person to know what is or is not on the Act's hazardous waste "list." Moreover, as . . . noted above, a substance need not be 'listed' by EPA in order to be deemed hazardous waste under the Act. *See* 40

C.F.R. §§ 261.20-261.24. It may be hazardous waste within the meaning of the Act if it meets any of the four articulated tests for hazardousness. It is even less likely that the average lay person would be able to determine whether a particular substance met one of those tests for hazardousness. . . . [I]t is appropriate to apply a reasonableness standard in this type of situation.⁸⁹

However, establishing that an employee engaged in one or more activities that are protected by the environmental laws does not end the analysis. Several other elements must be proven in order to establish a claim. For example, to establish a prima facie case under the employee protection provision of the CWA, an employee must show that:

(1) the plaintiff was an employee of the party charged with discrimination; (2) the plaintiff was engaged in a protected activity under the Clean Water Act; (3) the employer took an adverse action against the plaintiff; and (4) the evidence created a reasonable inference that the adverse action was

89. *Minard v. Nerco Delmar Co.*, 92-SWD-1, slip op. at 4-5 (Dep't of Labor Jan. 25, 1994).

taken because of the plaintiff's participation in the statutorily protected activity.⁹⁰

In a later case, the ARB constructed the formulation a bit differently:

To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that he or she engaged in protected activity of which the respondent was aware; he or she suffered adverse employment action; and the protected activity was the reason for the adverse action, *i.e.*, that a nexus existed between the protected activity and the adverse action.⁹¹

No matter the formulation, the requirements are essentially the same as the requirements set forth in the CWA.

Whether an employee's actions are protected under environmental whistleblowing statutes can depend, in part, on where, or to whom, the employee disclosed the information. Some cases make a distinction between internal

90. *Passaic Valley Sewerage Comm'rs v. U.S. Dep't of Labor*, 992 F.2d 474, 480-81 (3d Cir. 1993). *See also* *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir.1989), 886 F.2d 147, 148 (8th Cir. 1989) (describing the four elements of a prima facie discrimination case under the Energy Reorganization Act); *Lockert v. U.S. Dep't of Labor*, 867 F.2d 513 (9th Cir. 1989) (holding that an employee was not protected by the whistleblower provisions of the Energy Reorganization Act and National Labor Relations Act); *DeFord v. Sec'y of Labor*, 700 F.2d 281, 286 (6th Cir. 1983) (listing the three elements of a valid discrimination claim for participating in a Nuclear Regulatory Commission proceeding under the Energy Reorganization Act).

91. *Dixon v. Dep't of Interior*, ARB No. 06-147, ALJ No. 2005-SDW-8, slip op. at 8 (Dep't of Labor Aug. 28, 2008) (quoting *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 1617 (Dep't of Labor Feb. 28, 2003)).

and external complaints.⁹² Internal complaints generally involve employee communications directly to an employer, supervisor, or other employee that may be in a position to address the issue being raised; while external complaints are made to persons or entities outside the employee's employer, such as regulators or the press. Crucially, employees are protected for reporting both internal concerns and external concerns to a variety of persons, agencies and offices. The following have been recognized as appropriate forms of protected disclosures:

- Complaining to a state agency.⁹³
- Cooperating with and complaining to local authorities.⁹⁴

92. The controversy about whether internal employee complaints are protected arose in a case interpreting the employee protection provision of the Energy Reorganization Act (ERA). *See* *Brown & Root, Inc. v. Donovan*, 747 F.2d 1029, 1029 (5th Cir. 1984) (holding that purely internal quality control complaints were not protected under the ERA). Several other circuits disagreed with the court's analysis in *Brown & Root*, and instead have held that internal complaints are protected. *See, e.g.,* *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1165 (9th Cir. 1984) (remanding to the Secretary of Labor to review petitioner's claim that he was discharged for making internal complaints); *Kan. Gas & Elec. Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert. denied*, 478 U.S. 1011, 1011–12 (1986) (White, J., dissenting) (arguing that the Supreme Court's role is to resolve the Circuit split over whether internal complaints are protected whistleblower actions); *Passaic Valley Sewerage Comm'rs v. Dep't of Labor*, 992 F.2d 474, 475 (3d Cir. 1993) (holding that Department can interpret the Clean Water Act to protect intracorporate complaints); *Bechtel Constr. Co. v. Sec'y of Labor*, 50 F.3d 926, 928 (11th Cir. 1995) (holding that an employee who questioned certain safety procedures had engaged in protected activity under the Energy Reorganization Act); *Jones v. Tenn. Valley Auth.*, 948 F.2d 258, 264 (6th Cir. 1991) (holding that an employee terminated for filing internal reports has recourse under the ERA); 29 C.F.R. § 24.110(a) (2011) (stating that ALJs are the final arbiter of retaliation complaints unless a petition for review is filed with the Administrative Review Board within ten days); *Couty v. Dole*, 886 F.2d 147, 148 (8th Cir. 1989) (holding that the Dep't of Labor erred in holding that petitioner's complaints and subsequent dismissal did not constitute a *prima facie* discrimination case); *Consol. Edison Co. v. Donovan*, 673 F.2d 61, 64 (2d Cir. 1982) (holding that employer failed show cause to terminate).

In 1992, Congress resolved the controversy by amending the ERA, specifically stating that filing an internal safety complaint is a protected activity. *See* 42 U.S.C. §§ 5851(a)(1)(A)–(B) (2006) (an employer may not terminate an employee for notifying the employer of safety violations). The filing of safety complaints was relevant to whistleblowers under the environmental laws because the employee protection provisions of the ERA and the environmental laws were substantially similar prior to 1992. However, the Secretary of Labor has taken the position that internal complaints made pursuant to the environmental laws were protected. *See, e.g.,* *Poulos v. Ambassador Fuel Oil Co., Inc.*, 86–CAA–1, slip op. at 1, 3, 4 (Dep't of Labor Apr. 27, 1987) (interpreting the Congressional intent of the Clean Air Act to afford broad protection to employee complaints); *Bivens v. La. Power & Light*, 89–ERA–30 slip op. at 3 (Dep't of Labor June 4, 1991) (holding that the Secretary has consistently found internal complaints to be protected under the ERA and other environmental statutes).

93. *Conley v. McClellan Air Force Base*, 84–WPC–1, slip op. at 1111 (Dep't of Labor Sept. 7, 1993) (finding that complainant engaged in protected activity when he complained about his employer to the California State Water Resources Control Board).

94. *See* *Helmstetter v. Pacific Gas & Elec. Co.*, 91–TSC–1, slip op. at 3 (Dep't of Labor Jan. 13, 1993) (holding that Complainant's report of a spill to the local fire department and cooperation with the district attorney's investigation were both protected activities).

- Participating in a television report on the leakage of radioactive waste.⁹⁵
- Releasing reports of employees' safety and health issues to a citizens' group, a newspaper, and a federal agency.⁹⁶
- Sharing information with an individual to report to responsible government officials for use in an environmental lawsuit.⁹⁷
- Communicating with a reporter to prompt an investigation or with the media about a safety or environmental issue or problem.⁹⁸
- Threatening to go to the media with safety concerns.⁹⁹
- Expressing "safety-related concerns to fellow workers" publicly and as part of an "extended pattern of otherwise protected activity."¹⁰⁰ Distributing a leaflet that raised environmental concerns at a company picnic.¹⁰¹
- Writing to Congress about the environmentally deleterious impact of her company's product.¹⁰²
- Seeking an opinion from EPA's Office of General Counsel.¹⁰³

This list summarizes types of protected activity. The underlying premise is that communicating with these audiences is akin to a whistleblower

95. See *Dobreuenaski v. Assoc. Univs., Inc.*, 96-ERA-44, slip op. at 9 (ARB Dep't of Labor June 18, 1998) (providing documentation of a radioactive spill to a television station was a protected activity under the ERA).

96. See *Gutierrez v. Regents of the Univ. of Cal.*, ARB No. 99-116, ALJ No. 1998-ERA-19, slip op. at 2, 6 (Dep't of Labor Nov. 13, 2002) (finding that an employee who informed these organizations of plutonium leaks engaged in protected activity).

97. See *Scott v. Alyeska Pipeline Serv. Co.*, 92-TSC-2, slip op. at 2, 4 (Dep't of Labor July 25, 1995) (holding that a complainant who turned over his employer's documents to an individual, who gave the documents to state and federal officials, had engaged in a protected activity).

98. See, e.g. *Wedderspoon v. City of Cedar Rapids, Iowa*, 80-WPC-1 (Dep't of Labor July 28, 1980); *Carter v. Elec. Dist. No. 2 of Pinal Cnty.*, 92-TSC-11, slip op. at 12 (Dep't of Labor July 26, 1995) (holding that complainant's allegations giving his employer negative publicity in the press were protected under the whistleblower statutes); *Floyd v. Az. Pub. Serv. Co.*, 90-ERA-39, slip op. at 4 (Dep't of Labor Sept. 23, 1994) (holding that complainant giving documents to a reporter concerning his employer's safety violations engaged in a protected activity); *Pooler v. Snohomish Cnty. Airport*, 87-TSC-1, slip op. at 3 (Dep't of Labor Feb. 14, 1994) (holding that complainant engaged in a protected activity when he spoke to a reporter about a toxic waste dumping incident and provided him with a written report).

99. See *Dias-Robainas v. Fla. Power & Light*, 92-ERA-10, slip op. at 7 (Dep't of Labor Jan. 19, 1996) (holding that the complainant's threat to report safety concerns to the Miami Herald was a protected activity).

100. *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1576 (11th Cir. 1997).

101. *Immanuel v. Wy. Concrete Indus., Inc.*, 95-WPC-3, slip op. at 8 (Dep't of Labor Oct. 24, 1995).

102. *Jenkins v. EPA*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 17 (Dep't of Labor Feb. 28, 2003).

103. *Id.* (holding that seeking an opinion from Agency counsel on the legality of other criteria may be protected activity because it questions the appropriateness of regulations).

communicating with the government. In determining whether an employee has presented her concerns to an appropriate party, consider the oversight authority of the party (e.g., a government agency) or the connection between the party receiving the information and an opportunity for oversight or investigation (e.g., supervisor, inspector, media, or environmental group).

PROVING DISCRIMINATION/RETALIATION

Despite the broad scope of potentially protected activities, proving that an employee has been discriminated against because she engaged in an activity protected by one of the federal environmental statutes is more cumbersome. It is difficult to navigate the legal process and satisfy the legal standards necessary to prove discrimination and retaliation claims.

The employee bears the burden of proving by a preponderance of the evidence that she suffered retaliation in violation of the law.¹⁰⁴ However, as applied, an employee's "burden of proof in a whistleblower action is formidable."¹⁰⁵ One case has stated: "[t]o show that adverse action was taken 'because of' protected activity, [the employee] must show that his protected activity was a 'motivating' factor in [the employer's] decision to dismiss him."¹⁰⁶ In other words, the employee must show that her protected activity played the predominant role in triggering the adverse action taken against her. If the employer offers any other basis for the adverse action, which employers typically do, then the employee's burden to prove her case is very heavy.¹⁰⁷ For instance, one case has described the employee's burden as follows:

The complainant has the ultimate burden of persuading that the legitimate reason articulated by the respondent was a pretext for discrimination, either by showing that the

104. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 506 (1993) (holding that the plaintiff in an employer racial discrimination case must establish a *prima facie* case of discrimination by a preponderance of the evidence).

105. *Miller v. Lower Makefield Pub. Works Dept.*, 2009-CAA-00010, slip op at 22 (Dep't of Labor Apr. 27, 2010).

106. *Lopez v. Serbaco, Inc.*, ARB No. 04-158, ALJ No. 04-CAA-5, slip op. at 4 (Dep't of Labor Nov. 29, 2006) (citations omitted).

107. When the employer offers a non-discriminatory reason for the adverse action the employee can try to prove that the employer's reason for the action is a pretext. *Morris v. LG&E Power Svcs.* summarized the employee's burden to prove pretext as follows: "It is not sufficient for [the employee] to establish that the decision to terminate [his] employment was not 'just, or fair, or sensible . . . rather he must show that the explanation is a phony reason.' Thus, [the employee] must show that the [the employer's] proffered explanations are false and a pretext for discrimination." *Morris v. LG&E Power Svcs., LLC*, ALJ No. 2004-CAA-14, ARB No. 05-047, slip op. at 44 (Dep't of Labor Feb. 28, 2007) (citation omitted). If pretext cannot be shown and both a legitimate and an illegitimate reason for an adverse action are offered, then a dual motive analysis must be performed. "[O]nce the employee shows that illegal motives played some part in the discharge, the employer must prove that it would have discharged the employee *even if* he had not engaged in protected conduct." *Pogue v. U.S. Dep't of Labor*, 940 F.2d 1287, 1290 (9th Cir. 1991) (quoting *Mackowiak v. Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984)) (emphasis in original).

unlawful reason more likely motivated it or by showing that the proffered explanation is unworthy of credence. . . . At all times, the complainant has the burden of showing that the real reason for the adverse action was discriminatory.¹⁰⁸

In some cases, OSHA or an ALJ may initially skip the analysis of the complainant's prima facie case and first address whether the respondent employer had a legitimate, nondiscriminatory reason to take the personnel action.

REMEDIES

The remedies available under the employee protection provisions of the federal environmental statutes are intended to make whole an employee who has been discriminated against. In general, an employee who succeeds may be entitled to reinstatement, back pay, medical expenses, interest on lost wages, a clear personnel record, compensatory damages, reasonable attorneys' fees, and litigation costs.¹⁰⁹ These remedies are often more theoretical than real for many employees because their cases have little chance of succeeding under the current procedural and substantive legal standards.¹¹⁰

TRACK RECORD OF ENVIRONMENTAL WHISTLEBLOWERS OVER THE LAST DECADE

Unfortunately, the employee protection provisions contained in the federal environmental statutes do not provide adequate protections for employees who disclose environmental problems. Thus, the goal of encouraging employees to report environmental problems and potential violations of permits and regulatory standards has not been realized. For example, case decisions of the U.S. Department of Labor's Office of Administrative Law Judges (OALJ) reveal that from 2000 through 2010 only seventeen of 127 decided environmental whistleblower cases (slightly over thirteen percent) have resulted in some type of relief for the employee.

Out of the 127 cases sampled, fifty-five were appealed to the ARB. Of those, the ARB upheld the ALJ's recommended decision in forty, reversed or vacated ALJ's ruling in fifteen—rendering three split decisions, and dismissed two appeals as untimely. In cases where the ARB upheld the ALJ's recommendation, only one decision affirmed an initial win for the employee.

108. *Crosier v. Westinghouse Hanford*, 92-CAA-03, 1994 WL 897404, slip op. at 55 (Dep't of Labor Jan. 12, 1994) (citations omitted).

109. *See, e.g., Fabricius v. Town of Briantree Park Dept.*, ALJ No. 97-CAA-14, ARB No. 97-144, slip op. at 99 (Dep't of Labor Feb. 9, 1999).

110. For an assessment of developments in the area of whistleblower protection during the Obama Administration, *see* TOM DEVINE & TAREK F. MAASSARANI, *THE CORPORATE WHISTLEBLOWER'S SURVIVAL GUIDE* 183-186 (Berrett-Koehler Publishers 2011).

Where the ARB's decisions reversed or vacated the ALJ's recommendation, six stripped the whistleblower of a previous win.

As a result, employees who have exposed environmental problems have become victims rather than heroes. It is likely that their experiences and a general fear of retaliation have prevented more employees from coming forward. These case outcomes prove that reform is needed and that employees need to be included in efforts to ensure better environmental and public health protections.

RECOMMENDATIONS FOR AMENDING THE EMPLOYEE PROTECTION PROVISIONS IN THE ENVIRONMENTAL STATUTES

While the rights of and protections for environmental whistleblowers have languished, both the Congress and state legislatures have recognized the importance of improving the procedural and substantive safeguards for a variety of employees in diverse industries, which range from public transportation to financial accountability for publicly traded corporations. In general, however, the first steps taken by Congress to improve protections for whistleblowers focused on federal employees.

In 1989, Congress amended the Civil Service Reform Act (CSRA) by enacting the Whistleblower Protection Act (WPA), and significantly changed the legal landscape of employee protection. The stated intent of the WPA was:

[T]o strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and (2) establishing . . . that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration.¹¹¹

When interpreted as Congress intended,¹¹² the WPA is a powerful tool for protecting government employees and encouraging transparency.¹¹³ The WPA made it easier for federal government employees to prove claims of whistleblower retaliation. As a result of the WPA, employees are required to

111. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, § 2(b)(1) & (b)(2)(C), 103103 Stat. 1616 (codified as amended at 5 U.S.C. § 1201 (2006)).

112. Congress intended that whistleblowing would receive appropriate protection. The Senate report accompanying the WPA made this point clear by stating: “[r]egardless of the official’s motives, personnel actions against employees should quite simply [sic] not be based on protected activities such as whistleblowing.” S. REP. NO. 100-413 at 16 (1988).

113. Efforts have been undertaken over the last several years to further improve and correct the WPA through amendments in order to address court decisions that have weakened its protections.

prove by a preponderance of the evidence that their whistleblowing disclosure was a “contributing factor” in the personnel action taken against them, instead of a “significant factor” as was required under the CSRA.¹¹⁴

Perhaps the most significant change made by the WPA was the shifting in the burden of proof. The WPA increased the employer’s burden by requiring the employer to establish as an affirmative defense that it would have taken the adverse action even if the employee had not engaged in protected activity. Moreover, if the employee establishes that whistleblowing was a “contributing factor” in the adverse action, then the burden of proof shifts such that the employer must prove by “clear and convincing evidence” that it would have taken the same personnel action even in the absence of the employee’s whistleblowing.¹¹⁵ These amendments revolutionized employee protection law and have been incorporated into many other federal and state laws.¹¹⁶ Following Congress’s lead in creating the WPA, these new laws include the following features:

- Extending the statute of limitations in many provisions to at least 180 days;¹¹⁷
- Requiring the employee to prove unlawful discrimination by establishing by a preponderance of evidence that her protected activity was a “contributing factor” to the adverse action taken by the employer;¹¹⁸
- Providing that when the employee meets her burden of proof the burden shifts to the employer to prove by “clear and convincing” evidence that it would have taken the adverse action even if the employee had not engaged in protected activity;¹¹⁹

114. 5 U.S.C. § 1214(b)(4)(B)(i) (2006) (stating that the Board will require employer action if it determines that the whistleblower’s complaint contributed to a negative personnel action against him).

115. 5 U.S.C. § 1214(b)(4)(B)(ii) (2006).

116. *See, e.g.*, Energy Reorganization Act, 42 U.S.C. § 5851 (2006) (nuclear power and weapons whistleblowers); Aviation Investment and Reform Act, 49 U.S.C. § 42121 (2006) (aviation industry whistleblowers); FDA Food Safety Modernization Act, 21 U.S.C. § 301 (2011) (food industry whistleblowers); National Transit System Security Act of 2007, 6 U.S.C. § 1142 (2006) (transit system whistleblowers); Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010) (financial accountability whistleblowers); Surface Transportation Assistance Act, 49 U.S.C. § 31105 (2007) (commercial driving whistleblowers); Federal Railroad Safety Act, 49 U.S.C. § 20109 (2008) (railroad carrier whistleblowers); Pipeline Safety Improvement Act, 49 U.S.C. § 60129 (2006) (pipeline safety whistleblowers); Consumer Product Safety & Improvement Act, 15 U.S.C. § 2087 (2008) (consumer product whistleblowers); District of Columbia Whistleblower Protection Act, D.C. CODE § 1-615.54 (2008) (District of Columbia government employee whistleblowers). For a more complete listing of federal laws with employee protection provisions, *see* DEVINE & MAASSARANI, *supra* note 30, at 247–50.

117. *See* 42 U.S.C. § 5851.

118. *Id.*

119. *Id.*

- In several provisions, providing preliminary relief if the employee receives a successful determination at the investigatory stage;¹²⁰ and
- In many provisions, allowing the employee to remove her/his case to U.S. District Court to seek a jury trial if the administrative process is not concluded within less than one year.¹²¹

Beyond the best practice procedural safeguards and substantive improvements represented in the more recent employee protection provisions, more must be done to connect environmental whistleblowing with environmental enforcement. The EPA should require that all permit holders acknowledge the rights of their employees to report environmental concerns to their managers or others who may instigate action to address the concerns. This acknowledgment should be built into all EPA and authorized states program permits.

To this end, the EPA should consider following the lead of the Nuclear Regulatory Commission (NRC). The NRC specifically provides within its permitting and licensing structure that “[d]iscrimination by a Commission licensee, an applicant for a Commission license, or a contractor or subcontractor of a Commission licensee or applicant against an employee for engaging in certain protected activities is prohibited.”¹²² NRC regulations further provide that a violation of this prohibition may result in “(1) Denial, revocation, or suspension of the license. (2) Imposition of a civil penalty on the licensee, applicant, or a contractor or subcontractor of the licensee or applicant. (3) Other enforcement action.”¹²³ The EPA’s implementation of the NRC’s approach would enhance protection and more directly tie environmental whistleblowing to enforcement.

Moreover, Congress could readily increase reporting and reward environmental whistleblower if it created a bounty program like the one implemented by the Securities and Exchange Commission (SEC) under the Dodd-Frank Act.¹²⁴ In 2010, EPA reported that it secured over \$150 million in civil penalties and criminal fines and restitution.¹²⁵ Imagine how much more in penalties and fines would be recovered and how much environmental

120. *Id.*

121. Sarbanes-Oxley Act, 18 U.S.C. § 1514A (2010).

122. 10 C.F.R. § 50.7(a) (2011).

123. 10 C.F.R. § 50.7(c) (2011).

124. The Dodd-Frank Wall Street Reform and Consumer Protection Act. Pub. L. 111-203 § 922(a), 124 Stat. 1841 (codified as amended in scattered sections of 12 U.S.C.). The Act “added new Section 21F to the Exchange Act, entitled ‘Securities Whistleblower Incentives and Protection.’ Section 21F directs that the Commission pay awards, subject to certain limitations and conditions, to whistleblowers who voluntarily provide the Commission with original information about a violation of the securities laws that leads to the successful enforcement of an action brought by the Commission that results in monetary sanctions exceeding \$ 1,000,000.” *Securities Whistleblower Incentives and Protections*, 76 Fed. Reg. 34,300 (Summary and Background) (June 13, 2011) (codified at 17 C.F.R. §§ 240.21F-1 to 240.21F-17).

125. See Compliance and Enforcement Annual Results 2010 Fiscal Year, U.S. ENVIRONMENTAL PROTECTION AGENCY, <http://www.epa.gov/compliance/resources/reports/endofyear/eoy2010/index.html> (last visited Dec. 24, 2010).

degradation might be detected or prevented if employees were rewarded for blowing the whistle.

Far from being rewarded, employees who disclose environmental violations are lacking important substantive and procedural protections provided in the newer laws. Exclusion of environmental whistleblowers from these newer protections poorly serves both the public and the courageous employees who reveal critical information that may help protect the air we breathe, the water we drink, and the food we eat.

CONCLUSION

Congress should immediately provide a twenty-first century upgrade for environmental whistleblowers, including incentivizing disclosures through a bounty program. Failing to do so places serious limits on the ability of the EPA and authorized state agencies to take advantage of the observations and insights of those working in jobs that may impact the environment. The employee protection provisions in the federal environmental statutes, which became law in the 1970s and 1980s, have a poor history of protecting employees. These provisions deter rather than encourage employees to help protect the environment and expose wrongdoing and, likewise, must be improved.