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# Investigator’s Desk Aid to the Whistleblower Protection Provisions of Six Environmental Statutes

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*This Desk Aid represents the Occupational Safety and Health Administration’s (OSHA’s) summary of the scope of coverage and protected activity and the procedures for investigating and adjudicating retaliation complaints under the Environmental Statutes (Clean Air Act, Comprehensive Environmental Response, Compensation and Liability Act; Federal Water Pollution Control Act; Safe Drinking Water Act; Solid Waste Disposal Act; and Toxic Substances Control Act) as of the “last revised” date listed below. This Desk Aid is intended for OSHA’s use and the guidance herein is subject to change at any time. This Desk Aid is not a standard or regulation, and it neither creates new legal obligations nor alters existing obligations. There may be a delay between the publication of significant decisions or other authority under this whistleblower protection provision and modification of the Desk Aid. The Code of Federal Regulations and final decisions of the Secretary of Labor and the Department of Labor’s Administrative Review Board remain the official sources for the views of the Secretary of Labor on the interpretation of these whistleblower protection provisions.*

### Abbreviations Used in this Desk Aid

<b>ALJ</b>	Administrative Law Judge
<b>ARB</b>	Administrative Review Board
<b>CAA</b>	Clean Air Act

<b>CERCLA</b>	Comprehensive Environmental Response, Compensation and Liability Act
<b>CWA</b>	Clean Water Act (alternate name for Federal Water Pollution Control Act, or FWPCA)
<b>FWPCA</b>	Federal Water Pollution Control Act (alternate name for Clean Water Act, or CWA)
<b>EPA</b>	Environmental Protection Agency
<b>NAAQS</b>	National Ambient Air Quality Standards
<b>OSHA</b>	Occupational Safety and Health Administration
<b>RCRA</b>	Resource Conservation and Recovery Act (alternate name for Solid Waste Disposal Act, or SWDA)
<b>RSOL</b>	Regional Solicitor's Office
<b>SDWA</b>	Safe Drinking Water Act
<b>SIP</b>	State Implementation Plan
<b>SWDA</b>	Solid Waste Disposal Act (alternate name for Resource Conservation and Recovery Act, or RCRA)
<b>TSCA</b>	Toxic Substances Control Act

## **I. The Whistleblower Provisions of the Environmental Statutes in a Nutshell**

OSHA enforces the whistleblower provisions of six environmental statutes:

- Clean Air Act (CAA) – 42 U.S.C. § 7622;
- Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) – 42 U.S.C. § 9610;
- Federal Water Pollution Control Act(FWPCA)/Clean Water Act (CWA) – 33 U.S.C. § 1367;
- Safe Drinking Water Act (SDWA) – 42 U.S.C. § 300j-9(i);
- Solid Waste Disposal Act (SWDA)/Resource Conservation and Recovery Act (RCRA) – 42 U.S.C. § 6971; and
- Toxic Substances Control Act (TSCA) – 15 U.S.C. § 2622.

Broadly speaking, these environmental statutes were enacted to protect human health and the environment by limiting exposure to certain pollutants, chemicals, and hazards. This is accomplished in various ways, such as by creating standards for emissions, setting limitations on the use and disposal of certain substances and, where necessary, requiring remediation in damaged areas (see Section B, below, and Appendix 1). Each of these whistleblower provisions protects employees who commence, testify, assist, or participate in proceedings or engage in any other action to carry out the purposes of these statutes and provides that it is a violation for any employer to intimidate, threaten, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee for engaging in this protected activity. 29 C.F.R. § 24.102.

## **A. Covered Entities**

*Covered Complainants* – The whistleblower provisions of the Environmental Statutes protect “employees,” from retaliation. This protection is not limited to current employees, but also extends to former employees and job applicants. In addition, under CERCLA, FWCPA, and SWDA/RCRA, this protection extends to “any authorized representative of employees,” such as a union representative or other person acting on behalf of an employee or group of employees in matters within the purview of these statutes at the employee’s or group’s request.

*Covered Respondents* – The Environmental Statutes prohibit retaliation by an employer, meaning that there must be an employer-employee relationship (or a potential one) between the complainant and the respondent.<sup>1</sup> In addition, as described below, the type of employer (e.g., private, government) will affect coverage under the whistleblower provisions of the Environmental Statutes.

### Private Sector Employers

All of the Environmental Statutes apply to private sector employers.

### Federal Government Employers

The CAA, CERCLA, SDWA, and SWDA/RCRA apply to federal government employers and waive federal sovereign immunity, whereas the FWPCA/CWA and TSCA do not.

### State Government Employers

The Environmental Statutes generally apply to state government employers. However, state sovereign immunity may impact a complainant’s right to pursue the case beyond the OSHA investigation phase if the respondent is considered an arm of the state and state sovereign immunity has not been waived.

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<sup>1</sup> The text of the CERCLA, FWPCA/CWA, and SWDA/RCRA whistleblower provisions states that they apply to “persons,” not employers, but they have nevertheless been interpreted to require an employment relationship. Presumably, where the complainant is an “authorized representative” of an employee or group of employees, an employment relationship must exist between the represented employee(s) and the respondent.

State sovereign immunity does not affect OSHA’s authority to conduct an investigation. Thus, even if the employer asserts state sovereign immunity, OSHA should investigate the case as long as the statute applies to state employers. If sovereign immunity appears to be an issue in the case, the investigator should work with the supervisor and attorneys in the appropriate regional solicitor’s office (“RSOL”) early in the investigation to determine whether sovereign immunity applies. Sovereign immunity, where it applies, does not prevent RSOL, representing the Assistant Secretary of Labor for Occupational Safety and Health, from litigating a meritorious case.

Private contractors to state governments are typically not protected by state sovereign immunity.

### Municipal Government Employers

The Environmental Statutes generally apply to municipal government employers. Unlike state government entities, municipal or local government entities (and any private contractors they hire) are typically not covered by state sovereign immunity.

### Tribal Employers

The FWPCA/CWA, SDWA, and SWDA/RCRA explicitly include Indian tribes as covered employers and abrogate tribal sovereign immunity. Coverage under the other Environmental Statutes may also extend to tribal employers (for instance, because the relevant Environmental Statute is a generally applicable law not implicating tribal self-governance). In evaluating a complaint involving a tribal employer, the investigator should work with the supervisor and RSOL to determine coverage.

## **B. Protected Activity**

The whistleblower provisions of the Environmental Statutes protect employees and, in some instances, authorized representatives, who engage in “protected activity,” which includes commencing, assisting in, testifying in, or participating in a proceeding under one of the Environmental Statutes. An employee engages in protected activity when he reports actions that he reasonably believes constitute environmental hazards, irrespective of whether it is ultimately determined that the employer’s actions violate a particular environmental statute. This has been interpreted broadly to encompass all phases of a proceeding relating to public health or the environment, including an internal or external complaint that may precipitate a proceeding and, in certain circumstances, work refusals. It may also include reports to the news media.

Protection under the Environmental Statutes is extended to a range of activities that further the respective purposes of those statutes. The complainant’s activities must “touch on” the concerns for the environment or public health that are the focus of the Environmental Statutes. Although complaints that are “purely occupational in nature” do not qualify for whistleblower protection under the Environmental Statutes, a complainant who has expressed a concern for the complainant’s own health but which also touches on the concerns of one or more of the Environmental Statutes has engaged in protected activity under the Environmental Statutes.

## Concerns of the Environmental Statutes

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<b>CAA</b>	Air emissions from area, stationary, and mobile sources; standards for control technologies, fuel, consumer goods; acid rain; depletion of the ozone layer; visibility in national parks; hazardous air pollutants
<b>CERCLA</b>	Clean-up of hazardous waste or “superfund” sites, as well as accidents, spills, and other emergency releases of pollutants and contaminants; allocation of financial responsibility for clean-up
<b>FWPCA/CWA</b>	Discharge of pollutants into water; requirements for sewage sludge, including land application and air requirements; requirements for discharges to wastewater treatment systems; standards for wastewater treatment systems; standards for certain vessel discharges; wetlands
<b>SDWA</b>	Violations relating to waters actually or potentially designated for drinking; water quality standards; requirements for public water systems; injection of waste into groundwater; “lead-free” requirements for pipes, plumbing fixtures, and school water fountains
<b>SWDA/RCRA</b>	Treatment, storage, and disposal of hazardous waste and solid waste (including liquid and contained gaseous wastes, semi-solid wastes and sludge) at active sites; standards for municipal and industrial waste landfills; underground storage tanks; reduction of waste generation
<b>TSCA</b>	Manufacture, importation, processing, distribution, use and/or disposal of chemicals; also regulates PCBs, elemental mercury, asbestos mitigation, radon monitoring, lead abatement, and formaldehyde emissions

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### **1. Does an employee need to be correct that conduct violates one of the Environmental Statutes to engage in protected activity?**

No. A complainant must have a reasonable belief that her complaint or other activity furthered the purposes of the Environmental Statutes. To have a reasonable belief, an employee must have a subjective belief (i.e., actually believe that misconduct has occurred, is occurring, or is likely to occur), and the belief must be objectively reasonable (i.e., it must be possible that a reasonable person in the employee’s position would share this belief). In determining whether the employee had an objectively reasonable belief, the employee’s training, experience, and educational background are relevant. The report will be protected so long as a reasonable person with the same training and experience would also believe that the relevant activity constitutes a violation. Thus, a complaint based on a reasonable, but mistaken, belief that conduct violated an Environmental Statute is protected.

**2. How specific must an employee’s complaint of misconduct be to be protected under an Environmental Statute?**

While a complainant can be mistaken about a violation, 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. A complainant does not need to explain his reasonable belief when he engages in protected activity so long as he reasonably believed, at the time he voiced his complaint or raised his concerns that a threat to the environment or to the public existed. However, the complaint must be specific enough regarding the conduct that the employee believed would harm the environment to permit the employer or the agency receiving the complaint to investigate the conduct.

**3. Do the whistleblower provisions of the Environmental Statutes protect employees who engage in work refusals?**

Yes. The Secretary of Labor interprets these statutes to protect refusals to work when an employee has a reasonable belief that his or her working conditions are unsafe or unhealthful for reasons that touch on the purposes of at least one of the Environmental Statutes, and the employer does not abate the hazard or provide an adequate explanation that the conditions are safe after having been informed of the hazard. An adequate explanation is one that a reasonable person in the employee’s circumstances would accept as indicating that conditions are safe.

**4. Can an employee’s complaint implicate more than one Environmental Statute?**

Yes. Given the technical and overlapping nature of the Environmental Statutes, as well as the reasonable belief standard (which does not require proving a violation), an issue raised in a complaint may implicate several of these statutes. If the complaint appears to implicate the concerns of more than one Environmental Statute, OSHA should docket the complaint and investigate it under all of the Environmental Statutes that appear to apply.

**5. Do the Environmental Statutes contain any explicit exceptions to protection?**

The Environmental Statutes do not protect employees who, acting on their own, without express or implied direction from the employer (or the employer’s agent), deliberately violate any requirement of any of the Environmental Statutes. This exception to protection is an affirmative defense that the employer must raise and requires an element of willfulness. In other words, for the exception to apply, the evidence must show that the employee knew or acted with reckless disregard for whether his or her conduct violated the law.

**6. What are some examples of protected activity under the Environmental Statutes?**

As previously noted, the Environmental Statutes have been broadly interpreted to protect a wide-range of activity that touches on their purposes. The following is a non-exclusive list of the types of activities that have been found to be protected:

- Complaining to a supervisor or other employer personnel or agents of the employer, such as a safety inspector employed by the employer, who can address potential environmental violations;
- Complaining to the EPA or a state or local government agency regarding potential environmental violations, misuse of grant funds, or other issues related to an Environmental Statute;
- Providing information or assisting in an environmental inspection by the EPA or a state or local government agency;
- Testifying in a proceeding or providing information to Congress regarding potential violations of an Environmental Statute;
- Being about to participate, assist, or testify in an investigation or proceeding related to one or more of the Environmental Statutes;
- Refusing to violate an Environmental Statute; and
- Refusing to work when confronted with a condition that the employee reasonably believes is an environmental hazard if the employer refuses to abate the hazard or to adequately explain that the condition does not present a hazard after having been made aware of it.

For instance, the following factual scenarios involve activity potentially protected by the Environmental Statutes as explained below:

- A janitor working in a county recreation facility notices paints and commercial-grade cleaning supplies stored in rusty containers in an outdoor shed near the boat launch. Since the area is prone to occasional flooding, he suggests moving these to a different location, but his supervisor tells him the materials are kept where they are so as to be near the boats. Believing these materials could end up in the water stream, he takes pictures to send to the Environmental Protection Agency.

Here, so long as complainant has a reasonable belief that pollutants could end up in the water stream, the complainant has engaged in protected activity by expressing concerns to the employer about the location of the containers and preparing to share information with the EPA, to further the purpose of one or more of the Environmental Statutes. This activity is potentially protected under the FWPCA/CWA, which regulates the discharge of pollutants into navigable waters; the SDWA, which was established to protect drinking water; and the SWDA/RCRA, which regulates the disposal of solid and hazardous waste (solid waste refers to non-hazardous waste and can include liquids). Assuming that the complainant has only a layperson's understanding of these issues, he may be able to show that he reasonably believed employer's activities violated any or all of these statutes. Thus, protection will depend on the specific concerns he raises. All three of these statutes cover municipal employees.

- An employee of a regional public transportation authority raises concerns that the agency was improperly promoting a ride-sharing service in a public awareness program funded with grant funds intended to improve air quality and reduce congestion. This program is funded through Department of Transportation grants intended to support a region's attainment or maintenance of national air quality standards, as defined by the CAA, and

reduction of air pollution. Because ride-sharing trips often involve only one passenger, the employee believes that including this service in the program is inconsistent with the purpose of the grant and, by extension, the CAA.

This is potentially protected activity under the CAA because the grants are in furtherance of the CAA. Protection under the CAA in this case will depend on whether the employee reasonably believes that the inclusion of the ride-sharing service violated the requirements of the grant.

- A company's environmental compliance officer believes that her company is improperly incinerating certain waste materials, which could result in the release of sulfur dioxide into the ambient air. She raises concerns to the company's owner but is told to continue allowing the incineration of this type of waste. Instead, the environmental compliance officer follows emergency procedures to shut down the incinerator.

If she can show that her belief is reasonable, her actions can be protected activity under SWDA/RCRA and the CAA (given her expertise in environmental compliance, a reasonable person with her background will be expected to identify violations with more accuracy than would a layperson). Conduct can constitute a protected activity, so long as it advances the goals of the environmental statutes. This includes conduct undertaken by an employee whose role is to ensure compliance with environmental laws, such as SWDA/RCRA and the CAA.

- Complainant, a new teacher, learns that in the previous year the school replaced aging plumbing in one wing of his school in response to tests showing elevated levels of lead. Believing the school should have replaced plumbing throughout the building, he complains to the principal, who explains that the drinking water in the rest of the building had been tested and shown to be safe. Not satisfied, the teacher complains at a school board meeting, makes comments to the media, and distributes a flyer to parents stating that the school's drinking water contains lead.

The complainant's conversation with his principal may be protected as the SDWA was designed to protect drinking water; however his subsequent activities are not. Complainants must have a reasonable belief that an environmental law or regulation is being violated. After being told by the principal that water in the rest of the school building had been tested and shown to be safe, the complainant's belief is no longer reasonable.

- An employee of a chemical manufacturer believes that it is underreporting the quantity of a chemical produced to the EPA's Chemical Data Reporting (CDR) database and reports her concerns to the EPA. Such reporting is required by TSCA; however, the quantities manufactured for certain exempt uses (e.g., for pesticides) are likewise exempt from this reporting requirement. If the employee reasonably believes, in light of her education, background, knowledge, and role at the company, that this constitutes a violation of TSCA's reporting requirements, her report to the EPA constitutes protected activity under TSCA even if there was no violation.



- County environmental compliance inspectors complain internally and to the state environmental protection department that their employer is not reporting all sewage spills or “sanitary sewage overflows” to the state environmental protection department as required by a state law designed to ensure compliance with the FWPCA/CWA. Provided that their concerns were reasonable, their complaints would be protected activity under the FWPCA/CWA.
- Complainants, who are trained in asbestos removal and have been hired by a private contractor to perform remediation in a public school, disagree with their job supervisor on the appropriate method to contain asbestos fibers. They express doubts to the supervisor about his method’s effectiveness in containing the fibers and concerns about their own exposure and the exposure of others. The crew refuses to work until their concerns are resolved.

Assuming that the complainants have a reasonable belief that the working conditions are unsafe and have not received a reasonable explanation regarding the safety of the supervisor’s method, their complaints and work refusal may be protected. This potentially touches on the environmental concerns in TSCA, which regulates asbestos abatement, and the CAA, which regulates asbestos as a hazardous air pollutant and requires certain procedures in renovation projects. In addition, the complaints to the supervisor may also implicate the requirements for local education agencies under Asbestos Hazard Emergency Response Act (AHERA) if there is evidence that the local school district played a role in any decision to take adverse action against the complainants, and the complaints and work refusal may implicate section 11(c) of the OSH Act.

## **7. When should OSHA investigate a case under an Environmental Statute and another type of OSHA-enforced whistleblower law?**

In some cases, the allegations in the employee’s complaint may implicate both the purposes of one or more of the Environmental Statutes and another OSHA-enforced whistleblower protection statute such as section 11(c) of the Occupational Safety and Health (“OSH Act”) or one of the transportation whistleblower statutes that OSHA enforces. In general, a complaint should be docketed under all OSHA whistleblower statutes that apply.

### *Dual Docketing Cases under Section 11(c) and One or More Environmental Statutes*

A complaint that originates from the employee’s concern about employee safety or health may nonetheless be protected under both section 11(c) of the OSH Act and one of the Environmental Statutes if the concerns raised touch on the purposes of the relevant Environmental Statute. As a result, there is considerable overlap between section 11(c) and the Environmental Statutes. The following are examples of fact patterns that implicate both Environmental Statutes and section 11(c):

- An employee of a defense contractor complained that incineration of certain materials by the employer caused releases of sulfur dioxide gas into employee work areas and also

potentially into ambient air. The sulfur dioxide sickened employees, and the employee believed that the methods for disposing of the material were improper. The incineration activity was subject to a permit under SWDA/RCRA. Based on the issues raised, this case should be docketed under section 11(c) and under SWDA/RCRA and CAA.

- An employee was project director for the employer's building improvement division. After being informed that he was being transferred to a new worksite, he repeatedly requested information on the site's environmental history and requested that his superiors contract for an environmental assessment of the site because he had learned from employees currently working at that site that they were experiencing debilitating ailments consistent with exposure to toxic chemicals and that the site had a history of toxic chemical releases under the prior owner. The employee's request for an environmental assessment implicates CERCLA and section 11(c) of the OSH Act. If the concerns raised are reasonable, the complaint would be protected under both.
- Employees at an organization were required to do environmental cleanup. The complainant expressed concerns that they were improperly trained, which could result in health issues for the employees and environmental problems because clean up would be completed incorrectly. The case was properly docketed under CERCLA and section 11(c) of the OSH Act.

*Dual Docketing Cases under One or More Environmental Statutes and an OSHA-Enforced Whistleblower Statute Other than Section 11(c)*

The following are examples of circumstances that may require docketing a case under an Environmental Statute and another OSHA-enforced whistleblower statute other than section 11(c):

- The employee, Environmental Health and Safety Engineer for a school district, complained, to her supervisors that she could not support the school district's boiler pipe testing as planned because of "the risk of violating a regulation" or having "an asbestos release." If reasonable, the employee's concerns regarding the possibility of an 'asbestos release,' would be protected under CAA (because it "touched on" the concerns for public health and the environment that are the purpose behind the CAA) and AHERA (because the concerns related to remediation of asbestos in schools).
- While performing routine maintenance repairs, an employee of a pipeline maintenance and repair contractor for an oil and gas producer finds discolored grass indicating that waste oil may have leaked out into the ground where a pipe was buried. Upon checking the maintenance records, the employee discovers that the section of leaking pipeline had not been periodically inspected as required. The worker notifies his supervisor about his observations and tells her they must report the incident to Department of Transportation Pipeline and Hazardous Materials Safety Administration (PHMSA) and to the state department of environmental protection. The supervisor tells the employee not to fill out any paperwork until she can discuss it with officials at the company. The next day, the employee asks his supervisor about preparing an estimate of the amount of oil that leaked

from the pipeline. The supervisor tells him not to worry about it because the incident is not reportable. The employee continues to press for reporting to both PHMSA and the state department of environmental protection, so his supervisor says that she will need more time to look into the reporting requirements. This complaint would implicate the Pipeline Safety Improvement Act, which requires reporting releases of hazardous substances, and the FWPCA/CWA, which has separate oil spill reporting requirements. If the employee reasonably believes that reporting to PHMSA and the state department of environmental protection is required, the complaint will be protected under all of these statutes.

## **II. Procedures for Handling Environmental Statutes Complaints**

Procedures for handling Environmental Acts complaints are contained in [29 CFR Part 24](#). Below is a summary of the procedural provisions most relevant to the OSHA investigation. More information is also available in the “[What to expect during an OSHA Whistleblower Investigation](#)” page on OSHA’s website, the [OSHA Whistleblower Investigations Manual](#), and the [fact sheets](#) for each of the [Environmental Statutes](#).

### **A. Complaint**

*Who may file:* An employee who believes that he or she has been retaliated against in violation of the Environmental Statutes may file a complaint with OSHA. The employee may also have a representative file on the employee’s behalf.

*Form:* The complaint need not be in any particular form. Oral or written complaints are acceptable. If the complainant cannot make a complaint in English, OSHA will accept a complaint in any language.

*Timing:* The complaint must be filed within 30 days of when the alleged adverse action took place. Equitable tolling principles may extend the time for filing in limited circumstances, consistent with the guidance in OSHA’s Whistleblower Investigations Manual.

*Distribution of complaints and findings to partner agencies:* Complaints and findings in Environmental Statutes cases must be sent electronically to the EPA.

### **B. Investigation**

Upon receiving a complaint, OSHA will evaluate the complaint to determine whether the complaint contains a *prima facie* allegation of retaliation. In other words, the complaint, supplemented as appropriate with interviews of the complainant, should allege that:

1. The employee engaged in activity protected by one of the Environmental Statutes;
2. The respondent knew or suspected that the employee engaged in activity protected by one of the Environmental Statutes;

3. The employee suffered an adverse action;<sup>2</sup> and
4. The circumstances were sufficient to raise the inference that there is a causal connection between the protected activity and the adverse action.

If the complaint meets these requirements, OSHA will ask for a position statement from the respondent and proceed with the investigation. If it does not meet these requirements, and the complainant does not agree to administrative closure of the case, OSHA will dismiss the complaint with notice to the complainant and the respondent of the right to request a hearing before a Department of Labor administrative law judge (ALJ).

If OSHA finds reasonable cause to believe that retaliation occurred, it will issue findings and a preliminary order stating the relief to be provided. The relief may include reinstatement, back pay, compensatory damages, other remedies for the retaliation (such as a neutral reference), and reasonable attorney fees and costs. Punitive damages are available under the SDWA and the TSCA.

If OSHA does not find reasonable cause to believe that retaliation occurred, it will issue findings dismissing the complaint.

If the complainant and respondent agree to settle a case under CAA, SDWA, or TSCA during the investigation, they must submit the settlement agreement for OSHA's review and approval.<sup>3</sup>

## **C. Administrative and Judicial Review**

Either the complainant or the respondent may object to OSHA's findings within 30 days and request a hearing before an ALJ. Filing objections will stay OSHA's order for all relief. If no objections are filed, OSHA's findings become the final order of the Secretary of Labor, not subject to review.

The ALJ proceeding is a *de novo*, adversarial proceeding in which both the complainant and the respondent have the opportunity to seek documents and information from each other in discovery and to introduce evidence and testimony into the hearing record. OSHA does not typically participate in the ALJ proceeding. Documents and other information submitted to OSHA during the investigation do not automatically become part of the record in the ALJ proceeding. However, both the complainant and the respondent may introduce evidence that they obtained or used during OSHA's investigation in the ALJ proceeding. The ALJ may hold a hearing or dismiss a case without a hearing if appropriate. Either the complainant or the respondent may appeal the ALJ's decision in the case to the Department of Labor's Administrative Review Board (ARB), which may either accept or reject the case for review. The ARB's decision is subject to

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<sup>2</sup> An adverse action is an action that might dissuade a reasonable employee from engaging in activity protected by one of the Environmental Statutes. Examples of adverse actions include (but are not limited to) firing, demoting, denying overtime or a promotion, or disciplining the employee.

<sup>3</sup> Parties are encouraged, but not required, to submit settlements in cases under FWPCA/CWA, SWDA/RCRA, and CERCLA.

discretionary review by the Secretary of Labor. A complainant or respondent may obtain review of a final, reviewable decision by the Department of Labor by appealing to the appropriate U.S. Court of Appeals.

#### **D. Kick-Out**

None of the Environmental Statutes includes a “kick-out” provision. Consequently, they do not permit a complainant to file his or her claim in federal district court if the Department of Labor has not made a final decision in the case within a specified number of days.

## **Appendix I: Background Information on the Environmental Statutes**

*The following is intended to provide a broad and simplified summary of the Environmental Statutes adapted from the EPA's website as of the last revised date below. The purpose of this summary is to provide OSHA investigators with basic summary information for use in deciding whether a complainant has a reasonable belief that the concern that he or she has raised touches on the purposes of one or more of the Environmental Statutes.*

*This summary is not an official source of regulatory information regarding the Environmental Statutes. The interpretation and enforcement of the Environmental Statutes is a complicated area of the law and is continually developing. Investigators should refer to the statutes themselves, along with implementing regulations and applicable EPA guidance for current and more comprehensive information regarding the requirements of these laws. Such information is available on the EPA's website through the links provided below. In some circumstances, investigators may need to consult with RSOL or the EPA to evaluate an allegation of protected activity under the Environmental Statutes.*

### **I. Clean Air Act (CAA)**

#### **Text of Whistleblower Provision, 42 U.S.C. § 7622**

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee)--(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or a proceeding for the administration or enforcement of any requirement imposed under this chapter;<sup>4</sup> or under any applicable implementation plan, (2) testified or is about to testify in any such proceeding, or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

#### **Background**

The CAA is a comprehensive federal law intended to “protect and enhance the quality of the nation’s air resources so as to promote the public health and welfare and the productive capacity of its population” and to prevent and control air pollution through research and assistance to State, local, and regional programs. 42 U.S.C. § 7401(b). The CAA requires the EPA to establish national ambient air quality standards (NAAQS) for certain widespread pollutants that may endanger public health or welfare and states to adopt enforceable state implementation plans (SIPs) to achieve these standards. The EPA also sets emission standards for many stationary and mobile sources (such as power plants, factories, and vehicles,), as well as standards for control technologies, fuel, and certain consumer goods, such as paint. In addition, the CAA contains provisions to address acid rain, depletion of the ozone layer, haze that impairs visibility in

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<sup>4</sup> This refers to Title 42, Chapter 85 of the U.S. Code, or the CAA, as codified.

national parks, and hazardous or toxic air pollutants that pose health risks or adverse environmental effects.

## Resources

- Overview of the Clean Air Act and Air Pollution, <https://www.epa.gov/clean-air-act-overview>.
- The Plain English Guide to the Clean Air Act, <https://www.epa.gov/sites/production/files/2015-08/documents/peg.pdf>.
- National Emission Standards for Hazardous Air Pollutants (NESHAP), <https://www.epa.gov/stationary-sources-air-pollution/national-emission-standards-hazardous-air-pollutants-neshap-9>.

## II. Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)

### Text of Whistleblower Provision, 42 U.S.C. § 9610

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 provided information to a State or to the Federal Government, filed, instituted, or caused to be filed or instituted any proceeding under this chapter,<sup>5</sup> or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

### Background

CERCLA, “enacted in response to the serious environmental and health risks posed by industrial pollution,” *U.S. v. Bestfoods*, 524 U.S. 51, 55 (1998) (citations omitted), is “designed to promote the timely cleanup of hazardous waste sites and to ensure that the costs of such cleanup efforts were borne by those responsible for the contamination,” *Burlington Northern & Santa Fe Ry. Co. v. U.S.*, 556 U.S. 599, 602 (2009) (citations omitted). It provides broad federal authority to respond to releases or threatened releases of hazardous substances and to remediate hazardous waste sites, and created a “superfund” to finance this activity. CERCLA’s implementing regulations are contained in the National Oil and Hazardous Substances Pollution Contingency Plan (NCP). The EPA, with the assistance of the Agency for Toxic Substances and Disease Registry (ATSDR), and other federal and state agencies, identifies and prioritizes sites for remediation on the National Priorities List (NPL). Under CERCLA, EPA may compel potentially responsible parties to perform necessary cleanup or may conduct the cleanup itself, using superfund monies, and seek reimbursement from the potentially responsible parties. EPA is required to coordinate with state and tribal governments and these entities are permitted to lead

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<sup>5</sup> This refers to Title 42, Chapter 103 of the U.S. Code or CERCLA, as codified.

remediation efforts using superfund monies if they have the requisite technical expertise. CERCLA applies to federally-owned and -operated facilities and imposes additional notice and other requirements on federal entities. CERCLA authorities complement those of SWDA/RCRA, which primarily regulates ongoing hazardous waste handling and disposal.

## Resources

- Superfund, <https://www.epa.gov/superfund>.
- CERCLA Enforcement, <https://www.epa.gov/enforcement/comprehensive-environmental-response-compensation-and-liability-act-cercla-and-federal>.

### III. Federal Water Pollution Control Act (FWPCA)/Clean Water Act (CWA)

#### Text of Whistleblower Provision, 33 U.S.C. § 1367

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,<sup>6</sup> or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter.

#### Background

The FWPCA amendments of 1972 (which came to be known as the CWA) “provide a comprehensive program for controlling and abating water pollution,” *Train v. City of New York*, 420 U.S. 35, 35 (1975), with the purpose of restoring and maintaining the chemical, physical, and biological integrity of the nation’s waters, while recognizing the role of states in addressing pollution and managing land and water resources, 33 U.S.C. § 1251(a)-(b). The CWA regulates the discharge of pollutants into waters of the U.S. and requires the establishment of water quality standards for surface waters. Under the CWA, the EPA has implemented pollution control programs, such as wastewater standards for industry, and developed national water quality criteria recommendations for pollutants in surface waters. The CWA prohibits the discharge of any pollutant from a point source into waters of the United States without a permit issued under the National Pollutant Discharge Elimination System (NPDES). Compliance monitoring under the NPDES program is largely done by discharger self-reporting overseen by the states (with the EPA directly overseeing compliance in four states, federal facilities, and tribal lands). In addition, the CWA regulates municipal wastewater treatments systems, sewage sludge, certain vessel discharges, and the dredging or filling of wetlands and prohibits the discharge of oil or hazardous substances into waters of the United States.

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<sup>6</sup> This refers to Title 33, Chapter 26 of the U.S. Code, or the CWA, as codified.



## Resources

- Summary of the Clean Water Act, <https://www.epa.gov/laws-regulations/summary-clean-water-act>.
- Clean Water Act (CWA) Compliance Monitoring, <https://www.epa.gov/compliance/clean-water-act-cwa-compliance-monitoring>

## IV. Safe Drinking Water Act (SDWA)

### Text of Whistleblower Provision, 42 U.S.C. § 300j-9(i)

No employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--(A) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this subchapter.<sup>7</sup> or a proceeding for the administration or enforcement of drinking water regulations or underground injection control programs of a State, (B) testified or is about to testify in any such proceeding, or (C) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this subchapter.

### Background

The SDWA was established to protect public health by safeguarding the nation’s public drinking water supply “from source to tap.” It focuses on all waters actually or potentially designated for drinking use, whether from above ground or underground sources. The EPA sets primary and secondary standards for drinking water quality, governing contaminants that pose a health risk and meet certain other criteria and those that impact the palatability of the water, respectively, and establishes operational requirements for public water systems. These standards and requirements are largely administered by the states (in fact, the EPA lacks authority to enforce secondary water standards). States must also assess sources of drinking water for potential contamination. EPA and the states implement the Underground Injection Control (UIC) program to control the injection of fluids. In addition, the SDWA protects water during distribution by requiring that the pipes, plumbing fittings and fixtures used by public water systems and in residential or non-residential facilities providing water for human consumption be “lead-free” and prohibiting the introduction of pipes, fittings, and fixtures that are not lead-free into commerce unless for manufacturing or industrial purposes. In addition to covering the minority of schools and childcare facilities that maintain their own water supplies, the SDWA also provides funds to replace older school water fountains containing lead and for voluntary lead testing for schools and childcare facilities.

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<sup>7</sup> This refers to Title 42, Chapter 6A, Subchapter XII, or the SDWA, as codified.

## Resources

- Understanding the Safe Drinking Water Act, <https://www.epa.gov/sdwa/overview-safe-drinking-water-act>.
- Ground Water and Drinking Water, <https://www.epa.gov/ground-water-and-drinking-water>.
- Use of Lead Free Pipes, Fittings, Fixtures, Solder, and Flux for Drinking Water, <https://www.epa.gov/sdwa/use-lead-free-pipes-fittings-fixtures-solder-and-flux-drinking-water>.
- Lead in Drinking Water in Schools and Childcare Facilities, <https://www.epa.gov/dwreginfo/lead-drinking-water-schools-and-childcare-facilities>.

## V. Solid Waste Disposal Act (SWDA)/Resource Conservation and Recovery Act (RCRA)

### Text of Whistleblower Provision, 42 U.S.C. § 6971

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<sup>8</sup> or under any applicable implementation plan, or has testified or is about to testify in any proceeding resulting from the administration or enforcement of the provisions of this chapter or of any applicable implementation plan.

### Background

RCRA, which refers to the SWDA and subsequent amendments, was intended to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste which is nonetheless generated, “so as to minimize the present and future threat to human health and the environment.” 42 U.S.C. § 6902(b). RCRA gives EPA the authority to control hazardous waste from “cradle-to-grave,” including setting standards applicable to those who generate or transport hazardous waste and those who own or operate treatment, storage, and disposal facilities, and requiring that such entities investigate and clean up contaminated soil, groundwater, and surface water. RCRA also sets forth a framework for the management of solid (non-hazardous) waste (including liquid and contained gaseous wastes, semi-solid wastes and sludge), which bans the open dumping of waste, encourages source-reduction and recycling, sets minimum criteria for municipal waste and industrial waste landfills, and governs non-hazardous secondary materials, burned in combustion units as ingredients or fuel (the emissions from which are also governed by the CAA). RCRA also governs the use of underground tanks storing petroleum and other hazardous substances. A majority of states are authorized to implement

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<sup>8</sup> This refers to Title 42, Chapter 82 of the U.S. Code or RCRA, as codified.

RCRA's hazardous and solid waste programs. RCRA regulates hazardous waste handling and disposal at sites in active use and prevents contamination resulting in future superfund sites (see CERCLA).

## Resources

- Resource Conservation and Recovery Act (RCRA) Overview, <https://www.epa.gov/rcra/resource-conservation-and-recovery-act-rcra-overview>.
- Hazardous Waste, <https://www.epa.gov/hw>.

## VI. Toxic Substances Control Act (TSCA)

### Text of Whistleblower Provision, 15 U.S.C. § 2622

No employer may discharge any employee or otherwise discriminate against any employee with respect to the employee's compensation, terms, conditions, or privileges of employment because the employee (or any person acting pursuant to a request of the employee) has--(1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter;<sup>9</sup> (2) testified or is about to testify in any such proceeding; or (3) assisted or participated or is about to assist or participate in any manner in such a proceeding or in any other action to carry out the purposes of this chapter.

### Background

TSCA was enacted to limit the public health and environmental risks associated with exposure to and release of toxic chemical substances and mixtures. *See* 15 U.S.C. § 2601. TSCA authorizes EPA to gather and disseminate information about the production, use, and possible adverse effects to human health and the environment of existing chemicals in commerce on its TSCA Chemical Substances Inventory and, where necessary, to require testing to evaluate potential risks to human health and the environment. For chemicals new to U.S. commerce, TSCA requires pre-market approval. Under TSCA, if EPA identifies unreasonable risks associated with existing or new chemicals, it must take steps to reduce risks to a reasonable level, for instance, by regulating the manufacture, importation, processing, distribution, use and/or disposal of the chemicals. In addition, TSCA directs EPA to control risks from polychlorinated biphenyls (PCBs); bans certain activities relating to elemental mercury; sets standards for asbestos mitigation in schools and requires asbestos contractors to be trained and certified; provides technical assistance to states that support radon monitoring and control; provides similar assistance with respect to abatement of lead-based paint hazards; addresses environmental issues at school; and sets standards for formaldehyde emissions from composite wood products.

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<sup>9</sup> This refers to Title 15, Chapter 53 of the U.S. Code or TSCA, as codified. Note that this includes the Asbestos Hazard Emergency Response Act (AHERA), codified in Subchapter II, violations of which are also subject to the whistleblower protection provision of 15 U.S.C. § 2651.

## Resources

- Summary of the Toxic Substances Control Act, <https://www.epa.gov/laws-regulations/summary-toxic-substances-control-act>.
- TSCA Chemical Substance Inventory, <https://www.epa.gov/tsca-inventory>.

## VII. Cross-Cutting Issues

As discussed above, certain issues may be addressed in several of the Environmental Statutes.

The following issues, which are frequently raised in complaints under these statutes, are regulated under multiple statutes and how they are docketed will depend on the specific allegations made and complaint's reasonable beliefs.

**Asbestos:** <https://www.epa.gov/asbestos/asbestos-laws-and-regulations>.

**Formaldehyde:** <https://www.epa.gov/formaldehyde/laws-and-regulations-concerning-formaldehyde>.

**Lead:** <https://www.epa.gov/lead/lead-laws-and-regulations>.

**Mercury:** <https://www.epa.gov/mercury/environmental-laws-apply-mercury>.

## Appendix II: Optional Worksheets

### Optional Worksheet 1: Analyzing Environmental Whistleblower Complaints

*In order to issue merit findings under an Environmental Statute, answers 1 to 9 must be "yes" and answer 10 must be "no."*

	Yes	No
<b>Timeliness</b>		
1. Was the complaint filed within 30 days of the alleged adverse action (or tolling applies)?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Coverage</b>		
2. Is respondent a covered employer under the relevant Environmental Statute?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is complainant an employee within the meaning of the Environmental Statutes?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Protected Activity</b>		
4. Has complainant engaged in protected activity under an Environmental Statute (see Optional Worksheet 2) (pick at least one statute): <input type="checkbox"/> CAA <input type="checkbox"/> FWPCA/CWA <input type="checkbox"/> SWDA/RCRA <input type="checkbox"/> CERCLA <input type="checkbox"/> SDWA <input type="checkbox"/> TSCA	<input type="checkbox"/>	<input type="checkbox"/>
5. If complainant's protected activity was providing information, filing a complaint, or refusing to work, did complainant have a subjective, good faith belief that the conduct complained of touched on the purposes of the relevant Environmental Statute?	<input type="checkbox"/>	<input type="checkbox"/>
6. If complainant's protected activity was providing information, filing a complaint, or refusing to work, could a reasonable person with similar training, knowledge, and experience believe that the conduct complained of touched on the purposes of the relevant Environmental Statute?	<input type="checkbox"/>	<input type="checkbox"/>
<b>Employer Knowledge</b>		
7. Did respondent know or suspect that complainant engaged in the protected activity? (Remember that knowledge may be imputed to respondent using a cat's paw theory or the small plant doctrine if warranted by the evidence.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Adverse Action</b>		
8. Did respondent discharge or take other adverse action against the employee? (Adverse action is any action that could dissuade a reasonable employee from engaging in protected activity. Common examples include firing, demoting, or disciplining the employee.)	<input type="checkbox"/>	<input type="checkbox"/>
<b>Nexus</b>		
9. Was complainant's protected activity a cause of respondent's decision to take adverse action against the complainant? Evidence that protected activity caused an adverse action includes, but is not limited to: <ul style="list-style-type: none"> <li>• Close timing (temporal proximity) between the protected activity and the adverse action.</li> <li>• Evidence of hostility towards the protected activity.</li> <li>• Disparate treatment of complainant as compared to other employees following the protected activity.</li> <li>• Changes in respondent's treatment of complainant after the protected activity.</li> <li>• Indicators that respondent's stated reasons for the adverse action are pretext.</li> </ul>	<input type="checkbox"/>	<input type="checkbox"/>
<b>Evaluation of Respondent's Defense</b>		
10. Would respondent have taken the same action against complainant absent the protected activity?	<input type="checkbox"/> No	<input type="checkbox"/> Yes

**Optional Worksheet 2: Environmental Statutes Protected Activity Checklist**

Check all that apply. If at least one box from item 1 and one box from item 2 are checked also check "yes" and the relevant statute(s) on Optional Worksheet 1, item 4.

<b>1. Which Environmental Statutes are implicated by the complaint (check all that apply):</b>	
<input type="checkbox"/> CAA	Air emissions from area, stationary, and mobile sources; standards for control technologies, fuel, consumer goods; acid rain; depletion of the ozone layer; visibility in national parks; hazardous air pollutants
<input type="checkbox"/> CERCLA	Clean-up of hazardous waste or "superfund" sites, as well as accidents, spills, and other emergency releases of pollutants and contaminants; allocation of financial responsibility for clean-up
<input type="checkbox"/> FWPCA/CWA	Discharge of pollutants into water; standards for wastewater treatment systems; wetlands
<input type="checkbox"/> SDWA	Violations relating to waters actually or potentially designated for drinking; water quality standards; requirements for public water systems; injection of waste into groundwater; "lead-free" requirements for pipes, plumbing fixtures, and school water fountains
<input type="checkbox"/> SWDA/RCRA	Treatment, storage, and disposal of solid and hazardous waste at active sites (can also be liquid and contained gaseous wastes, semi-solid wastes and sludge); standards for municipal and industrial waste landfills; underground storage tanks; reduction of waste generation
<input type="checkbox"/> TSCA	Manufacture, importation, processing, distribution, use and/or disposal of chemicals; also regulates PCBs, elemental mercury, asbestos mitigation, radon monitoring, lead abatement, and formaldehyde emissions
<b>2. What is the protected activity? (check all that apply)</b>	

Has complainant (or was complainant about to):

- Made an internal complaint to the employer related to an Environmental Statute?
- Provided information to or filed a complaint with a federal, state, or local agency, legislative body, or other federal, state, or local government entity related to an Environmental Statute?
- Participated, assisted, or testified in an investigation or proceeding related to an Environmental Statute?
- Refused to work, refused to perform an assigned task, or refused to authorize the use of facilities or equipment because of concerns related to an Environmental Statute?
- Other protected activity related to an Environmental Statute (specify below):

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