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October 9, 2004

Submitted electronically to: http://www.regulations.gov
OSHA Docket Office
U.S. Department of Labor
200 Constitution Ave., NW
Room N-2625
Washington, D.C. 20210

Re: Docket No. OSHA-2007-0028-
Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Federal Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended

To Whom It May Concern:

The Government Accountability Project (GAP) appreciates the opportunity to provide substantive comments on the above-referenced interim final rule published by the Occupational Safety & Health Administration (OSHA) on August 10, 2007. For thirty years, GAP has promoted government and corporate accountability by advancing occupational free speech, defending whistleblowers, and empowering citizen activists. We pursue this mission through our Nuclear Safety, International Reform, Corporate Accountability, Environmental, Food & Drug Safety, and Federal Employee/National Security programs. GAP is the nation's leading whistleblower protection organization. Over the course of its history, GAP has represented hundreds of whistleblowers, including many involved in nuclear and environmental issues.

GAP recognizes the important work performed each day on whistleblower complaints by OSHA, Administrative Law Judges (ALJ), the Administrative Review Board (ARB) and the respective staffs that support these offices. We agree that it is important to promulgate clear regulations that reflect the letter and spirit of the employee protection provisions contained within the six Federal Environmental statutes and the Energy Reorganization Act (ERA). However, we are concerned about several of the proposed interim final rules offered by OSHA. Our comments and suggested revisions are reflected in the passages that follow.

Section 24.101 Definitions.

The definition of “Respondent” in this section fails to include individuals who may have violated the rights of a Complainant. The definition as proposed states that “Respondent means the employer named in the complaint . . .” Of the seven statutes that

are the subjects of the proposed interim rules, three make clear that it is not only employers who are subject to the requirements of these statutes. Individuals who participate in discriminatory acts are also subject to liability. The statutes state, in part, that "[n]o **person** shall fire, or in any other way discriminate against . . . any employee . . ." SWDA, 42 U.S.C. § 6971(a) (emphasis added). See, also, FWPCA, 33 U.S.C. § 1367; CERCLA, 42 U.S.C. § 9610.

Consequently, the definition of "Respondent" must include individuals other than employers who fire, discriminate against, "or cause to be fired or discriminated against" any employee who engages in protected activity. We recognize that the ARB has seemingly ruled to the contrary by refusing to hold individuals liable for violations of SWDA, CERCLA or FWPCA. See, *e.g.*, *Erickson v. U.S. EPA*, *et al*., ARB Case No.s 04-024/025 (ARB Oct. 31, 2006), slip op. at 5 n.7, *citing*, *Culligan v. American Heavy Lifting Shipping Co.*, ARB Case No. 03-046 (ARB June 30, 2004), slip op. at 14 – 15. However, these decisions fail to address the plain language of the three statutes that invoke individual liability and do not provide any rationale justifying disregard for these statutes.

Section 24.102 Obligations and Prohibited Acts

This section describes the prohibitions prescribed under the six Federal Environmental statutes and ERA. Subsection (a) pertains to the prohibitions under the six Federal Environmental statutes. This subsection states in relevant part that "[n]o employer . . . may discharge or otherwise retaliate against any employee . . ." who engages in protected activity. Again the term "employer" is too restrictive regarding the FWPCA, CERCLA and SWDA. In addition, the phrase "or otherwise retaliate against" is more limited than the prohibition stated in every one of the statutes that are the subject of the interim rule. The language in the statutes states "[n]o employer may discharge any employee or otherwise **discriminate** against any employee" for engaging in protected activity. See, *e.g.*, TSCA, 15 U.S.C. § 2622(a) (emphasis added). The term "retaliate" should be replaced with the term "discriminate" in order to be consistent with the statutes.

We have the same concern in subsection (c), which describes the prohibitions contained in the ERA. The term "retaliate" is also used in this subsection and should be changed to "discriminate." OSHA does not have the lawful authority to rewrite statutory language in a way that materially shrinks employee rights. That is the case with this revision. "Discrimination" and "retaliation" are not synonyms. The latter requires a showing of animus; the former only disparate treatment. The substitution is flatly illegal.

Section 24.104 Investigation

A major concern regarding OSHA's investigation procedures in whistleblower cases is that the process requires the Complainant to openly release information in support of her/his complaint that can be reviewed by the Respondent, but the Respondent is not required to openly share information with the Complainant. In some situations this can present a due process problem because the Complainant cannot present evidence to

further support her/his position without knowing the details of the Respondent's purported defenses.

The proposed interim regulations perpetuate this problem by allowing the Respondent to provide a response to the complaint without copying that response to the Complainant or Complainant's counsel. See, 29 C.F.R. § 24.104(b). This section needs to be rewritten to require that any testimony or other evidence that is submitted by the Respondent to OSHA must be simultaneously served on the Complainant or her/his counsel.

This section of the regulations also delineates the procedures for conducting investigations under the six Federal Environmental statutes and the ERA. Subsection (d) outlines the procedures and burdens of proof that will be considered when OSHA investigates complaints under any of the six Federal Environmental statutes. Subsection (e) outlines the procedures and burdens of proof that will be considered when OSHA investigates complaints under the ERA.

In both subsections (d) and (e) OSHA refer to "unfavorable personnel action", "adverse personnel action", and similar terms. This language suggests that a particular form of action such as a demotion, termination, or reduction in salary may be required to demonstrate injury under the employee protection provisions of the six Federal Environmental statutes and the ERA. However, the language of these statutes makes clear that

> 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 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.

SWDA, 42 U.S.C. § 6971(a) (emphasis added). Each of the other statutes at issue contains similar language prohibiting firing any other form of discrimination.

More subtle forms of discrimination that are equally actionable under the environmental statutes and ERA include, but are not limited to, (1) changing the employee to an unfavorable shift; (2) changing or reducing hours; (3) eliminating or reducing overtime; (4) taking away benefits or privileges such as flex-time; (5) unequally enforcing rules or standards against the employee; (6) altering or taking away security clearances; (7) requiring the employee to stay at her/his desk or report to someone each time s/he leaves the work area; (8) unwarranted scrutiny or criticism of the employee's work products; (9) isolating the employee: (10) personal abuse or humiliation; (11) threatened or actual physical violence; (12) letters of admonishment; and (13) informal counseling. Each of these more subtle forms of discrimination may not rise to the level of what may be considered an "adverse" or "unfavorable" personnel action. In fact, these actions may not

even involve the employer's personnel or human resources departments. Nonetheless, when meted out individually or especially when used in combination, these more subtle forms of discrimination can cause a great deal of stress for the employee and are often used as means to force employees who have engaged in protected activity to quit their jobs. The regulations must make clear that such insidious means of harassment and discrimination are actionable and will be investigated.

One other area of concern involves the standards articulated in subsection (e)(4) to determine whether an investigation under the ERA will be conducted or will be discontinued. The interim regulation states:

> (4) Notwithstanding a finding that a complainant has made a prima facie showing, as required by this section, **an investigation of the complaint will not be conducted or will be discontinued** if the respondent, pursuant to the procedures provided in this paragraph, demonstrates by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected behavior or conduct.

29 C.F.R. § 24.104(e)(4) (emphasis added). The notion that an investigation will not be conducted or will be prematurely discontinued before all the evidence is in and weighed by the investigator is clearly inconsistent with the letter and spirit of the employee protection provision of the ERA. Only in the very rare circumstance where there is no evidence of protected activity should OSHA refuse to conduct an investigation or discontinue an investigation. In that unique instance, OSHA should clearly state in its determination letter the factual and legal bases relied upon to find that the employee did not engage in protected activity.

Finally, the standards and procedures to be utilized in the investigation of whistleblower cases fail to discuss the role that evidence of pretext plays in the investigatory analysis and decision-making. Pretext is often a tool used by employers to try and legitimize discriminatory actions. See, *e.g.*, *Hoffman v. Bossert*, 94-CAA-4 (Sec'y Sept. 19, 1995); *Nichols v. Bechtel Construction, Inc.*, 87-ERA-44 (Sec'y Oct. 26, 1992), slip op. at 13 – 17; *Overall v. TVA*, ARB No. 98-111 (ARB Apr. 30, 2001); *Fabricius v. Town of Braintree*, 1997-CAA-14 n.10 (ARB Feb. 9, 1999); *Timmons v. Franklin Electric Coop.*, 1997-SWD-2 (ARB Dec. 1, 1998). Over the years, GAP has found that this area of analysis is often disregarded or only given very modest consideration by OSHA investigators. Consequently, employees who have been terminated or subjected to some negative action on the job based upon a seemingly legitimate basis find it difficult to convince investigators that they deserve protection.

The regulations must specify that investigators pay particular attention to pretext in the form of misuse of policies or unequal enforcement of policies against those who engage in protected activity. Actions taken against employees who have engaged in protected activity because, for example, the employee used vulgar language when such language is routinely tolerated on the job; the employee was late to work or turned in reports or other work products outside of deadlines established by policy when such delays are routinely

accepted; and other unequal application of policies or procedures are examples of pretext and cannot be accepted by OSHA as meeting an employer's burden to establish a "legitimate business reason" for the action taken. Nor can pretext be the basis to prove by "clear and convincing evidence" that the action taken was legitimate.

Section 24.105 Issuance of Findings and Orders

The issuance of the findings and order has become an issue in a number of whistleblower cases because of the parties served and the very short time period for appealing an OSHA investigatory determination by seeking a hearing. The regulations should clarify in subsection (b) that the parties that will be served include the Complainant and Respondent(s) and their respective counsel. Both should be served in order to insure timely review and action on the decision.

GAP is pleased that OSHA has changed the time period for seeking a hearing from five (5) business days to thirty (30) days. This expansion of the time period for seeking a hearing should allow adequate time for each side to fully consider the implications of the investigatory decision before seeking a hearing.

Section 24.106 Objections to the Findings and Order and Request for a Hearing

The language in this section provides that a party who desires review of the investigative decision "must file any objections and/or a request for a hearing . . . and state whether the objection is to the findings and/or the order." 29 C.F.R. § 24.106(a). This language is confusing as it does not make clear whether requesting a hearing must be accompanied by listing specific objections. If objections are required, it is unclear how detailed the objections would need to be for them to be deemed sufficient.

GAP recommends that the language of subsection (a) be changed to simply indicate that it is sufficient for an objecting party to request a hearing. A request for hearing makes clear that the party needs to exercise the opportunity to more fully present evidence and to more fully challenge the evidence or issues raised by the opposing party. Detailed objections seem to serve no purpose when hearings are conducted *de novo*, making the results of the investigation inconsequential.

Section 24.107 Hearings

The language of this section seems to be driven by the need to timely complete a hearing, issue a recommended decision, and allow time for review and the issuance of a final decision by the ARB. While the need for timely hearings and decisions is important, obtaining them must not be accomplished by grossly limiting or taking away the tools employees need to prove their cases. The goal to avoid delay should not trump the legitimacy of a whistleblower's right to a fair administrative hearing by canceling long-established, deeply-ingrained due process rights.

This section of the proposed interim regulations states that "[t]he hearing is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties." The section further states that "[a]dministrative law judges have broad discretion to limit discovery in order to expedite the hearing." The quoted language strongly implies an emphasis on quickly scheduled hearings with little opportunity for discovery. This result should only be permitted when the Respondent fully cooperates in discovery by timely making witnesses available for deposition, timely answering written discovery requests, and timely providing access to documents that may lead to the discovery of admissible evidence including, e-mails and other electronically stored data. Because much of the evidence needed to prove the Complainant's case and to challenge the defenses raised by the Respondent is in the possession of the Respondent, Complainants suffer disproportionately when discovery and time for trial preparation is significantly limited.

Consequently, GAP respectfully urges the rewriting of this section to make clear that the need to complete the hearing process cannot be balanced solely on backs of Complainants who are usually vastly out resourced by the Respondents and need adequate time to seek and obtain the information necessary to prove their cases. Discovery is an essential tool that must not be rendered meaningless by an overriding focus on scheduling a hearing.

Section 24.109 Decision and Orders of the Administrative Law Judge

Some of the language in this section that discusses the burdens of proof under the six Federal Environmental statutes and the ERA should be clarified. When considering the respondent's burden the regulation states that "relief may not be ordered if the respondent demonstrates" by clear and convincing evidence under the ERA or by preponderance of evidence under the environmental statutes that it would have taken the same action in the absence of protected activity. GAP believes that the effect of the Complainant meeting her/his burden of proof should be more affirmatively stated. The language should be altered to state that "relief must be ordered unless" the respondent demonstrates by clear and convincing evidence under the ERA or by preponderance of evidence under the environmental statutes that it would have taken the same action in the absence of protected activity.

Section 24.114 District Court Jurisdiction of Retaliation Complaints under the Energy Reorganization Act

In subsection (a) the agency reflects the language of the ERA which permits a Complainant to move the case to federal district court if a final decision is not reached within one year. In particular, the language of this subsection states: "If the Board has not issued a final decision within one year of the filing of a complaint under the Energy Reorganization Act, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for *de novo* review in the appropriate district court of the United States." The question then is what would be considered "bad faith." At a minimum, the regulations should be clear that exercising rights available under the Federal Rules of Civil Procedure and the Department of Labor's rules is

not considered a bad faith delay that the Secretary will argue deprives whistleblowers of access to *de novo* court review.

GAP believes that it is not bad faith, for example, to seek discovery; seek reasonable delays to allow discovery; or to accommodate the schedules of the parties, their counsel or the ALJ. GAP requests that the agency make clear what it views as bad faith in light of the language of the statute and legislative history. Thus, penalizing complainants for engaging in discovery practices that are normal in analogous litigation is unwarranted, and without any legal basis. Neither statutory language nor legislative history contains any authority to sharply curtail existing discovery rights. The provisions for *de novo* court review were enacted because of deficiencies in the processing of whistleblower cases. Attempts to block court access by further deteriorating existing due process rights are flatly unacceptable and unlawful.

In GAP's experience, much of the most significant delays in the process occur at the investigative stage and during ARB review. Penalizing Complainants for modest and necessary delays during the trial stage would be unwarranted except in the most egregious circumstances.

Subsection (b) requires that a notice of intent to move the case to federal court be filed fifteen days before the Complainant formally files in federal court. This requirement goes beyond what is required by the ERA and should be removed from the rules.

ERA Posted Notice

Finally, the notice for employees explaining their rights under the ERA requires some clarifying language. The notice fails to make clear that an employee is protected for raising concerns pertaining to a suspected violation of the regulations or orders issued by the NRC or DOE. Further, in the section describing what employers are prohibited from doing to employees who engage in protected activity, the proposed notice states that along with other prohibitions the employer may not "in any other way retaliat[e] against you." The word "retaliating" should be replaced with "discriminating." This would make the language of the notice consistent with the language of the statutes.

Respectfully submitted,

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