In addition, Therio, Inc., is not currently listed in the animal drug regulations as a sponsor of an approved application. Accordingly, § 510.600 is being amended to add entries for this sponsor.

This rule does not meet the definition of ''rule'' in 5 U.S.C. 804(3)(A) because it is a rule of ''particular applicability.'' Therefore, it is not subject to the congressional review requirements in 5 U.S.C. 801–808.

List of Subjects

21 CFR Part 510

Administrative practice and procedure, Animal drugs, Labeling, Reporting and recordkeeping requirements.

21 CFR Part 522

Animal drugs.

Therefore, under the Federal Food, Drug, and Cosmetic Act and under authority delegated to the Commissioner of Food and Drugs and redelegated to the Center for Veterinary Medicine, 21 CFR parts 510 and 522 are amended as follows:

PART 510—NEW ANIMAL DRUGS

▪ The authority citation for 21 CFR part 510 continues to read as follows:

Authority: 21 U.S.C. 321, 331, 351, 352, 353, 360b, 371, 379e.

▪ 2. In § 510.600, in the table in paragraph (c)(1), remove the entry for ''Ausa International, Inc.''; and alphabetically add a new entry for ''Therio, Inc.''; and in the table in paragraph (c)(2), remove the entry for ''059521''; and in numerical sequence add a new entry for ''052923'' to read as follows:

§ 510.600 Names, addresses, and drug labeler codes of sponsors of approved applications.

* * * * *

(c) * * *

(1) * * *

Firm name and address	Drug labeler code
* * * * *	
Therio, Inc., 8801 Anderson Ave., Manhattan, KS 66503	052923
* * * * *	

(2) * * *

Drug labeler code	Firm name and address
* * * * *	
052923	Therio, Inc., 8801 Anderson Ave., Manhattan, KS 66503
* * * * *	

PART 522—IMPLANTATION OR INJECTABLE DOSAGE FORM NEW ANIMAL DRUGS

▪ 3. The authority citation for 21 CFR part 522 continues to read as follows:

Authority: 21 U.S.C. 360b.

§ 522.1002 [Amended]

▪ 4. In paragraph (a)(2) of § 522.1002, remove ''059521'' and add in its place ''No. 052923''.

Dated: January 12, 2011.

Steven D. Vaughn,
Director, Office of New Animal Drug Evaluation, Center for Veterinary Medicine.

[FR Doc. 2011–909 Filed 1–14–11; 8:45 am]
BILLING CODE 4160–01–P

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 24

[Docket Number: OSHA–2007–0028]

RIN 1218–AC25

Procedures for the Handling of Retaliation Complaints Under the Employee Protection Provisions of Six Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Final rule.

SUMMARY: This document provides the final text of regulations governing the employee protection (or ''whistleblower'') provisions of Section 211 of the Energy Reorganization Act of 1974, as amended, (''ERA''), implementing the statutory changes enacted into law on August 8, 2005, as part of the Energy Policy Act of 2005. The regulations also finalize changes to the procedures for handling retaliation complaints under Section 211 of the ERA and the six environmental whistleblower statutes that were designed to make them as consistent as possible with the more recently promulgated procedures for handling retaliation complaints under other whistleblower provisions administered by the Occupational Safety and Health Administration (OSHA).

DATES: This final rule is effective on January 18, 2011.

FOR FURTHER INFORMATION CONTACT: Nilgun Tolek, Director, Office of the Whistleblower Protection Program, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3610, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2199.

SUPPLEMENTARY INFORMATION:

I. Background

The Energy Policy Act of 2005, Public Law 109–58, was enacted on August 8, 2005. Among other provisions, this new law amended the employee protection provisions for nuclear whistleblowers under Section 211 of the ERA, 42 U.S.C. 5851; the statutory amendments affect only ERA whistleblower complaints. The changes to the regulations also affect the six environmental whistleblower statutes because the same procedures generally apply to each of the statutes covered in 29 CFR part 24. Because OSHA recognizes the importance of consistency in the procedures governing the whistleblower statutes that it administers, it has tried to standardize these regulations with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language. We have removed from this background section as unnecessary and confusing the statement in the interim final rule that the 2005 ERA amendments apply to claims filed on or after August 8, 2005; OSHA takes no position in these regulations on the applicability of the 2005 ERA amendments to complaints filed with the Department before August 8, 2005.

II. Summary of Statutory Changes to ERA Whistleblower Provisions

Section 629 of Public Law 109–58 (119 Stat. 785) amended Section 211 of the ERA, 42 U.S.C. 5851, by making the changes described below.

Revised Definition of ''*Employer*''

Section 211 of the ERA defined a covered ''employer'' to include: Licensees of the Nuclear Regulatory Commission (''Commission''); applicants for such licenses, and their contractors and subcontractors; contractors and subcontractors of the Department of Energy, except those involved in naval nuclear propulsion work under Executive Order 12344; licensees of an

agreement State under Section 274 of the Atomic Energy Act of 1954; applicants for such licenses, and their contractors and subcontractors. The August 2005 amendments revised the definition of ''employer'' to extend coverage to employees of contractors and subcontractors of the Commission; the Commission; and the Department of Energy.

De Novo Review

The August 2005 amendments added a provision for *de novo* review by a United States District Court in the event that the Secretary has not issued a final decision within one year after the filing of a complaint, and there is no showing that the delay is due to the bad faith of the complainant.

III. Summary of Regulations and Rulemaking Proceedings

On August 10, 2007, the Occupational Safety and Health Administration published in the **Federal Register** an interim final rule revising the rules that implemented Section 211 of the ERA, and the whistleblower provisions of the environmental statutes listed in part 24, 72 FR 44956–44969. In addition to promulgating the interim final rule, OSHA's notice included a request for public comment on the interim rules by October 9, 2007.

In response, two organizations—the Government Accountability Project (''GAP'') and the National Whistleblower Center (''NWC'')—and four individuals—William H. Ewing, Esq.; Richard R. Renner, Esq., Jason M. Zuckerman, Esq., and James F. Newport—filed comments with the agency within the public comment period. OSHA has reviewed and considered these comments and now adopts this final rule which has been revised in part to address problems perceived by the agency and the commenters.

General Comments

Richard R. Renner, Jason M. Zuckerman, and William H. Ewing commented generally that they believe the interim final regulations frustrate the purposes of the statutes to protect the public from environmental and nuclear safety dangers. They further commented that the interim final rule will deter complainants who have filed complaints under Section 211 of the ERA from seeking *de novo* relief in district courts. Renner and Zuckerman stated that previously the National Employment Lawyers Association helped initiate a liaison process with the Office of Administrative Law Judges (OALJ) and with OSHA ''to establish avenues of communication among policy makers, whistleblower groups and employer groups'' and expressed disappointment that the Department did not use that process to collect information and make decisions prior to issuing an interim final rule. Although no formal liaison process has been established, OSHA has met with representatives of the National Employment Lawyers Association and looks forward to further dialogue with its stakeholders.

The provisions in the interim final rule governing the filing of actions for *de novo* review in district court were modeled on the regulations implementing the whistleblower provisions of Section 806 of the Corporate and Criminal Fraud Accountability Act of 2002, Title VIII of the Sarbanes-Oxley Act of 2002 (''SOX''), 18 U.S.C. 1514A, codified at 29 CFR part 1980. OSHA does not believe that those regulations have deterred complainants from taking actions to district court under the *de novo* review provision. Nevertheless, based on a review of the comments and the agency's further consideration, OSHA has made some changes to the preamble and regulatory provisions that address an employee's option of proceeding in district court.

IV. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been revised to be consistent with other whistleblower regulations promulgated by OSHA to the extent possible within the bounds of the statutory language of the ERA and the six environmental statutes listed in section 24.100(a). The section numbers of these regulations also have been changed to correspond with the numbering under the regulations implementing other whistleblower statutes administered by OSHA. Although these regulations are intended to be consistent with the majority of OSHA's other whistleblower regulations, they refer to actions brought under the whistleblower provisions of the ERA and the six environmental statutes as actions alleging ''retaliation'' rather than ''discrimination.'' This change in terminology, which is not intended to have substantive effect, reflects that claims brought under these whistleblower provisions are prototypical retaliation claims. A retaliation claim is a specific type of discrimination claim that focuses on actions taken as a result of an employee's protected activity rather than as a result of an employee's characteristics (*e.g.*, race, gender, or religion).

Richard R. Renner and Jason Zuckerman commented that it would be helpful if the Department clarified in this Summary and Discussion of Regulatory Provisions that adverse actions in Title VII retaliation cases are not limited to tangible employment actions and that the burdens of proof in ERA cases, which were altered by statute in 1992, differ from the burdens of proof generally applicable to traditional discrimination cases. Renner and Zuckerman suggested that these principles can be clarified by including within the regulations definitions of ''unfavorable personnel action,'' ''clear and convincing evidence,'' and ''contributing factor.'' OSHA does not believe that these clarifications are necessary in the regulations. However, OSHA has included a discussion of these phrases in the preamble. Also, as explained in more detail below, for clarity and consistency, the final regulations use the phrase ''adverse action'' throughout, rather than the phrase ''unfavorable personnel action.'' In addition, both the preamble and the regulations clearly distinguish between the burdens of proof that apply under Section 211 of the ERA and the burdens of proof that apply under the six environmental whistleblower statutes.

Subpart A—Complaints, Investigations, Issuance of Findings

Section 24.100 Purpose and Scope

This section (formerly section 24.1) describes the purpose of the regulations implementing the whistleblower provisions of seven statutes enforced by the Secretary of Labor and provides an overview of the procedures covered by the regulations. The section has been revised to refer to the Federal Water Pollution Control Act, instead of the Clean Water Act. They are synonymous, but the Office of Administrative Law Judges and the Administrative Review Board (ARB) generally use Federal Water Pollution Control Act, and we do so here for the sake of consistency. In addition, the section has been renumbered to conform to the numbering system for other whistleblower regulations promulgated by OSHA. Thus, for example, former section 24.1 becomes current section 24.100. No comments were received on this section.

Section 24.101 Definitions

This new section includes general definitions applicable to the whistleblower provisions of the seven statutes listed in section 24.100(a). This section does not include programspecific definitions, which may be

found in the statutes. For purposes of clarity, OSHA has added a definition of ''business days'' to this definitional section. The term means days other than Saturday, Sunday, and Federal holidays.

One comment was received regarding the definitions contained in section 24.101. GAP commented that the definition of ''Respondent'' should include individuals other than employers, because the Solid Waste Disposal Act (SWDA), 42 U.S.C. 6971(a), provides that ''[n]o person shall fire, or in any other way discriminate against * * * any employee'' who has engaged in protected activity, and the Federal Water Pollution Control Act (FWPCA), 33 U.S.C. 1367, and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9610, have similar provisions. As GAP acknowledges in its comments, however, the ARB has held that notwithstanding the use of ''person'' in the FWPCA, SWDA, and CERCLA in place of ''employer,'' the statutes nevertheless require that the respondent have an employment relationship with the complainant or act in the capacity of an employer, that is, exercise control over the terms, conditions, or privileges of the complainant's employment. *See, e.g., Culligan* v. *American Heavy Lifting Shipping Co.*, No. 03–046 (ARB June 30, 2004). Accordingly, OSHA does not believe that changes to the definition of Respondent are necessary.

Section 24.102 Obligations and Prohibited Acts

This section (formerly section 24.2) describes the activities that are protected under the statutes covered by this part, and the conduct that is prohibited in response to any protected activities. The language generally has been revised to conform to the language in the majority of the other whistleblower regulations promulgated by OSHA, to the extent possible within the bounds of the statutory language of the ERA and the six environmental statutes. The changes are not intended to be substantive. References to the statutes listed in section 24.100(a) have deleted the adjective ''Federal'' as unnecessary. Paragraph (e) has been moved from former section 24.9. We note that the ARB interprets the phrase ''deliberate violations'' for the purpose of denying protection to an employee as including an element of willfulness. *See Fields* v. *U.S. Dep't of Labor Admin. Review Bd.*, 173 F.3d 811, 814 (11th Cir. 1999) (petitioners knowingly conducted unauthorized and potentially dangerous experiments).

One comment was received regarding the obligations and prohibited acts contained in section 24.102. GAP commented that in section 24.102(a), the term ''employer'' is too restrictive with respect to the FWPCA, CERCLA, and SWDA. As discussed above, the ARB has held that the use of ''person'' in the FWPCA, SWDA, and CERCLA in place of ''employer'' still requires that the respondent have an employment relationship with the complainant or act in the capacity of an employer. Accordingly, OSHA does not believe that use of the term ''employer'' is too restrictive in section 24.102(a). We note that former section 24.2 also used the term ''employer'' in describing obligations and prohibited acts. GAP also commented that the phrase ''or otherwise retaliate against'' should be changed to the statutory language ''or otherwise discriminate against'' to be consistent with the statutes, and that the language in section 24.102(c) describing the prohibitions under the ERA also should be changed from ''retaliate'' to ''discriminate,'' because '' '[d]iscrimination' and 'retaliation' are not synonyms.'' According to GAP, the latter term ''requires a showing of animus; the former only disparate treatment.'' As noted in this preamble, the use of the term ''retaliation'' in lieu of ''discrimination'' in these regulations is not meant to have a substantive distinction. Rather, the change in nomenclature reflects that claims brought under these whistleblower provisions are prototypical retaliation claims. Use of the term ''retaliation'' does not preclude a complaint based on an allegation of ''disparate treatment,'' as suggested by GAP. A discrimination claim based on ''disparate treatment'' requires a showing of intent to discriminate. *See, e.g., EEOC* v. *Joe's Stone Crab, Inc.*, 220 F.3d 1263, 1283– 84 (11th Cir. 2000). Similarly, a retaliation claim requires a showing of intent to retaliate. *See Wallace* v. *DTG Operations, Inc.*, 442 F.3d 1112, 1119 (8th Cir. 2006) (''The ultimate question in any retaliation case is whether the employer's adverse action against the employee was motivated by retaliatory intent.''). Accordingly, OSHA does not believe that it is necessary to change its use of the word ''retaliation,'' which is an accurate description of the type of discrimination claim that is at issue under the whistleblower provisions of the ERA and the six environmental statutes.

Section 24.103 Filing of Retaliation Complaint

This section (formerly section 24.3) has been revised to be consistent with the regulatory procedures implementing other whistleblower provisions administered by OSHA. Thus, the section heading has been changed from ''Complaint'' to ''Filing of retaliation complaint.'' Also, paragraph (c) has been changed to paragraph (b) and the heading has been changed from ''Form of Complaint'' to ''Nature of filing.'' Paragraph (d) has been changed to paragraph (c); and paragraph (b) has been changed to paragraph (d) and the language has been changed to conform with that appearing in most of OSHA's other whistleblower regulations. Finally, paragraph (e) ''Relationship to section 11(c) complaints'' has been added to explain the policy of the Secretary regarding the relationship between complaints filed under the statutes listed in section 24.100(a) and a complaint under Section 11(c) of the Occupational Safety and Health Act. No comments were received on this section.

The final regulation in paragraph (b) has been revised to provide that no particular form of complaint is required. Paragraph (b) specifies that a complaint may be made orally or in writing. It also states that when a complaint is made orally, OSHA will reduce the complaint to writing and that if a complainant is not able to file the complaint in English, the complaint may be filed in any language. These changes are consistent with decisions of the ARB, which have permitted oral complaints. *See, e.g., Roberts* v. *Rivas Environmental Consultants, Inc.*, 96–CER–1, 1997 WL 578330, at *3 n.6 (Admin. Review Bd. Sept. 17, 1997) (complainant's oral statement to an OSHA investigator, and the subsequent preparation of an internal memorandum by that investigator summarizing the oral complaint, satisfies the ''in writing'' requirement of CERCLA, 42 U.S.C. § 9610(b), and the Department's accompanying regulations in 29 CFR part 24); *Dartey* v. *Zack Co. of Chicago*, No. 82–ERA–2, 1983 WL 189787, at *3 n.1 (Sec'y of Labor Apr. 25, 1983) (adopting administrative law judge's findings that complainant's filing of a complaint to the wrong DOL office did not render the filing invalid and that the agency's memorandum of the complaint satisfied the ''in writing'' requirement of the ERA and the Department's accompanying regulations in 29 CFR part 24). Moreover, this is consistent with OSHA's longstanding practice of accepting oral complaints filed under Section 11(c) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 660(c); Section 211 of the Asbestos Hazard Emergency Response Act of 1986, 15 U.S.C. 2651; Section 7 of the International Safe Container Act of 1977, 46 U.S.C. 80507; and the Surface

Transportation Assistance Act of 1982, 49 U.S.C. 31105.

Section 24.104 Investigation

This section (formerly section 24.4) has been revised so that its language will conform more closely to the language of the majority of OSHA's other whistleblower regulations. Additionally, former paragraph (b) of section 24.5 has been revised and moved to this section, and former paragraph (d) of section 24.4 has been revised and moved to section 24.105, where it more appropriately appears under ''Issuance of findings and orders.''

Paragraphs (e) and (f) of section 24.104 set forth the standards of causation that OSHA applies to cases under the six environmental whistleblower statutes and the ERA. When adjudicating whistleblower complaints under the six environmental whistleblower statutes, the Department has relied on standards derived from discrimination case law as set forth under *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977); *Price Waterhouse* v. *Hopkins*, 490 U.S. 228 (1989); *Texas Department of Community Affairs* v. *Burdine*, 450 U.S. 248 (1981); and *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). *See Abdur-Rahman* v. *Dekalb County*, ARB Case Nos. 08–003, 10–074, 2010 WL 2158226, at *6 (Admin. Review Bd. May 18, 2010) (motion for reconsideration pending); *Dartey* v. *Zack Co.*, No. 82–ERA–2, 1983 WL 189787, at *3–*4 (Sec'y of Labor Apr. 25, 1983). Under these standards, a complainant may prove retaliation either by showing that the respondent took the adverse action because of the complainant's protected activity or by showing that retaliation was a motivating factor in the adverse action (*i.e.* a ''mixed-motive analysis''). *See, e.g., Abdur-Rahman*, 2010 WL 2158226, at *6 (FWPCA case applying a mixed motive analysis); *Higgins* v. *Alyeska Pipeline Serv. Corp.*, ARB Case No. 01– 022, 2003 WL 21488356, at *4 (Admin. Review Bd. June 27, 2003) (explaining burdens of proof applicable to claims under TSCA, SWDA, and CAA); *Masek* v. *The Cadle Co.*, ARB Case No. 97–069, 2000 WL 562699, at *9–*10 (Admin. Review Bd. Apr. 28, 2000) (explaining burdens of proof applicable to claims under FWCPA, TSCA, CAA and CERCLA); *Combs* v. *Lambda Link*, ARB Case No. 96–066, 1997 WL 665483, at *1–*2 (Admin. Review Bd. Oct. 17, 1997) (applying mixed-motive analysis under CAA, TSCA, FWCPA).

If the complainant demonstrates that the respondent acted at least in part for prohibited reasons, the burden shifts to the respondent to prove by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected activity. *See, e.g., Dixon* v. *U.S. Dep't of Interior, Bureau of Land Mgmt.*, ARB Case No. 06–14706–160, 2008 WL 4124113, at *9–*10 (Admin. Review Bd. Aug. 28, 2008) (applying ''mixed motive'' analysis to claims under CERCLA and SDWA); *Dartey*, 1983 WL 189787, at *4 (discussing *Mt. Healthy*, 429 U.S. at 287). In such cases, the employer ''bears the risk that 'the influence of legal and illegal motives cannot be separated.' '' *Mackowiak* v. *Univ. Nuclear Sys. Inc.*, 735 F.2d 1159, 1164 (9th Cir. 1984) (ERA case) (which quoted *NLRB* v. *Transp. Mgmt. Corp.*, 462 U.S. 393, 403 (1983)).

At the investigation stage, OSHA will dismiss the complaint unless the complainant makes a prima facie showing that protected activity was at least a motivating factor in the alleged adverse action. The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.

The complainant will be considered to have met the required showing if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence sufficient to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a motivating factor in the adverse action. The required showing may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a motivating factor in the adverse action. OSHA will dismiss the complaint if a preponderance of the evidence shows that the respondent would have taken the same adverse action in the absence of the complainant's protected activity.

The Department recognizes that after promulgation of the interim final rule, the Supreme Court issued *Gross* v. *FBL Financial Services, Inc.*, 129 S. Ct. 2343 (2009). The Court held in *Gross* that the prohibition against discrimination ''because of'' age in the Age Discrimination in Employment Act (ADEA), 29 U.S.C. 623(a)(1), requires a plaintiff to ''prove that age was the 'butfor' cause of the employer's adverse decision.'' 129 S. Ct. at 2350 (citation omitted). The Court rejected arguments that a plaintiff could prevail in an action under the ADEA by showing that discrimination was a motivating factor for the adverse decision, after which the employer had the burden of proving that it would have reached the same decision for non-discriminatory reasons. *Id.* at 2351–52.

The Department does not believe that the Supreme Court's decision in *Gross* affects the long-standing burden-shifting framework applied in mixed-motive cases under the six environmental whistleblower statutes as reflected in the Department's regulations and case law. The Supreme Court's *Gross* decision involved an age discrimination case under the ADEA, not retaliation cases filed by individuals under the environmental statutes. The Supreme Court cautioned in *Gross* itself that ''[w]hen conducting statutory interpretation, we 'must be careful not to apply rules applicable under one statute to a different statute without careful and critical examination.' '' *Id.* at 2349 (quoting *Fed. Express Corp.* v. *Holowecki*, 552 U.S. 389, 393 (2008)); *see Smith* v. *Xerox Corp.*, 602 F.3d 320 (5th Cir. 2010) (ADEA analysis in *Gross* is inapplicable to Title VII antiretaliation cases); *But see, e.g., Serwatka* v. *Rockwell Automation, Inc.*, 591 F.3d 957 (7th Cir. 2010) (applying *Gross* reasoning to Americans with Disabilities Act).

In addition, as the Court noted in *Gross*, its decision did not conflict with, or undermine, prior Supreme Court decisions applying the mixed motive burden-shifting framework to Constitutional cases and cases under the National Labor Relations Act (NLRA). *Gross*, 129 S. Ct. at 2352 n.6 (citing *Transp. Mgmt. Corp.*, 462 U.S. at 401– 403; and *Mt. Healthy City Bd. of Educ.*, 429 U.S. at 287); *but see Fairley* v. *Andrews*, 578 F.3d 518 (7th Cir. 2009) (applying *Gross* reasoning to First Amendment case), *cert. denied*, 130 S. Ct. 3320 (2010). The Court recognized the appropriateness of deferring to the National Labor Relations Board's (NLRB's) interpretation of the NLRA to allow a mixed motive burden-shifting analysis. *Gross*, 129 S. Ct. at 2352 n.6 (''The case involving the NLRA did not require the Court to decide in the first instance whether burden shifting should apply as the Court instead deferred to

the National Labor Relations Board's determination that such a framework was appropriate'') (citation omitted); *see Hunter* v. *Valley View Local Schs.*, 579 F.3d 688, 691–92 (6th Cir. 2009) (deferring to Department of Labor's Family and Medical Leave Act (FMLA) regulations in holding that prohibition in FMLA against interference with the exercise of rights permits mixed-motive analysis after *Gross*). With regard to the environmental whistleblower provisions, as with the NLRB's interpretation of the NLRA, the Secretary's longstanding administrative case law permits a mixed-motive analysis. This case law is due deference as the Secretary's reasonable interpretation of the environmental whistleblower statutes. *Knox* v. *U.S. Dep't of Labor,* 434 F.3d 721, 724 (4th Cir. 2006) (''We review the ARB's interpretation of the CAA under the deferential standard set forth in *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*''); *Anderson* v. *U.S. Dep't of Labor*, 422 F.3d 1155, 1173, 1181 (10th Cir. 2005) (providing Chevron deference to the ARB's construction of the environmental whistleblower statutes); *Reid* v. *Sec'y of Labor*, No. 95–3648, 1996 WL 742221, at *1 (6th Cir. 1996) (unpubl'd) (106 F.3d 401 (Table)) (deferring to Secretary's reasonable construction of the term employee under CAA); *Mackowiak*, 735 F.2d at 1164 (deferring to Secretary's application of mixed-motive analysis under pre-amendment version of the ERA).

Finally, the Court in *Gross* based its decision that a mixed-motive analysis was inapplicable to the ADEA in part on its determination that Congress decided not to amend the ADEA to clarify that a mixed-motive analysis applied when it amended both the ADEA and Title VII in the Civil Rights Act of 1991 (Title VII). *Gross*, 129 S. Ct. at 2349 (''Unlike Title VII, the ADEA's text does not provide that a plaintiff may establish discrimination by showing that age was simply a motivating factor. Moreover, Congress neglected to add such a provision to the ADEA when it amended Title VII to add §§ 2000e–2(m) and 2000e–5(g)(2)(B), even though it contemporaneously amended the ADEA in several ways'') (citations omitted). In so finding, the Court noted that '' 'negative implications raised by disparate provisions are strongest' when the provisions were 'considered simultaneously when the language raising the implication was inserted.' '' *Id.* (quoting *Lindh* v. *Murphy*, 521 U.S. 320, 330 (1997)). Congress did not consider amendments to the environmental whistleblower provisions when it amended Title VII and the ADEA in the Civil Rights Act of 1991. Thus, the environmental whistleblower statutes do not raise the strong negative implications that the Supreme Court noted in *Gross.*

The Department therefore believes that the application of a mixed-motive analysis to the environmental whistleblower statutes continues to be appropriate based on the ARB's longstanding decisions interpreting these statutes, is consistent with Congress' intent and is reasonable in the context of the remedial purposes of these laws to safeguard workers from retaliation for protected activity involving the public health and the environment.

Paragraph (f) of this section, which sets forth procedures that apply only in ERA cases, applies the ERA's statutory burdens of proof. Since the 1992 amendments to the ERA, its whistleblower provisions, in contrast to the other whistleblower provisions listed under section 24.100(a), have contained specific statutory standards for the dismissal and adjudication of complaints. *See* 42 U.S.C. 5851(b)(3)(A) through (b)(3)(D); Public Law 102–486, § 2902, 106 Stat. at 3123–3124. Because the ERA expressly sets forth the burdens of proof that apply to retaliation claims under that statute, the holding in *Gross* does not apply to the ERA. The ERA requires that a complainant make an initial prima facie showing that his or her protected activity was ''a contributing factor'' in the adverse action alleged in the complaint, *i.e.*, that the protected activity, alone or in combination with other factors, affected in some way the outcome of the employer's decision. 42 U.S.C. 5851(b)(3)(A). If the complainant does not make the prima facie showing, the investigation must be discontinued and the complaint dismissed. *See Trimmer* v. *U.S. Dep't of Labor,* 174 F.3d 1098, 1101 (10th Cir. 1999) (noting that the distinct burden-shifting framework of the 1992 ERA amendments served a ''gatekeeping function'' that ''stemmed frivolous complaints''). Even in cases where the complainant successfully makes a prima facie showing, the investigation must be discontinued if the employer demonstrates, by clear and convincing evidence, that it would have taken the same adverse action in the absence of the protected activity. Thus, under the ERA, the Secretary must dismiss the complaint and not investigate (or cease investigating) if either: (1) The complainant fails to meet the prima facie showing that protected activity was a contributing factor in the adverse action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same adverse action absent the protected activity. Assuming that an investigation proceeds beyond the gatekeeping phase, the ERA specifies statutory burdens of proof that require an employee to prove that the alleged protected activity was a ''contributing factor'' to the alleged adverse action. 42 U.S.C. 5851(b)(3)(C). If the employee proves that the alleged protected activity was a contributing factor to the adverse action, the employer, to escape liability, must prove by ''clear and convincing evidence'' that it would have taken the same action in the absence of the protected activity. A contributing factor is ''any factor, which alone or in combination with other factors, tends to affect in any way the outcome of the decision.'' *Marano* v. *Dep't of Justice*, 2 F.3d 1137, 1140 (Fed. Cir. 1993) (Whistleblower Protection Act, 5 U.S.C. 1221(e)(1)); *cf. Trimmer*, 174 F.3d at 1101 (the 1992 amendments aimed, in part, ''to make it easier for [ERA] whistleblowers to prevail in their discrimination suits'')). In proving that protected activity was a contributing factor in the adverse action, ''a complainant need not necessarily prove that the respondent's articulated reason was a pretext in order to prevail,'' because a complainant alternatively can prevail by showing that the respondent's '' 'reason, while true, is only one of the reasons for its conduct,' '' and that another reason was complainant's protected activity. *See Klopfenstein* v. *PCC Flow Techs. Holdings, Inc.*, No. 04–149, 2006 WL 1516650, *13 (ARB May 31, 2006) (discussing contributing factor test under SOX) (citing *Rachid* v. *Jack in the Box, Inc.*, 376 F.3d 305, 312 (5th Cir. 2004)).

The ERA statutory burdens of proof do not address the evidentiary standard that applies to a complainant's proof that protected activity was a contributing factor in an adverse action. Adhering to traditional Title VII discrimination law, it is the Secretary's position that the complainant must prove by a ''preponderance of the evidence'' that his or her protected activity contributed to the adverse action; otherwise, the burden never shifts to the employer to establish its ''clear and convincing evidence'' defense. *See, e.g., Dysert* v. *U.S. Sec'y of Labor*, 105 F.3d 607, 609 (11th Cir. 1997) (upholding Department's interpretation of 42 U.S.C. 5851(b)(3)(C), as requiring an employee to prove by a preponderance of the evidence that

protected activity was a contributing factor in an adverse action); *see also Trimmer*, 174 F.3d at 1102 (''[o]nly if the complainant meets his burden [of proving by a preponderance of the evidence that he engaged in protected activity that was a contributing factor in an adverse action] does the burden then shift to the employer to demonstrate by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence of such behavior.''); *Stone & Webster Engineering Corp.* v. *Herman*, 115 F.3d 1568, 1572 (11th Cir. 1997) (under section 5851, an employee must first persuade the Secretary that protected activity was a contributing factor in an adverse action and then, if the employee succeeds, the employer must prove by clear and convincing evidence that it would have taken the same action in the absence of protected activity).

The 1992 ERA amendments altered the employer's burden in traditional ''mixed motive'' cases; under the ERA, once the Secretary concludes that the employer acted for both prohibited and legitimate reasons, the employer can escape liability only by proving by clear and convincing evidence that it would have reached the same decision even in the absence of the protected activity. 42 U.S.C. 5851(b)(3)(D). The ''clear and convincing evidence'' standard is a higher burden of proof for employers than the former ''preponderance of the evidence'' standard. *See* 138 Cong. Rec. 32,081, 32,082 (1992). Comments were received on section 24.104 from GAP, NWC, William H. Ewing, Richard R. Renner, and Jason M. Zuckerman. GAP, Ewing, Renner, and Zuckerman commented that section 24.104(b) should require that the respondent's responses to the complaint be served on the complainant. According to GAP, while the procedures currently require the complainant to provide information that can be reviewed by the respondent, they do not require the respondent to share information with the complainant. Ewing, Renner, and Zuckerman commented that investigations would be improved if complainants were given copies of the respondents' responses. OSHA believes that these concerns are valid and has specified in the regulation that the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant or the complainant's legal counsel, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws. The agency expects that sharing information with complainants in accordance with this new provision will enhance OSHA's ability to conduct full and fair investigations and permit the Assistant Secretary to more thoroughly assess defenses raised by respondents.

Commenting on section 24.104(c), Renner and Zuckerman commented that it is important for employee witnesses of respondents to have the option of meeting privately with the OSHA investigator because they may be reluctant to speak to investigators for fear of retaliation. While OSHA does not believe that any changes to its regulations are necessary, it is OSHA's policy to meet privately with nonmanagement employees. The facts and circumstances of each case will be considered in determining whether an employee is a non-management employee. In addition, the whistleblower provisions of the six environmental statutes and the ERA protect management employees to the same extent that they protect nonmanagement employees. Thus, where the complainant is a management employee, it is OSHA's policy to meet privately with the complainant.

GAP objected to OSHA's use in sections 24.104(d) and (e) of the terms ''unfavorable personnel action'' and ''adverse personnel action,'' because those terms suggest that only actions taken by an employer's personnel or human resources departments are actionable. OSHA does not believe that the reference to ''personnel action'' in sections 24.104(d) and (e) of the interim final rule suggested that only adverse actions taken by personnel or human resources departments are actionable. However, for clarity and consistency, the final regulatory text has been changed to use ''adverse action'' throughout.

GAP also commented with respect to section 24.104(e)(4) that to refuse to investigate or discontinue an investigation before all of the evidence is reviewed by OSHA is ''inconsistent with the letter and spirit of the employee protection provision of the ERA,'' and that only where there is no evidence of protected activity should an investigation be either not conducted or discontinued. Moreover, GAP commented that ''[t]he 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.'' OSHA does not believe that these comments require revisions to the regulations. The language contained in section 24.104(e)(4) reflects the statutory language of the ERA. *See* 42 U.S.C. 5851(b)(3)(A) and (3)(B). OSHA conducts fair and impartial investigations of whistleblower complaints. In evaluating the merits of a complaint, investigators credit only explanations for adverse action taken by an employer that are supported by the evidence.

NWC commented that these regulations should adopt the statutory ERA burdens of proof for complaints filed under the six environmental statutes, because since the 1992 ERA amendments, Congress has applied the ERA burdens of proof to other whistleblower statutes that it has enacted or amended, including the Pipeline Safety Improvement Act of 2002 (''PSIA''), 49 U.S.C. 60129; SOX; the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR21''), 49 U.S.C. 42121; and the Surface Transportation Assistance Act of 1982 (''STAA''), 49 U.S.C. 31105. NWC commented in this regard that the burdens of proof currently applied to the six environmental whistleblower acts are not statutory, but are based on employment discrimination law (Title VII), and that using the ERA burdens of proof for the six environmental statutes would serve the interests of justice. However, absent specific statutory direction, OSHA does not believe it is appropriate to apply the ERA's burdens of proof to the six environmental statutes.

Section 24.105 Issuance of Findings and Orders

The procedures set forth in this section formerly appeared under a paragraph of section 24.4, the Investigations section. This new section was created for purposes of clarification and consistency with a majority of the other whistleblower regulations promulgated by OSHA. The former regulations provided that the Assistant Secretary would issue a ''Notice of Determination'' at the conclusion of the investigation, or upon dismissal of a complaint. These regulations no longer use the term ''Notice of Determination.'' Instead, the regulations refer to the issuance of findings and orders, the nomenclature used in most of OSHA's other whistleblower regulations. This change in nomenclature is not intended to be substantive.

The 30-day timeframe for completion of the investigation has been retained because it is a statutory requirement under the majority of the whistleblower

statutes covered by this part (the Solid Waste Disposal Act, the Federal Water Pollution Control Act, and the Comprehensive Environmental Response, Compensation and Liability Act have no timeframe). The current regulations provide a 5-business-day timeframe for filing objections to the findings. These new regulations have been changed to provide that if no objections to the Assistant Secretary's findings and order are filed within 30 days of their receipt, the findings and order of the Assistant Secretary will become the final order of the Secretary. Thus, the timeframe for objecting to the findings and/or order and for requesting a hearing has been extended from 5 business days to 30 days. The Secretary is aware that, since the ERA, the Clean Air Act (''CAA''), the Safe Drinking Water Act (''SDWA''), and the Toxic Substances Control Act (''TSCA'') provide that the Secretary should issue a final decision within 90 days of the filing of the complaint, allowing the parties 30 days in which to object to the Assistant Secretary's findings and any order issued may have an impact on the Department's meeting the 90-day timeframe. Although the ERA amendments in 2005 did not change the 90-day timeframe, the Secretary believes that in amending the ERA in 2005, Congress recognized that it appropriately could take up to one year to complete the investigatory and adjudicative processing of a whistleblower complaint (*i.e.*, issue a final decision of the Secretary) under these environmental statutes. Accordingly, the Secretary believes that allowing 30 days for a party to object to the Assistant Secretary's findings and request a hearing is warranted. Not only does the extension make the regulations more consistent with those implementing the majority of the other whistleblower statutes administered by OSHA, it also offers the parties a more reasonable timeframe in which to consider whether to appeal the Assistant Secretary's findings.

With regard to this section, GAP, William H. Ewing, Richard R. Renner and Jason M. Zuckerman expressed approval for OSHA's decision to increase the time period for seeking a hearing from five business days to 30 days. In addition, GAP, Ewing, Renner, and Zuckerman commented that in section 24.105(b), the rule should specifically require service on the attorney of record for each party (if the party has counsel). Ewing, Renner, and Zuckerman commented that alternatively, the rule should allow objections within 30 days of the last date of service, when the party and his or her attorney are served at different times. Although it is already OSHA's policy to send its findings to the complainant and the respondent by certified mail with copies to their respective attorneys, OSHA has revised the regulations to require service on the attorney of record.

Subpart B—Litigation

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

Formerly, the procedures for requesting a hearing before an administrative law judge (''ALJ'') were set forth under section 24.6. As indicated above, to be effective, objections to the findings of the Assistant Secretary must be in writing and must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW., Washington, DC 20001 within 30 days of receipt of the findings. The date of the postmark, facsimile transmittal, or email communication is considered the date of the filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. The filing of objections is also considered a request for a hearing before an ALJ. Although the parties are directed to serve a copy of their objections to the other parties of record, as well as the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, 200 Constitution Ave., NW., Room N–2716, Washington, DC 20210, the failure to serve copies of the objections to the other parties of record does not affect the ALJ's jurisdiction to hear and decide the merits of the case. *See Shirani* v. *Calvert Cliffs Nuclear Power Plant, Inc.*, No. 04– 101, 2005 WL 2865915, *7 (ARB Oct. 31, 2005).

GAP commented that the language in section 24.106(a) needs to be clarified because it is unclear whether detailed objections, which are unnecessary since an administrative hearing is *de novo,* must accompany a hearing request. GAP suggested that the regulation be changed to state that ''it is sufficient for an objecting party to request a hearing.'' OSHA has considered this concern and does not believe that changes to the rule are necessary or that the suggested change would add helpful clarification; the rule contains no requirement that a party file detailed objections to request a hearing.

Section 24.107 Hearings

This section has been revised to conform to the majority of the other whistleblower regulations promulgated by OSHA. The interim final rule adopted the rules of practice of the Office of Administrative Law Judges at 29 CFR part 18, subpart A. In order to assist in obtaining full development of the facts in whistleblower proceedings, however, the interim final rule provided that formal rules of evidence do not apply. The section specifically provides for consolidation of hearings if both the complainant and respondent object to the findings and/or order of the Assistant Secretary. Otherwise, this section no longer addresses procedural issues, *e.g.*, place of hearing, right to counsel, procedures, evidence and record of hearing, oral arguments and briefs, and dismissal for cause, because the Office of Administrative Law Judges has adopted its own rules of practice that cover these matters. In order for hearings to be conducted as expeditiously as possible, and particularly in light of the provision in the ERA allowing complainants to seek a *de novo* hearing in Federal court if the Secretary has not issued a final decision within one year of the filing of the complaint, this section in the interim final rule provided that the ALJ has broad authority to limit discovery. The preamble noted, for example, that an ALJ may limit the number of interrogatories, requests for production of documents, or depositions allowed. The preamble also noted that an ALJ may exercise discretion to limit discovery unless the complainant agrees to delay filing a complaint in Federal court for some definite period of time beyond the one-year point; and that if a complainant seeks excessive or burdensome discovery under the ALJ's rules and procedures at part 18 of Title 29, or fails to adhere to an agreement to delay filing a complaint in Federal court, a district court considering a request for *de novo* review might conclude that such conduct resulted in a delay due to the claimant's bad faith.

Former paragraphs (f) and (g) of this section have been moved to section 24.108.

Comments on section 24.107 were received from GAP, NWC, William H. Ewing, James F. Newport, Richard R. Renner, and Jason M. Zuckerman. GAP commented that this section should be rewritten to de-emphasize the importance of an expeditious hearing. According to GAP, limiting discovery injures complainants to a greater extent than respondents because the documents needed to prove their cases

are in the possession of the respondents. Similarly, NWC, Ewing, Newport, Renner, and Zuckerman opposed the last sentence of section 24.107(b), which provides ALJs with broad discretion to limit discovery to expedite hearings. NWC commented that there is no legal basis for treating discovery in whistleblower cases differently from how it is treated in Title VII cases and that it is inconsistent with the interests of justice and Congressional intent to limit the ability of whistleblowers to obtain evidence in discovery while holding them to the same evidentiary burden applicable in Title VII cases. Ewing, Renner, and Zuckerman suggested that instead of limiting discovery, hearings could be expedited by requiring parties to comply with the initial disclosure requirements under Federal Rules of Civil Procedure 26(a)(1), by shortening the time permitted for discovery, and by providing that ALJs can make adverse inferences of unlawful retaliation based on a respondent's failure to respond fully and completely to discovery requests. They also commented that hearings could be expedited by requiring parties to provide discovery responses in searchable electronic forms when a party has the responsive information in such forms. GAP also commented that the Department should clarify that it will not be considered bad faith ''to seek discovery; seek reasonable delays to allow discovery; or to accommodate the schedules of the parties, their counsel or the ALJ.'' Suggesting that most delays in administrative cases occur either at the investigative stage or during ARB review, GAP added that complainants should not be penalized for necessary delays at the hearing stage.

The provisions and statements to which GAP, NWC, Ewing, Newport, Renner, and Zuckerman object were intended by OSHA to implement Congress's intent that administrative whistleblower hearings under the ERA proceed expeditiously. *See* 42 U.S.C. 5851(b)(2)(A) and (b)(4). OSHA believes that the short time frames provided under the whistleblower statutes generally, as well as the provision in Section 211 of the ERA providing for *de novo* review in district court, illustrate a congressional intent that the Department expedite its administrative hearings and procedures. Nevertheless, after carefully considering the comments, OSHA has decided to remove the regulatory provision in the rule stating that ALJs have broad discretion to limit discovery. The provision essentially reiterates authority that ALJs currently possess under their procedural rules at 29 CFR 18.14— 18.21, which permit judges to limit discovery in appropriate circumstances as well as to make adverse inferences where parties fail to comply with their discovery orders. Accordingly, the provision is not necessary. In response to GAP's comments, OSHA also has eliminated from the preamble the suggestion that a complainant's attempts to engage in extensive discovery when prosecuting or defending a claim before an ALJ might constitute a presumption of bad faith delay. And while OSHA agrees that it would be beneficial for parties to provide discovery responses in searchable electronic formats, it does not believe that it is appropriate for these regulations to specify how discovery in a particular case should proceed. The final rule now adopts the rules of evidence of the Office of Administrative Law Judges at 29 CFR part 18, subpart B, as well as the rules of practice at subpart A. Because it is no longer necessary for this rule to address evidentiary matters, paragraph (d) of this section has been deleted.

NWC commented regarding the preamble's discussion of this section that OSHA should not permit an employee to enter into an agreement to delay filing a complaint in district court because the jurisdictional time period for filing such an action cannot be altered by regulation. Rather, NWC commented that OSHA should add to section 24.107 a procedure in cases where third-party witnesses refuse to testify that permits employees to seek stays of their administrative proceedings so that they may file district court complaints once the one-year ''kick-out'' period has passed. NWC believes that such a procedure would encourage third-party witnesses who cannot be compelled by subpoena to testify in a whistleblower case to voluntarily appear before an ALJ proceeding. While third-party witnesses may be more inclined to voluntarily testify at ALJ hearings as an alternative to being compelled to testify in district court pursuant to a subpoena, OSHA does not believe that a special regulatory procedure to enable complainants to seek stays prior to filing in district court is necessary; the regulations do not prohibit an employee from seeking a stay from an ALJ based on his or her intention to file a *de novo* action in district court.

Finally, James F. Newport commented that the new rule shifts the cost of attending hearings to the complainant by removing the requirement that the hearing be held within 75 miles of the complainant's residence (*see* former section 24.6(c)). Newport commented that this change could discourage complainants from pursuing a case because of the financial burden. OSHA does not believe that the removal of the requirement that the hearing be held within 75 miles of the complainant's residence will discourage complainants from pursuing a case due to financial burden. This rule provides that the rules of practice and procedures for administrative hearings before the OALJ should apply to ALJ hearings. The OALJ's rules of practice and procedure provide, at 29 CFR 18.27(c): ''Unless otherwise required by statute or regulations, due regard shall be given to the convenience of the parties and the witnesses in selecting a place for the hearing.'' This same provision has governed the scheduling of hearings under regulations implementing the whistleblower protection provisions of AIR21, 29 CFR part 1979; SOX, 29 CFR part 1980; and PSIA, 29 CFR part 1981. No evidence has been submitted to suggest that complainants have been discouraged from pursuing cases under those statutes out of concern for the potential location of the hearing.

Section 24.108 Role of Federal Agencies

This new section was added to conform these regulations to the majority of OSHA's other whistleblower regulations. As noted above, the substance of this section formerly was set forth under paragraphs (f) and (g) of section 24.6, the section covering hearings. No substantive changes are intended. Under the ERA and the environmental whistleblower statutes, OSHA does not ordinarily appear as a party in the proceeding. The Secretary has found that in most whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation. Nevertheless, the Assistant Secretary, at his or her discretion, may participate as a party or amicus curiae at any time in the administrative proceedings. For example, the Assistant Secretary may exercise his or her discretion to prosecute the case in the administrative proceeding before an ALJ; petition for review of a decision of an ALJ, including a decision based on a settlement agreement between the complainant and the respondent, regardless of whether the Assistant Secretary participated before the ALJ; or participate as amicus curiae before the ALJ or in the ARB proceeding. Although we anticipate that ordinarily the Assistant Secretary will not participate, the Assistant Secretary may choose to

do so in appropriate cases, such as cases involving important or novel legal issues, large numbers of employees, alleged violations which appear egregious, or where the interests of justice might require participation by the Assistant Secretary. The Environmental Protection Agency, the Nuclear Regulatory Commission, and the Department of Energy, at those agencies' discretion, also may participate as amicus curiae at any time in the proceedings.

NWC commented that when a State agency is named as a party, OSHA should be required to intervene or participate as a party in the proceeding. In support of this comment, NWC stated that the public interest would be served if OSHA intervened in every case in which a State agency is a named respondent because Congress intended that the whistleblower provisions of the six environmental acts cover State agencies. Richard R. Renner and Jason M. Zuckerman commented that OSHA should consider intervening on behalf of complainants, especially where a complainant is *pro se,* disputing OSHA's statement in the preamble that ''in most whistleblower cases, parties have been ably represented and the public interest has not required the Department's participation.''

OSHA continues to believe that its participation as a routine matter in all whistleblower cases is neither necessary nor an effective use of its resources. Nevertheless, as noted above, it is OSHA's policy to consider participating in cases in which the Assistant Secretary considers the agency's participation to be in the interests of justice. The inability of complainants to pursue their own actions against State employers and their lack of representation by counsel are among the factors that OSHA considers when exercising its discretion to intervene as a party or as an *amicus.*

Section 24.109 Decision and Order of the Administrative Law Judge

This section sets forth the content of the decision and order of the ALJ, and includes the standard for finding a violation under the environmental statutes and the ERA. The section further provides that the Assistant Secretary's determination to dismiss the complaint without an investigation or without a complete investigation pursuant to section 24.104 is not subject to review. Thus, paragraph (c) of section 24.109 clarifies that the Assistant Secretary's determinations on whether to proceed with an investigation under the ERA and whether to make particular investigative findings under any of the statutes subject to this part are discretionary decisions not subject to review by the ALJ. The ALJ hears cases *de novo* and, therefore, as a general matter, may not remand cases to the Assistant Secretary to conduct an investigation or make further factual findings. Paragraph (c) further clarifies that the ALJ will either hear a case on the merits or dispose of the matter without a hearing if appropriate. A full discussion of the burdens of proof used by the Department of Labor to resolve whistleblower cases under this part is set forth above in the discussion of section 24.104.

This section also has been revised to eliminate the requirement under the ERA for the ALJ to issue a preliminary order of reinstatement separate from the findings. The section clarifies that when an ALJ's decision finds that the complaint has merit and orders relief, the order will be effective immediately upon its receipt by the respondent, except for that part of the order awarding compensatory damages. Congress intended that whistleblowers under the ERA be reinstated and provided additional interim relief based upon the ALJ's order even while the decision is on review with the ARB. The previous regulations have caused confusing delays to the complainant's right to immediate reinstatement. *See, e.g., McNeill* v. *Crane Nuclear, Inc.,* ARB Case No. 02–002, 2002 WL 31932543, at *1–*2 (Admin. Review Bd. Dec. 20, 2002). The Secretary intends that, by eliminating any requirement that the ALJ ''shall also issue a preliminary order providing [all of the] relief'' specified in the recommended order before an interim order becomes effective, confusion will be avoided and congressional intent to have complainants promptly reinstated based upon a meritorious ALJ decision will be better effectuated. *Id.* Furthermore, the ALJ's order will be effective immediately whether or not the ALJ designates the decision and/or order as recommended.

The substance of the rest of this section was formerly found in section 24.7. The requirement that the ALJ issue a decision within 20 days after the conclusion of the hearing has been eliminated because procedures for issuing decisions, including their timeliness, are addressed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR 18.57. GAP commented that the language in section 24.109(b) discussing the burdens of proof should be clarified.

GAP commented that the regulation should be changed to state affirmatively with respect to the respondent's burden that ''relief must be ordered unless'' the respondent carries its burden of proof, rather than to state that ''relief may not be ordered'' if the respondent demonstrates by clear and convincing evidence under the ERA, or by preponderance of the evidence under the environmental statutes, that it would have taken the same action in the absence of protected activity. The language used in the regulation, however, accurately reflects the statutory language in section 211 of the ERA and, consistent with that language, the regulation retains language indicating that relief may not be ordered if the respondent proves by a preponderance of the evidence under the environmental statutes that it would have taken the same action in the absence of protected activity.

Section 24.110 Decision and Orders of the Administrative Review Board

The decision of the ALJ is the final decision of the Secretary if no timely petition for review is filed with the ARB. Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the ARB for review of that decision, or it becomes the final decision of the Secretary and is not subject to judicial review. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The appeal provisions in this part have been revised, consistent with the majority of OSHA's other whistleblower regulations, to provide that an appeal to the ARB is no longer a matter of right but is accepted at the discretion of the ARB. Congress intended these whistleblower actions to be expedited and this change may assist in furthering that goal. The parties should identify in their petitions for review the legal conclusions and orders to which exception is taken, or the exceptions will ordinarily be deemed waived. The ARB has 30 days to decide whether to grant the petition for review. If the ARB does not grant the petition, the decision of the ALJ becomes the final decision of the Secretary. The ERA, CAA, SDWA, and TSCA contain a 90- day timeframe for issuing final agency decisions. Notwithstanding this short timeframe, the Secretary believes that it is appropriate to give the ARB 30 days in which to decide whether to grant review; as stated above, the Secretary believes that in amending the ERA in August 2005, Congress recognized that

the Department appropriately could take up to one year to complete the investigatory and adjudicative processing of a whistleblower complaint under these statutes. If a timely petition for review is filed with the ARB, any relief ordered by the ALJ, except for that ordered under the ERA, is inoperative while the matter is pending before the ARB. The relief ordered by the ALJ under the ERA is effective immediately except for that portion awarding compensatory damages. This section further provides that, when the ARB accepts a petition for review, the ALJ's factual determinations will be reviewed under the substantial evidence standard.

This section also provides that in the exceptional case, the ARB may grant a motion to stay an ALJ's order of relief under the ERA, which otherwise will be effective while review is conducted by the ARB. The Secretary believes that a stay of an ALJ's order of relief under the ERA only would be appropriate where the respondent can establish the necessary criteria for equitable injunctive relief, *i.e.*, irreparable injury, likelihood of success on the merits, and a balancing of possible harms to the parties and the public favors a stay.

Comments on section 24.110 were received by NWC, William H. Ewing, Richard R. Renner, and Jason M. Zuckerman. NWC commented that the 10-day period for filing objections is too short and that parties should be given between 30 and 60 days to petition for review, depending on the level of specificity required in the petition. Ewing, Renner, and Zuckerman also commented that the time period for petitioning for review by the ARB was too short and suggested a 30-day period to petition for review. In addition, Ewing, Renner, and Zuckerman suggested that rather than provide that exceptions not raised in the petition for review ordinarily will be waived, the regulations should permit parties to supplement the reasons for seeking review when filing their opening briefs. They commented that to the extent that the ARB needs to determine whether there are issues meriting review, the regulations can require that a party file a petition that identifies good grounds for review, and permit the party to raise additional assignments of error in the brief.

OSHA believes that 10 business days, which also is the time frame under AIR21 (*see* 29 CFR 1979.110(a)) and under SOX (*see* 29 CFR 1980.110(a)), is sufficient time to petition for review of an ALJ decision, particularly in light of the fact that the rule uses the date of filing to determine timeliness rather than the date of the ARB's receipt of the petition. Furthermore, OSHA believes that to enable the ARB to determine whether to accept review, it is necessary that the petition for review identify the rulings to which the party seeking review takes exception. Nevertheless, it is not necessary that the petition identify each factual finding to which the party objects. Rather, it is sufficient that the petition generally identify the legal conclusions that are alleged to be erroneous. OSHA has amended these regulations accordingly.

NWC commented that these regulations should revert to the previous practice that required the ARB to review the entire record on appeal *de novo*. As indicated above, in providing that the ARB will review factual determinations under the substantial evidence standard, these regulations apply the standard of review that the ARB applies in reviewing ALJ decisions under the whistleblower provisions of AIR21, SOX, and PSIA. OSHA believes that, because the ARB is an appellate body, it is appropriate for the ARB to give special deference to the findings of the trier of fact. *See Henrich* v. *Ecolab, Inc.*, No 05–030, 2007 WL 1578490, at *4 (Admin. Review Bd. May 30, 2007) (''As we and our predecessors often have noted, the Board is an appellate body. We review ALJ decisions for error; we do not simply sit as a second-tier factfinder.''). Accordingly, no change to the standard of review is necessary.

Finally, OSHA is changing the regulation at section 24.110(b) to correct the inadvertently erroneous statement that when the ARB denies a petition for review of an ALJ's decision, judicial review is not available. Although no comments were received regarding this error, OSHA is amending the rule to clarify that judicial review is available in cases where the ARB denies review of an ALJ decision for which appropriate review was sought.

Subpart C—Miscellaneous Provisions

Section 24.111 Withdrawal of Complaints, Objections, and Petitions for Review; Settlement

This section provides for procedures and time periods for withdrawal of complaints, the withdrawal of findings by the Assistant Secretary, and the withdrawal of objections to findings. It also provides for approval of settlements at the investigative and adjudicative stages of the case. The regulations reflect that settlement agreements under the statutory provisions of the ERA, CAA, SDWA, and TSCA must be reviewed and approved by the Secretary to ensure that they are just and reasonable and in the public interest. *See Beliveau* v. *United States Dep't of Labor*, 170 F.3d 83, 86 (1st Cir. 1999); *Macktal* v. *Secretary of Labor*, 923 F.2d 1150, 1154 (5th Cir. 1991). Although it has been OSHA's practice to review settlements for approval under all the environmental whistleblower statutes, it is required by statute only under the ones noted above. *See Bertacchi* v. *City of Columbus—Division of Sewerage & Drainage*, ARB Case No. 05–155 (April 13, 2006). Notwithstanding this statutory distinction, the Department encourages the parties to submit all settlements for review and approval, even those arising under the CERCLA, SWDA, and FWPCA. We note that a settlement that has not been reviewed and approved by the Secretary will not be considered a final order enforceable under section 24.113.

One comment was received regarding section 24.111. NWC commented that the section should be dropped and that the former practice of liberally permitting employees to withdraw claims, without prejudice, should be continued, especially under the six environmental acts, in which employees are required to file claims within 30 days. NWC commented that any restriction on the right to freely withdraw claims without prejudice will chill an employee's willingness to file a claim and punish employees who simply needed to protect their procedural rights. OSHA does not believe that section 24.111 hinders a complainant's ability to withdraw his or her complaint prior to the filing of objections to the Assistant Secretary's findings and/or order. However, when OSHA is aware that a withdrawal is requested after a settlement has been reached between the complainant and the respondent, the Assistant Secretary's approval is necessary to ensure that the settlement is just, reasonable, and in the public interest. This policy, which is required by statute in most instances, recognizes that:

> The Department of Labor does not simply provide a forum for private parties to litigate their private employment discrimination suits. Protected whistleblowing under the ERA may expose not just private harms but health and safety hazards to the public. The Secretary represents the public interest by assuring that settlements adequately protect whistleblowers.

Beliveau, 170 F.3d at 88 (quoting *Hoffman* v. *Fuel Econ. Contracting*, 97–ERA–33 (Sec'y Order Denying Request to Reconsider, Aug. 4, 1989); *see also Thompson* v. *U. S. Dep't of Labor,* 885 F.2d 551, 556 (9th Cir. 1989) (Secretary must approve all settlement agreements under the ERA).

Significant revisions are being made to paragraph (c), which addresses situations in which parties seek to withdraw either objections to the Assistant Secretary's findings and/or preliminary order or petitions for review of ALJ decisions. Paragraph (c) provides that a party may withdraw its objections to the Assistant Secretary's findings and/or preliminary order at any time before the findings and preliminary order become final by filing a written withdrawal with the ALJ. Similarly, if a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, depending on where the case is pending, will determine whether to approve the withdrawal of the objections or the petition for review. Paragraph (c) clarifies that if the ALJ approves a request to withdraw objections to the Assistant Secretary's findings and/or preliminary order, and there are no other pending objections, the Assistant Secretary's findings and preliminary order will become the final order of the Secretary. Likewise, if the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. Finally, paragraph (c) provides that if objections or a petition for review are withdrawn because of settlement, the settlement must be submitted for approval in accordance with paragraph (d).

Section 24.112 Judicial Review

This section describes the statutory provisions for judicial review of decisions of the Secretary and requires, in cases where judicial review is sought, the ARB to submit the record of proceedings to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of such court. Paragraph (d) reflects that original jurisdiction for judicial review of a decision issued under the Comprehensive Environmental Response, Compensation and Liability Act is with the district courts rather than the appellate courts. *See* 42 U.S.C. 9610(b) and 9613(b). The paragraph also reflects, however, that when an agency decision is based on other statutes that provide for direct review in the court of appeals, principles of judicial economy and consistency justify review of the entire proceeding in the court of appeals. *See Ruud* v. *U. S. Dep't of Labor,* 347 F.3d 1086, 1090 (9th Cir. 2003) (''[T]he court of appeals should entertain a petition to review an agency decision made pursuant to the agency's authority under two or more statutes, at least one of which provides for direct review in the court of appeals, where the petition involves a common factual background and raises a common legal question. Consolidated review of such a petition avoids inconsistency and conflicts between the district and appellate courts while ensuring the timely and efficient resolution of administrative cases.''); *see also Shell Oil Co.* v. *F.E.R.C.*, 47 F.3d 1186, 1195 (DC Cir. 1995) (''[W]hen an agency decision has two distinct bases, one of which provides for exclusive jurisdiction in the court of appeals, the entire decision is reviewable exclusively in the appellate court.'') (citations and internal question marks omitted). No comments were received on this section.

Section 24.113 Judicial Enforcement

This section describes the Secretary's power under several of the statutes listed in section 24.100(a) to obtain judicial enforcement of orders and the terms of a settlement agreement. It also provides for enforcement of orders of the Secretary by the person on whose behalf the order was issued under the ERA and the CAA. No comments were received on this section.

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

This section sets forth the ERA provision allowing complainants to bring an action in district court for *de novo* review if there has been no final decision of the Secretary within one year of the filing of the complaint and there is no delay due to the complainant's bad faith. It provides that complainants will give notice 15 days in advance of their intent to file a complaint in district court. This provision authorizing a Federal court complaint is similar to those under the whistleblower provisions of SOX, STAA, the National Transit Systems Security Act of 2007, and the Federal Railroad Safety Act. In the interim final rule, the Secretary noted that this statutory scheme created the possibility that a complainant would file a complaint in district court after having litigated a claim before the agency and having received a decision from an ALJ or the ARB. The Secretary believed that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation. Accordingly, the Secretary suggested that the Federal courts might apply principles of issue or claim preclusion if a complainant brought a new action in Federal court following extensive litigation before the Department that resulted in a decision by an ALJ or the ARB. The Secretary also stated that where an administrative hearing had been completed and a matter was pending before an ALJ or the ARB for a decision, a Federal court also might treat a complaint as a petition for mandamus and order the Department to issue a decision under appropriate time frames.

Two comments were received regarding section 24.114. NWC commented that because the rules concerning issue and claim preclusion only apply to an agency's final order and an ALJ's decision is not a final order, the Department should not advise Federal courts or parties that res judicata and/or collateral estoppel principles may apply. NWC further commented that because once an employee exhausts his or her administrative remedies, the Department cannot legally implement a rule restricting an employee's right to file in Federal court, it should not urge a Federal court to remand a case back to the Department. NWC suggested that a potential waste of resources is not at issue because the discovery and hearing testimony obtained during an administrative proceeding may be used in the Federal court proceeding.

In response to these comments, OSHA has reconsidered the statements made in the interim final rule. OSHA recognizes that there is no statutory basis for including preclusion principles in these regulations, and that the ERA does not delegate authority to the Secretary to regulate litigation in the Federal district courts. *See Adams Fruit Co., Inc.* v. *Barrett,* 494 U.S. 638, 649–50 (1990). Accordingly, the language in the preamble addressing issue preclusion principles and mandamus has been removed.

Also on further consideration, the Secretary does not believe that it is reasonable to construe the statute to permit a complainant to initiate an action in Federal court *after* the Secretary issues a final decision, even if the date of the final decision is more than one year after the filing of the complaint. In the Secretary's view, the purpose of the ''kick out'' provision is to aid the complainant in receiving a prompt decision. That goal is not implicated in a situation where the complainant already has received a final decision from the Secretary. In addition, permitting the complainant to file a new case in district court in such circumstances could conflict with the parties' rights to seek judicial review of the Secretary's final decision in the courts of appeals. The regulation has

been reworded in accordance with this position.

Finally, GAP commented that OSHA's requirement under section 24.114(b) that a complainant file a notice with the agency of his or her intention to seek relief in district court within 15 days of filing his or her *de novo* action in district court goes beyond the ERA's requirements.

Although the 15-day notice provision is not required by statute, OSHA believes that this notice provision falls within the scope of these procedural rules.

Section 24.115 Special Circumstances; Waiver of Rules

This section provides that in circumstances not contemplated by these rules or for good cause the ALJ or the ARB may, upon application and notice to the parties, waive any rule as justice or the administration of the statutes listed in section 24.100(a) requires. No comments were received on this section.

Appendix A—Your Rights Under the ERA

The notice that employers are required to post under Section 211(i) of the ERA has been revised to reflect the 2005 amendments. Specifically, the notice now reflects that the definition of ''employer'' has been expanded and that the employee has a right to file a complaint in district court if the Secretary has not issued a final decision within one year of the filing of the complaint and the delay is not due to the bad faith of the employee. As noted above, we also have substituted the term ''retaliation'' for ''discrimination.'' The notice has also been revised to clarify that a complaint may be filed orally or in writing and that if a complainant is not able to file the complaint in English, the complaint may be filed in any language.

One comment was received regarding Appendix A. GAP commented that the notice should be clarified to state that an employee is protected for raising concerns about a suspected violation of regulations or orders issued by the NRC or DOE. OSHA does not believe that changes to this notice are required because the protected activity listed on the notice applies the language used in the statute. Nevertheless, OSHA notes that the Secretary has held that the reporting of possible violations of NRC regulations is protected activity under the ERA. *See McDonald* v. *University of Missouri*, No. 90–ERA–59, 1995 WL 848132, *5 (DOL Off. of Adm. App. Mar. 21, 1995). A similar analysis suggests that the reporting of possible violations of relevant DOE regulations also is protected activity under the ERA. GAP further commented that in the section describing prohibited activity, the use of the word ''retaliate'' should be replaced with ''discriminate'' to make the language of the notice consistent with the statutory language. For the reasons discussed above in response to comments to section 24.102, OSHA does not believe that it is necessary or advisable to replace the word ''retaliate'' in the required notice with the word ''discriminate.''

IV. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, section 24.103) which was previously reviewed and approved for use by the Office of Management and Budget (''OMB'') and assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

V. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (''APA'') do not apply to ''interpretive rules, general statements of policy, or rules of agency organization, procedure, or practice.'' 5 U.S.C. 553(b)(A). This is a rule of agency procedure and practice within the meaning of that section. Therefore, publication in the **Federal Register** of a notice of proposed rulemaking and request for comments was not required. Although this rule was not subject to the notice and comment procedures of the APA, the Assistant Secretary sought and considered comments to enable the agency to improve the rules by taking into account the concerns of interested persons.

Furthermore, because this rule is procedural rather than substantive, the normal requirement of 5 U.S.C. 553(d) that a rule be effective 30 days after publication in the **Federal Register** is inapplicable. The Assistant Secretary also finds good cause to provide an immediate effective date for this rule. It is in the public interest that the rule be effective immediately so that parties may know what procedures are applicable to pending cases.

VI. Executive Order 12866; Unfunded Mandates Reform Act of 1995; Small Business Regulatory Enforcement Fairness Act of 1996; Executive Order 13132

The Department has concluded that this rule is not a ''significant regulatory action'' within the meaning of Executive Order 12866 because it is not likely to result in a rule that may: (1) Have an annual effect on the economy of $100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or Tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866. Therefore, no regulatory impact analysis has been prepared.

Because this rulemaking is procedural in nature it is not expected to have a significant economic impact; therefore no statement is required under Section 202 of the Unfunded Mandates Reform Act of 1995. Furthermore, because this is a rule of agency procedure or practice, it is not a ''rule'' within the meaning of the Small Business Regulatory Enforcement Fairness Act of 1996 (5 U.S.C. 804(3)(C)) and does not require congressional review. Finally, this rule does not have ''federalism implications.'' The rule does not have ''substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government'' and therefore is not subject to Executive Order 13132 (Federalism).

VII. Regulatory Flexibility Analysis

The Department has determined that the regulation will not have a significant economic impact on a substantial number of small entities. The regulation primarily implements procedures necessitated by statutory amendments enacted by Congress. Additionally, the regulatory revisions are necessary for the sake of consistency with the regulatory provisions governing procedures under the other whistleblower statutes administered by the Secretary. Furthermore, no certification to this effect is required and no regulatory flexibility analysis is required because no proposed rule has been issued.

Document Preparation. This document was prepared under the direction of the Assistant Secretary, Occupational Safety and Health Administration, U.S. Department of Labor.

List of Subjects in 29 CFR Part 24

Administrative practice and procedure, Employment, Environmental protection, Investigations, Reporting and recordkeeping requirements, Whistleblowing.

Signed in Washington, DC on January 7, 2011.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

Accordingly, for the reasons set out in the preamble, part 24 of title 29 of the Code of Federal Regulations is revised to read as follows:

PART 24—PROCEDURES FOR THE HANDLING OF RETALIATION COMPLAINTS UNDER THE EMPLOYEE PROTECTION PROVISIONS OF SIX ENVIRONMENTAL STATUTES AND SECTION 211 OF THE ENERGY REORGANIZATION ACT OF 1974, AS AMENDED

Subpart A—Complaints, Investigations, Issuance of Findings

Subpart B—Litigation

Subpart C—Miscellaneous Provisions

Authority: 15 U.S.C. 2622; 33 U.S.C. 1367; 42 U.S.C. 300j–9(i)BVG, 5851, 6971, 7622, 9610; Secretary of Labor's Order No. 5–2007, 72 FR 31160 (June 5, 2007); Secretary of Labor's Order No. 1–2010 (Jan. 15, 2010), 75 FR 3924–01 (Jan. 25, 2010).

Subpart A—Complaints, Investigations, Issuance of Findings

§ 24.100 Purpose and scope.

(a) This part implements procedures under the employee protection (or ''whistleblower'') provisions for which the Secretary of Labor has been given responsibility pursuant to the following Federal statutes: Safe Drinking Water Act, 42 U.S.C. 300j–9(i); Federal Water Pollution Control Act, 33 U.S.C. 1367; Toxic Substances Control Act, 15 U.S.C. 2622; Solid Waste Disposal Act, 42 U.S.C. 6971; Clean Air Act, 42 U.S.C. 7622; Energy Reorganization Act of 1974, 42 U.S.C. 5851; and Comprehensive Environmental Response, Compensation and Liability Act of 1980, 42 U.S.C. 9610.

(b) This part establishes procedures pursuant to the Federal statutory provisions listed in paragraph (a) of this section for the expeditious handling of retaliation complaints made by employees, or by persons acting on their behalf. These rules, together with those rules codified at 29 CFR part 18, set forth the procedures for submission of complaints under the Federal statutory provisions listed in paragraph (a) of this section, investigations, issuance of findings, objections to findings, litigation before administrative law judges (''ALJ''), issuance of decisions and orders, post-hearing administrative review, and withdrawals and settlements.

§ 24.101 Definitions.

Assistant Secretary means the Assistant Secretary of Labor for Occupational Safety and Health or the person or persons to whom he or she delegates authority under any of the statutes listed in § 24.100(a).

Business days means days other than Saturdays, Sundays, and Federal holidays.

Complainant means the employee who filed a complaint under any of the statutes listed in § 24.100(a) or on whose behalf a complaint was filed.

OSHA means the Occupational Safety and Health Administration of the United States Department of Labor.

Respondent means the employer named in the complaint, who is alleged to have violated any of the statutes listed in § 24.100(a).

Secretary means the Secretary of Labor or persons to whom authority under any of the statutes listed in § 24.100(a) has been delegated.

§ 24.102 Obligations and prohibited acts.

(a) No employer subject to the provisions of any of the statutes listed in § 24.100(a), or to the Atomic Energy Act of 1954 (AEA), 42 U.S.C. 2011 *et seq.*, may discharge or otherwise retaliate 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 the employee's request, engaged in any of the activities specified in this section.

(b) It is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, discipline, or in any other manner retaliate against any employee because the employee has:

(1) Commenced or caused to be commenced, or is about to commence or cause to be commenced, a proceeding under one of the statutes listed in § 24.100(a) or a proceeding for the administration or enforcement of any requirement imposed under such statute;

(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 such statute.

(c) Under the Energy Reorganization Act, and by interpretation of the Secretary under any of the other statutes listed in § 24.100(a), it is a violation for any employer to intimidate, threaten, restrain, coerce, blacklist, discharge, or in any other manner retaliate against any employee because the employee has:

(1) Notified the employer of an alleged violation of such statute or the AEA of 1954;

(2) Refused to engage in any practice made unlawful by such statute or the AEA of 1954, if the employee has identified the alleged illegality to the employer; or

(3) Testified or is about to testify before Congress or at any Federal or State proceeding regarding any provision (or proposed provision) of such statute or the AEA of 1954.

(d)(1) Every employer subject to the Energy Reorganization Act of 1974, as amended, shall prominently post and keep posted in any place of employment to which the whistleblower provisions of the Act apply, a fully legible copy of the notice prepared by OSHA, printed as appendix A to this part, or a notice approved by the Assistant Secretary that contains substantially the same provisions and explains the whistleblower provisions of the Act and the regulations in this part. Copies of the notice prepared by OSHA may be obtained from the Assistant Secretary for Occupational Safety and Health, U.S. Department of Labor, Washington, DC 20210, from local OSHA offices, or from OSHA's Web site at *http://www.osha.gov.*

(2) Where the notice required by paragraph (d)(1) of this section has not been posted, the requirement in § 24.103(d)(2) that a complaint be filed with the Assistant Secretary within 180

days of an alleged violation will be inoperative, unless the respondent establishes that the complainant had knowledge of the material provisions of the notice. If it is established that the notice was posted at the employee's place of employment after the alleged retaliatory action occurred or that the complainant later obtained knowledge of the provisions of the notice, the 180 days will ordinarily run from whichever of those dates is relevant.

(e) This part shall have no application to any employee who, acting without direction from his or her employer (or the employer's agent), deliberately causes a violation of any requirement of any of the statutes listed in § 24.100(a) or the AEA of 1954.

§ 24.103 Filing of retaliation complaint.

(a) *Who may file.* An employee who believes that he or she has been retaliated against by an employer in violation of any of the statutes listed in § 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation.

(b) *Nature of Filing.* No particular form of complaint is required. A complaint may be filed orally or in writing. Oral complaints will be reduced to writing by OSHA. If a complainant is not able to file the complaint in English, the complaint may be filed in any language.

(c) *Place of Filing.* The complaint should be filed with the OSHA Area Director responsible for enforcement activities in the geographical area where the employee resides or was employed, but may be filed with any OSHA officer or employee. Addresses and telephone numbers for these officials are set forth in local directories and at the following Internet address: *http://www.osha.gov.*

(d) *Time for Filing.* (1) Except as provided in paragraph (d)(2) of this section, within 30 days after an alleged violation of any of the statutes listed in § 24.100(a) occurs (*i.e.*, when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of any of the statutes listed in § 24.100(a) may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, e-mail communication, telephone call, hand-delivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(2) Under the Energy Reorganization Act, within 180 days after an alleged violation of the Act occurs (*i.e.*, when the retaliatory decision has been both made and communicated to the complainant), an employee who believes that he or she has been retaliated against in violation of the Act may file, or have filed by any person on the employee's behalf, a complaint alleging such retaliation. The date of the postmark, facsimile transmittal, e-mail communication, telephone call, handdelivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The time for filing a complaint may be tolled for reasons warranted by applicable case law.

(e) *Relationship to Section 11(c) complaints.* A complaint filed under any of the statutes listed in § 24.100(a) alleging facts that would also constitute a violation of Section 11(c) of the Occupational Safety and Health Act, 29 U.S.C. 660(c), will be deemed to be a complaint under both Section 11(c) and the applicable statutes listed in § 24.100(a). Similarly, a complaint filed under Section 11(c) that alleges facts that would also constitute a violation of any of the statutes listed in § 24.100(a) will be deemed to be a complaint under both section 11(c) and the applicable statutes listed in § 24.100(a). Normal procedures and timeliness requirements under the respective statutes and regulations will be followed.

§ 24.104 Investigation.

(a) Upon receipt of a complaint in the investigating office, the Assistant Secretary will notify the respondent of the filing of the complaint by providing the respondent (or the respondent's legal counsel if respondent is represented by counsel) with a copy of the complaint, redacted, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws. The Assistant Secretary will provide a copy of the unredacted complaint to the complainant (or complainant's legal counsel, if complainant is represented) and to the appropriate office of the Federal agency charged with the administration of the general provisions of the statute(s) under which the complaint is filed.

(b) Within 20 days of receipt of the notice of the filing of the complaint provided under paragraph (a) of this section, the respondent may submit to the Assistant Secretary a written statement and any affidavits or documents substantiating its position. Within the same 20 days, the respondent may request a meeting with the Assistant Secretary to present its position.

(c) Throughout the investigation, the agency will provide to the complainant (or the complainant's legal counsel if complainant is represented by counsel) a copy of all of respondent's submissions to the agency that are responsive to the complainant's whistleblower complaint. Before providing such materials to the complainant, the agency will redact them, if necessary, in accordance with the Privacy Act of 1974, 5 U.S.C. 552a, *et seq.*, and other applicable confidentiality laws.

(d) Investigations will be conducted in a manner that protects the confidentiality of any person who provides information on a confidential basis, other than the complainant, in accordance with part 70 of title 29 of the Code of Federal Regulations.

(e) *Investigation under the six environmental statutes.* In addition to the investigative procedures set forth in §§ 24.104(a), (b), (c), and (d), this paragraph sets forth the procedures applicable to investigations under the Safe Drinking Water Act; Federal Water Pollution Control Act; Toxic Substances Control Act; Solid Waste Disposal Act; Clean Air Act; and Comprehensive Environmental Response, Compensation and Liability Act.

(1) A complaint of alleged violation will be dismissed unless the complainant has made a prima facie showing that protected activity was a motivating factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a motivating factor in the adverse action.

(3) The complainant will be considered to have met the required showing if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence sufficient to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a motivating factor in the adverse action.

The required showing may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a motivating factor in the adverse action.

(4) The complaint will be dismissed if a preponderance of the evidence shows that the respondent would have taken the same adverse action in the absence of the complainant's protected activity.

(f) *Investigation under the Energy Reorganization Act.* In addition to the investigative procedures set forth in §§ 24.104(a), (b), (c), and (d), this paragraph sets forth special procedures applicable only to investigations under the Energy Reorganization Act.

(1) A complaint of alleged violation will be dismissed unless the complainant has made a prima facie showing that protected activity was a contributing factor in the adverse action alleged in the complaint.

(2) The complaint, supplemented as appropriate by interviews of the complainant, must allege the existence of facts and evidence to make a prima facie showing as follows:

(i) The employee engaged in a protected activity;

(ii) The respondent knew or suspected, actually or constructively, that the employee engaged in the protected activity;

(iii) The employee suffered an adverse action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the adverse action.

(3) For purposes of determining whether to investigate, the complainant will be considered to have met the required burden if the complaint on its face, supplemented as appropriate through interviews of the complainant, alleges the existence of facts and either direct or circumstantial evidence to meet the required showing, *i.e.*, to give rise to an inference that the respondent knew or suspected that the employee engaged in protected activity and that the protected activity was a contributing factor in the adverse action. The burden may be satisfied, for example, if the complainant shows that the adverse action took place shortly after the protected activity, giving rise to the inference that it was a contributing factor in the adverse action. If the required showing has not been made, the complainant (or the complainant's legal counsel if complainant is represented by counsel) will be so notified and the investigation will not commence.

(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 adverse action in the absence of the complainant's protected behavior or conduct.

(5) If the respondent fails to make a timely response or fails to demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the behavior protected by the Act, the Assistant Secretary will proceed with the investigation. The investigation will proceed whenever it is necessary or appropriate to confirm or verify the information provided by the respondent.

§ 24.105 Issuance of findings and orders.

(a) After considering all the relevant information collected during the investigation, the Assistant Secretary will issue, within 30 days of filing of the complaint, written findings as to whether or not there is reasonable cause to believe that the respondent has retaliated against the complainant in violation of any of the statutes listed in § 24.100(a).

(1) If the Assistant Secretary concludes that there is reasonable cause to believe that a violation has occurred, he or she shall accompany the findings with an order providing relief to the complainant. The order shall include, where appropriate, a requirement that the respondent abate the violation; reinstate the complainant to his or her former position, together with the compensation (including back pay), terms, conditions and privileges of the complainant's employment; pay compensatory damages; and, under the Toxic Substances Control Act and the Safe Drinking Water Act, pay exemplary damages, where appropriate. At the complainant's request the order shall also assess against the respondent the complainant's costs and expenses (including attorney's fees) reasonably incurred in connection with the filing of the complaint.

(2) If the Assistant Secretary concludes that a violation has not occurred, the Assistant Secretary will notify the parties of that finding.

(b) The findings and order will be sent by certified mail, return receipt requested, to all parties of record (and each party's legal counsel if the party is represented by counsel). The findings and order will inform the parties of their right to file objections and to request a hearing and provide the address of the Chief Administrative Law Judge. The Assistant Secretary will file a copy of the original complaint and a copy of the findings and order with the Chief Administrative Law Judge, U.S. Department of Labor.

(c) The findings and order will be effective 30 days after receipt by the respondent (or the respondent's legal counsel if the respondent is represented by counsel) or on the compliance date set forth in the order, whichever is later, unless an objection and/or a request for a hearing has been filed as provided at § 24.106.

Subpart B–Litigation § 24.106

Objections to the findings and order and request for a hearing.

(a) Any party who desires review, including judicial review, of the findings and order must file any objections and/or a request for a hearing on the record within 30 days of receipt of the findings and order pursuant to paragraph (b) of § 24.105. The objection and/or request for a hearing must be in writing and state whether the objection is to the findings and/or the order. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the objection is filed in person, by hand-delivery or other means, the objection is filed upon receipt. Objections must be filed with the Chief Administrative Law Judge, U.S. Department of Labor, 800 K Street, NW., Washington, DC 20001, and copies of the objections must be mailed at the same time to the other parties of record, the OSHA official who issued the findings and order, the Assistant Secretary, and the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely objection is filed, all provisions of the order will be stayed. If no timely objection is filed with respect to either the findings or the order, the findings and order will become the final decision of the Secretary, not subject to judicial review.

§ 24.107 Hearings.

(a) Except as provided in this part, proceedings will be conducted in accordance with the rules of practice and procedure and the rules of evidence for administrative hearings before the Office of Administrative Law Judges, codified at part 18 of title 29 of the Code of Federal Regulations.

(b) Upon receipt of an objection and request for hearing, the Chief Administrative Law Judge will promptly

assign the case to a judge who will notify the parties, by certified mail, of the day, time, and place of hearing. The hearing is to commence expeditiously, except upon a showing of good cause or otherwise agreed to by the parties. Hearings will be conducted *de novo*, on the record.

(c) If both the complainant and the respondent object to the findings and/or order, the objections will be consolidated, and a single hearing will be conducted.

§ 24.108 Role of Federal agencies.

(a)(1) The complainant and the respondent will be parties in every proceeding. At the Assistant Secretary's discretion, he or she may participate as a party or participate as amicus curiae at any time at any stage of the proceeding. This right to participate includes, but is not limited to, the right to petition for review of a decision of an administrative law judge, including a decision approving or rejecting a settlement agreement between the complainant and the respondent.

(2) Copies of documents in all cases, whether or not the Assistant Secretary is participating in the proceeding, must be sent to the Assistant Secretary, Occupational Safety and Health Administration, and to the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) The Environmental Protection Agency, the Nuclear Regulatory Commission, and the Department of Energy, if interested in a proceeding, may participate as amicus curiae at any time in the proceedings, at the respective agency's discretion. At the request of the interested Federal agency, copies of all pleadings in a case must be sent to the Federal agency, whether or not the agency is participating in the proceeding.

§ 24.109 Decision and orders of the administrative law judge.

(a) The decision of the ALJ will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (c) of this section, as appropriate.

(b)(1) In cases arising under the ERA, a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by clear and convincing evidence that it would have taken the same adverse action in the absence of any protected activity.

(2) In cases arising under the six environmental statutes listed in § 24.100(a), a determination that a violation has occurred may only be made if the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint. If the complainant has demonstrated by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint, relief may not be ordered if the respondent demonstrates by a preponderance of the evidence that it would have taken the same adverse action in the absence of the protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 24.104(e) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the ALJ, and a complaint may not be remanded for the completion of an investigation or for additional findings on the basis that a determination to dismiss was made in error. Rather, if there otherwise is jurisdiction, the ALJ will hear the case on the merits or dispose of the matter without a hearing if the facts and circumstances warrant.

(d)(1) If the ALJ concludes that the respondent has violated the law, the order shall direct the respondent to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of that employment, and compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate. At the request of the complainant, the ALJ shall assess against the respondent, all costs and expenses (including attorney fees) reasonably incurred.

(2) In cases brought under the Energy Reorganization Act, when an ALJ issues a decision that the complaint has merit and orders the relief prescribed in paragraph (d)(1) of this section, the relief ordered, with the exception of compensatory damages, shall be effective immediately upon receipt, whether or not a petition for review is filed with the ARB.

(3) If the ALJ determines that the respondent has not violated the law, an order will be issued denying the complaint.

(e) The decision will be served upon all parties to the proceeding, the Assistant Secretary, and the Associate Solicitor for Fair Labor Standards. Any ALJ's decision issued under any of the statutes listed in § 24.100(a) will be effective 10 business days after the date of the decision unless a timely petition for review has been filed with the ARB. An ALJ's order issued under the Energy Reorganization Act will be effective immediately upon receipt, except for that portion of the order awarding any compensatory damages.

§ 24.110 Decision and orders of the Administrative Review Board.

(a) Any party desiring to seek review, including judicial review, of a decision of the ALJ must file a written petition for review with the ARB, U.S. Department of Labor, 200 Constitution Ave., NW., Washington, DC 20210, which has been delegated the authority to act for the Secretary and issue final decisions under this part. The decision of the ALJ will become the final order of the Secretary unless, pursuant to this section, a timely petition for review is filed with the ARB and the ARB accepts the case for review. The parties should identify in their petitions for review the legal conclusions or orders to which they object, or the objections will ordinarily be deemed waived. A petition must be filed within 10 business days of the date of the decision of the ALJ. The date of the postmark, facsimile transmittal, or e-mail communication will be considered to be the date of filing; if the petition is filed in person, by hand-delivery or other means, the petition is considered filed upon receipt. The petition must be served on all parties and on the Chief Administrative Law Judge at the time it is filed with the ARB. Copies of the petition for review and all briefs must be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, and the ARB, within 30 days of the filing of the petition, issues an order notifying the parties that the case has been accepted for review, the decision of the ALJ will be inoperative unless and until the ARB issues an order adopting the decision, except that an order by an ALJ issued under the Energy Reorganization Act, other than that portion of the order awarding

compensatory damages, will be effective while review is conducted by the ARB, unless the ARB grants a motion by the respondent to stay the order based on exceptional circumstances. The ARB will specify the terms under which any briefs are to be filed. The ARB will review the factual findings of the ALJ under the substantial evidence standard. If no timely petition for review is filed, or the ARB denies review, the decision of the ALJ will become the final order of the Secretary. If no timely petition for review is filed, the resulting final order is not subject to judicial review.

(c) The final decision of the ARB will be issued within 90 days of the filing of the complaint. The decision will be served upon all parties and the Chief Administrative Law Judge by mail. The final decision will also be served on the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor, even if the Assistant Secretary is not a party.

(d) If the ARB concludes that the respondent has violated the law, the final order will order the respondent to take appropriate affirmative action to abate the violation, including reinstatement of the complainant to that person's former position, together with the compensation (including back pay), terms, conditions, and privileges of employment, and compensatory damages. In cases arising under the Safe Drinking Water Act or the Toxic Substances Control Act, exemplary damages may also be awarded when appropriate. At the request of the complainant, the ARB will assess against the respondent all costs and expenses (including attorney's fees) reasonably incurred.

(e) If the ARB determines that the respondent has not violated the law, an order will be issued denying the complaint.

Subpart C—Miscellaneous Provisions

§ 24.111 Withdrawal of complaints, objections, and petitions for review; settlement.

(a) At any time prior to the filing of objections to the findings and/or order, a complainant may withdraw his or her complaint under any of the statutes listed in § 24.100(a) by filing a written withdrawal with the Assistant Secretary. The Assistant Secretary will then determine whether to approve the withdrawal. The Assistant Secretary will notify the respondent of the approval of any withdrawal. If the complaint is withdrawn because of settlement under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, or the Toxic Substances Control Act, the settlement must be submitted for approval in accordance with paragraph (d) of this section. Parties to settlements under the Federal Water Pollution Control Act, the Solid Waste Disposal Act, and the Comprehensive Environmental Response, Compensation and Liability Act are encouraged to submit their settlements for approval. After the filing of objections to the Assistant Secretary's findings and/or order, a complainant may not withdraw his or her complaint.

(b) The Assistant Secretary may withdraw his or her findings and/or order, at any time before the expiration of the 30-day objection period described in § 24.106, provided that no objection has yet been filed, and substitute new findings and/or a new order. The date of the receipt of the substituted findings and/or order will begin a new 30-day objection period.

(c) At any time before the Assistant Secretary's findings or order become final, a party may withdraw its objections to the Assistant Secretary's findings or order by filing a written withdrawal with the ALJ. If a case is on review with the ARB, a party may withdraw its petition for review of an ALJ's decision at any time before that decision becomes final by filing a written withdrawal with the ARB. The ALJ or the ARB, as the case may be, will determine whether to approve the withdrawal of the objections or the petition for review. If the ALJ approves a request to withdraw objections to the Assistant Secretary's findings or order, and there are no other pending objections, the Assistant Secretary's findings and order will become the final order of the Secretary. If the ARB approves a request to withdraw a petition for review of an ALJ decision, and there are no other pending petitions for review of that decision, the ALJ's decision will become the final order of the Secretary. If the objections are withdrawn because of settlement under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, or the Toxic Substances Control Act, the settlement must be submitted for approval in accordance with paragraph (d) of this section.

(d)(1) *Investigative settlements under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, and the Toxic Substances Control Act.* At any time after the filing of a complaint, and before the findings and/ or order are objected to or become a final order by operation of law, the case may be settled if the Assistant Secretary, the complainant and the respondent agree to a settlement. The Assistant Secretary's approval of a settlement reached by the respondent and the complainant demonstrates his or her consent and achieves the consent of all three parties.

(2) *Adjudicatory settlements under the Energy Reorganization Act, the Clean Air Act, the Safe Drinking Water Act, and the Toxic Substances Control Act.* At any time after the filing of objections to the Assistant Secretary's findings and/or order, the case may be settled if the participating parties agree to a settlement and the settlement is approved by the ALJ if the case is before the judge, or by the ARB if the ARB has accepted the case for review. A copy of the settlement must be filed with the administrative law judge or the ARB, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the ARB will constitute the final order of the Secretary and may be enforced pursuant to § 24.113.

§ 24.112 Judicial review.

(a) Except as provided under subsections (b), (c), and (d) of this section, within 60 days after the issuance by the ARB of a final order of the Secretary under § 24.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. A final order of the ARB is not subject to judicial review in any criminal or other civil proceeding.

(b) Under the Federal Water Pollution Control Act, within 120 days after the issuance by the ARB of a final order of the Secretary under § 24.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(c) Under the Solid Waste Disposal Act, within 90 days after the issuance by the ARB of a final order of the Secretary under § 24.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation.

(d) Under the Comprehensive Environmental Response, Compensation and Liability Act, after the issuance by

the ARB of a final order of the Secretary under § 24.110, any person adversely affected or aggrieved by the order may file a petition for review of the order in the United States district court in which the violation allegedly occurred. For purposes of judicial economy and consistency, when a final order of the Secretary issued by the ARB under the Comprehensive Environmental Response, Compensation and Liability Act also is issued under any other statute listed in § 24.100(a), the adversely affected or aggrieved person may file a petition for review of the entire order in the United States Court of Appeals for the circuit in which the violation allegedly occurred or the circuit in which the complainant resided on the date of the violation. The time for filing a petition for review of an order issued under the Comprehensive Environmental Response, Compensation and Liability Act and any other statute listed in § 24.100(a) is determined by the time period applicable under the other statute(s).

(e) If a timely petition for review is filed, the record of a case, including the record of proceedings before the administrative law judge, will be transmitted by the ARB to the appropriate court pursuant to the Federal Rules of Appellate Procedure and the local rules of the court.

§ 24.113 Judicial enforcement.

Whenever any person has failed to comply with an order by an ALJ issued under the Energy Reorganization Act, with the exception of any award of compensatory damages, or with a final order of the Secretary, including final orders approving settlement agreements as provided under § 24.111(d), the Secretary may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred. Whenever any person has failed to comply with an order by an ALJ issued under the Energy Reorganization Act, with the exception of any award of compensatory damages, or with a final order of the Secretary under either the Energy Reorganization Act or the Clean Air Act, the person on whose behalf the order was issued also may file a civil action seeking enforcement of the order in the United States district court for the district in which the violation was found to have occurred.

§ 24.114 District court jurisdiction of retaliation complaints under the Energy Reorganization Act.

(a) If there is no final order of the Secretary, one year has passed since 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, which will have jurisdiction over such an action without regard to the amount in controversy.

(b) Fifteen days in advance of filing a complaint in Federal court, a complainant must file with the Assistant Secretary, the ALJ, or the ARB, depending upon where the proceeding is pending, a notice of his or her intention to file such complaint. The notice must be served on all parties to the proceeding. A copy of the notice must be served on the Regional Administrator, the Assistant Secretary, Occupational Safety and Health Administration, and on the Associate Solicitor, Division of Fair Labor Standards, U.S. Department of Labor. The complainant shall file and serve a copy of the district court complaint on the above as soon as possible after the district court complaint has been filed with the court.

§ 24.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the ALJ or the ARB on review may, upon application, after three days notice to all parties, waive any rule or issue any orders that justice or the administration of any of the statutes listed in § 24.100(a) requires.

Appendix A to Part 24—Your Rights Under the Energy Reorganization Act

BILLING CODE 4510–26–P

Your Rights under the Energy Reorganization Act

The Energy Reorganization Act (ERA), makes it illegal to discharge or otherwise retaliate against an employee because the employee or any person acting at an employee's request engages in protected activity.

Employers covered by the ERA are:

- The Nuclear Regulatory Commission (NRC)
- A contractor or subcontractor of the NRC
- A licensee of the NRC or an agreement state, and the licensee's contractors and subcontractors
- An applicant for a license, and the applicant's contractors and subcontractors
- The Department of Energy (DOE)
- A contractor or subcontractor of the DOE under the Atomic Energy Act (AEA)

You are engaged in protected activity when you:

- Notify your employer of an alleged violation of the ERA or the AEA
- Refuse to engage in any practice made unlawful by the ERA or the AEA
- Testify before congress or at any federal or state proceeding regarding any provision or proposed provision of the ERA or the AEA
- Commence or cause to be commenced a proceeding under the ERA, or a proceeding for the administration or enforcement of any requirement imposed under the ERA
- Testify or are about to testify in any such proceeding
- Assist or participate in such a proceeding or in any other action to carry out the purposes of the ERA or the AEA

Employers may not retaliate against you for engaging in protected activity by:

- Intimidating
- Threatening
- Restraining
- Coercing
- Blacklisting
- Firing
- or in any other manner retaliating against you

Filing a complaint: You may file a complaint ***within 180 days*** of the retaliatory action. A complaint ***may be filed orally or in writing.*** If you are not able to file the complaint in English, OSHA will accept the complaint in any language. The date of the postmark, facsimile transmittal, e-mail communication, telephone call, handdelivery, delivery to a third-party commercial carrier, or in-person filing at an OSHA office will be considered the date of filing. The complaint may be filed at or sent to the nearest local office of the Occupational Safety and Health Administration (OSHA), U.S. Department of Labor, or the Office of the Assistant Secretary, OSHA, U.S. Department of Labor, Washington, D.C. 20210.

If DOL has not issued a final decision within one year of the filing of the complaint, you have the right to file the complaint in district court for *de novo* review, so long as the delay is not due to your bad faith.

For additional information: Contact OSHA (listed in telephone directories), or see the agency's web site at: www.whistleblowers.gov.

Employers are required to display this poster where employees can readily see it.

[FR Doc. 2011–828 Filed 1–14–11; 8:45 am]
BILLING CODE 4510–26–C