



**In the Matter of:**

**BETTY A. DEVERS, *et al.*,**

**ARB CASE NO. 03-113**

**COMPLAINANTS,**

**ALJ CASE NO. 01-SWD-3**

**v.**

**DATE: March 31, 2005**

**KAISER-HILL COMPANY,**

**RESPONDENT.**

**BEFORE: THE ADMINISTRATIVE REVIEW BOARD**

**Appearances:**

***For the Complainants:***

**Todd J. McNamara, Esq., Kristine James, Esq., *McNamara & Martinez, LLP,*  
*Denver, Colorado***

***For the Respondent:***

**Gilbert M. Roman, Esq., S. Kato Crews, Esq., *Rothgerber Johnson & Lyons,*  
*LLP, Denver, Colorado***

**FINAL DECISION AND ORDER OF REMAND**

Betty A. Devers and five coworkers filed a complaint under the whistleblower protection provisions of the Energy Reorganization Act (ERA), 42 U.S.C.A. § 5851 (West 2003); the Toxic Substances Control Act (TSCA), 15 U.S.C.A. § 2622 (West 1998); the Solid Waste Disposal Act (SWDA, also known as the Resource Conservation and Recovery Act, RCRA), 42 U.S.C.A. § 6971 (West 2003); and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C.A. § 9610 (West 1995), as implemented by the regulations at 29 C.F.R. Part 24 (2004). They alleged that their employer, the Kaiser-Hill Company, involuntarily transferred them to menial positions because they reported safety issues, causing them to lose substantial overtime and bonus pay.

In a Recommended Decision and Order (R. D. & O.), the Administrative Law Judge (ALJ) found that the Complainants had not engaged in activity protected under the four statutes and therefore dismissed their complaint for lack of jurisdiction. The Complainants appealed to the Administrative Review Board (ARB). Because we disagree with the ALJ's conclusion that Devers and her five coworkers did not engage in activity protected under the ERA, we remand the case for further proceedings.

## BACKGROUND

The basic facts are not disputed. All six Complainants worked for Kaiser-Hill at Rocky Flats, a 6,300-acre facility near Denver, Colorado, which the Department of Energy (DOE) owned and which made plutonium triggers for nuclear weapons until about 1989. The complex's weapons production "left high-risk radioactive and hazardous materials and wastes, severely contaminated buildings, and large areas of contaminated soil . . ." CX 24.<sup>1</sup> DOE contracted with Kaiser-Hill to decontaminate and decommission the complex, a process that involved removing radioactive equipment and other materials and demolishing more than 700 structures by December 15, 2006. CX 24, RX 45. All the buildings, equipment, materials, and the soil itself at Rocky Flats had to be decontaminated, boxed and packaged, and shipped to other storage sites. Rocky Flats will eventually become a nature preserve.

The six Complainants – Betty Devers, David Martin, Shirley Voorhies, Dallas Sherman, James Miller, and Tracy Rittenbach – worked in Building 771, which contained more than 200 steel glove boxes and more than 30 miles of piping contaminated by plutonium and uranium radiation and toxic chemicals, including nitric acid. TR at 9. From early 2000 until the end of January 2001, all six raised personal safety issues with their supervisors about the equipment they used and the procedures they followed in their decontamination and decommissioning work.

In February 2001, the Complainants were involuntarily transferred from Building 771 to menial jobs in other buildings, which resulted in their loss of wages for overtime and hazardous duty. They claimed damages ranging from \$3,566.40 to \$16,537.36. CX 10, 39, 43, 47, 49. Eventually, each of the Complainants sought and accepted more desirable reassignments to other buildings where they could again earn overtime and hazardous duty pay.

The Complainants filed a complaint on March 2, 2001, alleging that Kaiser-Hill retaliated against them for voicing numerous concerns "regarding safety violations, process and procedural failures, and general inattention" to safety matters. RX 1. The

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<sup>1</sup> The following abbreviations shall be used: Complainant's Exhibit, CX; Respondent's Exhibit, RX; and hearing transcript, TR.

U.S. Department of Labor's (DOL) Occupational Health and Safety Administration (OSHA) investigated and found on June 21, 2001, that the Complainants had engaged in protected activity, but had not established that Kaiser-Hill retaliated or discriminated against them. RX 6. The Complainants requested a hearing before an ALJ, which he held on April 8-12 and 15-17, 2002.

After hearing the evidence on the merits of the Complainants' whistleblower complaints, the ALJ determined that the safety issues they raised about themselves and coworkers with their supervisors did not involve the safety or protection of the general public and that none of their concerns about radiation and other contaminants affected anyone outside Building 771. R. D. & O. at 9. The ALJ found that the principle of ALARA – As Low As Reasonably Achievable – was central to the case because the goal was to keep each employee's exposure to radiation as low as possible.<sup>2</sup> However, he noted that ALARA was by its nature an occupational safety issue when applied to worker exposure, not an environmental safety issue. R. D. & O. at 12.

The ALJ stated that Rocky Flats was not an operating facility, at which nuclear malfunctions could have catastrophic effects on both the public and the environment. He concluded that, although the Complainants' concerns were "legitimate nuclear safety issues," their complaints related only to their own safety and that of their coworkers and thus clearly fell under the Occupational Safety and Health Act (OSH Act), 29 U.S.C.A. §§ 651-678 (West 1999), rather than the whistleblower protection provisions of the four statutes. R. D. & O. at 13.

Because he held that the Complainants' concerns were not protected under the four whistleblower statutes, the ALJ dismissed the complaint for lack of jurisdiction. R. D. & O. at 13. Although he stated that Kaiser-Hill's involuntary transfer of the six Complainants was "truly bizarre" and found that none of the company's witnesses provided a credible explanation for their actions, R. D. & O. at 4-6, he made no findings on whether Kaiser-Hill was aware of the Complainants' concerns and took adverse action against them because of their complaints.

### **ISSUE PRESENTED**

We address whether the ALJ properly dismissed the complaint on the basis that the Complainants had not engaged in protected activity.

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<sup>2</sup> The DOE defines the concept as "the approach to radiation protection to manage and control exposures (both individual and collective) to the work force and to the general public to as low as is reasonable, taking into account social, technical, economic, practical, and public policy considerations. As used in [Part 835], ALARA is not a dose limit but a process which has the objective of attaining doses as far below the applicable limits of [Part 835] as is reasonably achievable." 10 C.F.R. § 835.2(a)(2)(2003).

## JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated authority to the ARB to review an ALJ's recommended decision in cases arising under the environmental and nuclear whistleblower statutes. *See* 29 C.F.R. § 24.8 (2004). *See also* Secretary's Order No. 1-2002, 67 Fed. Reg. 64,272 (Oct. 17, 2002) (delegating to the ARB the Secretary's authority to review cases arising under, inter alia, the statutes listed at 29 C.F.R. § 24.1(a)).

Under the Administrative Procedure Act, the ARB, as the Secretary's designee, acts with all the powers the Secretary would possess in rendering a decision under the whistleblower statutes. The ARB engages in de novo review of the ALJ's findings of fact and conclusions of law. *See* 5 U.S.C.A. § 557(b) (West 1996); 29 C.F.R. § 24.8; *Stone & Webster Eng'g Corp. v. Herman*, 115 F.3d 1568, 1571-1572 (11th Cir. 1997); *Masek v. Cadle Co.*, ARB No. 97-069, ALJ No. 95-WPC-1, slip op. at 7 (ARB Apr. 28, 2000); *Berkman v. United States Coast Guard Acad.*, ARB No. 98-056, ALJ Nos. 97-CAA-2, 97 CAA-9, slip op. at 15 (ARB Feb. 29, 2000).

## DISCUSSION

At the center of our review is the ALJ's determination that the Complainants did not engage in protected activity and therefore failed to establish one of the required elements of a whistleblower complaint under the ERA, TSCA, SWDA, and CERCLA. Drawing a "dichotomy" between occupational and environmental safety and health complaints, the ALJ noted that complaints which relate only to safety in the workplace fall under the OSH Act and are litigated in the United States District Courts, *see* 29 C.F.R. § 1977.3; *Tucker v. Morrison & Knudson*, ALJ No. 94-CER-1, ARB No. 96-043, slip op. at 5 (ARB Feb. 28, 1997), while whistleblower complaints involving public health and the environment are adjudicated through the DOL's administrative process.<sup>3</sup>

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<sup>3</sup> The ALJ's dismissal of the Complainants' claims for lack of jurisdiction requires some clarification. The complaint filed with OSHA under the ERA, TSCA, SWDA, and CERCLA conferred jurisdiction upon the ALJ to determine whether the Complainants were entitled to relief under one or more of those statutes. *See Bell v. Hood*, 327 U.S. 678, 682 (1946) (whether the complaint states a cause of action on which relief could be granted is a question of law, which must be decided after, and not before, the court has assumed jurisdiction over the controversy; if the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction); *Culligan v. American Heavy Lifting Shipping Co.*, ARB No. 03-46, ALJ Nos. 00-CAA-20, 02-CAA-09, 11, slip op. at 7-11 (ARB June 30, 2004) (ARB has jurisdiction to decide that the complainants' case must be dismissed under the TSCA, SWDA, and CERCLA). Where,

Continued . . .

R. D. & O. at 6-9. For reasons we next discuss, we hold that the ALJ erred in concluding that their complaints were not protected under the whistleblower provision of the ERA. However, as we later observe, we agree with the ALJ that the Complainants failed to prove that their health and safety concerns were activities protected under the TSCA, SWDA, and CERCLA.

## I. The Complainants' Complaints Covered under ERA

We begin with the ERA. The statute provides, in pertinent part, that

[n]o employer may discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . . [notifies a covered employer about an alleged violation of the ERA or the Atomic Energy Act (AEA) (42 U.S.C. § 2011 *et seq.* (2000)), refuses to engage in a practice made unlawful by the ERA or AEA, testifies regarding provisions or proposed provisions of the ERA or AEA, or commences, causes to be commenced or testifies, assists or participates in a proceeding under the ERA or AEA].

42 U.S.C.A. § 5851(a)(1).

To prevail on a complaint of unlawful discrimination under the ERA, a complainant must prove by a preponderance of the evidence that: (1) he or she was an employee (2) who engaged in protected activity; (3) the employer knew about this activity and (4) took adverse action against him or her; and (5) the protected activity was a contributing factor in the adverse action the employer took. 42 U.S.C.A. § 5851(b)(3)(C); *Kester v. Carolina Power & Light Co.*, ARB No. 02-007, ALJ No. 00-ERA-31, slip op. at 6-8 (Sept. 30, 2003); *Paynes v. Gulf States Utilities*, ARB No. 98-045, ALJ No. 93-ERA-47, slip op. at 4-5 (ARB Aug. 31, 1999).

If a complainant establishes each of these elements, the burden of proof shifts to the employer to demonstrate “by clear and convincing evidence that it would have taken the same unfavorable personnel action in the absence” of the protected activity. 42 U.S.C.A. § 5851 (b)(3)(D). Thus, the employer’s burden of proof is in the nature of an

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as here, the case is fully litigated on the merits, and the ALJ finds and concludes that what the Complainants assert is their protected activity is not in fact protected under the statutes at issue, we consider the question to be one of coverage under those statutes and not of jurisdiction. *See Gain v. Las Vegas Metro. Police Dep’t*, ARB No. 03-108, ALJ No. 02-SWD-4, slip op. at 4 n.5 (ARB June 30, 2004). *See also* discussion, *infra*.

affirmative defense and arises only if a complainant has proven that the employer took adverse action against him in part because of his protected activity. *Kester*, slip op. at 8.

Because the ALJ found that the Complainants' concerns implicated only their own occupational safety and health and that of their coworkers, he ruled that their complaint fell under the OSH Act, not the ERA. Following his analysis, the Complainants did not engage in activities protected under the ERA, and a crucial element of their proof necessarily failed. We draw a different conclusion. As we now explain, the OSH Act is pre-empted with respect to facilities over which DOE has exercised its statutory authority, and the ERA protects employees who raise concerns about their individual exposure to radioactive sources.

#### **A. ERA pre-emption of OSH Act**

In considering the pre-emption issue, we look at the statutory authority of the OSH Act and the AEA. The DOL generally regulates the occupational safety and health of all private sector workers through the OSH Act. 29 U.S.C.A. §§ 651-678. However, the OSH Act exempts working conditions of non-federal employees from its provisions to the extent that other federal agencies exercise their statutory authority to prescribe or enforce occupational safety and health standards or regulations affecting these conditions. "Nothing in this chapter shall apply to working conditions of employees with respect to which other federal agencies, and state agencies acting under section 2021 of Title 42, exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety or health." 29 U.S.C.A. § 653(b)(1).

The exemption requires an actual "exercise" by a federal agency of its authority, even though such action may result in duplication and overlapping assertions by competing federal agencies. *Baltimore & O. R. Co., v. Occupational Safety and Health Review Comm'n*, 548 F.2d 1052, 1054 (D.C. Cir. 1976).

The Secretary of DOE has exercised such statutory authority. The relevant section of the AEA provides that in the performance of its functions the DOE [successor agency to the Atomic Energy Commission] is authorized to "prescribe such regulations or orders as it may deem necessary. . . (3) to govern any activity authorized pursuant to this chapter, including standards and restrictions governing the design, location, and operation of facilities used in the conduct of such activity, in order to protect health and to minimize danger to life or property." 42 U.S.C.A. § 2201(i)(3).

Pursuant to section 2282c.(a)(1), which permits DOE to "promulgate regulations for industrial and construction health and safety at [DOE] facilities that are operated by contractors that are covered by agreements of indemnification under section 2210(d) of this title . . . ," 42 U.S.C.A. § 2282c(a)(1); 42 U.S.C.A. § 2210(d), DOE has issued regulations and a series of orders that require contractor compliance with all OSHA standards as well as additional requirements prescribed by DOE. *See, e.g.*, 10 C.F.R. § 830 (Appendix A) (2003) and 48 C.F.R. § 952.223-71 and 970.5223-1 (2004); *Dyer v. United States*, 96 F. Supp. 2d 725, 736 (E.D. Tenn. 2000); *see Bricker v. Rockwell Intern.*

*Corp.*, 22 F.3d 871, 877 (9th Cir. 1993) (DOE orders require DOE contractors operating government-owned, contractor-operated (GOCO) facilities to comply with applicable OSHA standards as well as additional safety and health requirements adopted by DOE).

The DOE's exercise of its statutory authority is found in a memorandum of understanding with the DOL, which states that, pursuant to its authority under the AEA, DOE establishes and enforces occupational safety and health standards for the working conditions of contractor employees at GOCO facilities. *See Memorandum of Understanding Between the U.S. Department of Labor and the Department of Energy* dated August 28, 1992. [www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=mou&p\\_id=240](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=mou&p_id=240). The memorandum acknowledges DOE's extensive regulation of the health and safety of a contractor's employees and provides that the OSH Act shall not apply to GOCO sites or other facilities over which DOE has exercised its authority to regulate occupational safety and health. *See* 65 Fed. Reg. 41,492 (July 5, 2000).

That is the situation here. The 1992 memorandum of understanding applies to GOCO facilities. Rocky Flats was and is a GOCO facility over which the DOE has exercised jurisdiction.<sup>4</sup> *See* CX 24. Therefore, the memorandum applies to Kaiser-Hill as the contractor operator. The Complainants are employees of Kaiser-Hill and brought their case under the employee protection provision of the ERA, which pre-empts the OSH Act. Because the OSH Act is pre-empted, we conclude that the ALJ erred in finding that the complaints were covered only under the OSH Act and in dismissing the complaint under the ERA.

## **B. ERA protection for concerns about radiation exposure**

Our prior rulings support our conclusion here. We have held that allegations of violations of the ALARA principle are covered because the ERA protects an employee's internal allegations of noncompliance with nuclear safety regulations. *Mosley v. Carolina Power & Light Co.*, ALJ No. 94-ERA-23, slip op. at 4 (Sec'y Aug. 23, 1996). *See* 42 U.S.C.A. § 5851(a)(1). In *Mosley*, we determined that Mosley's complaints to his supervisors about unfair work assignments that violated the regulations promulgated by the Nuclear Regulatory Commission to keep radiation exposure as low as reasonably achievable were protected activity.

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<sup>4</sup> Subsequent memoranda of understanding dated June 19, 1995, and July 25, 2000, were aimed at evaluating the possible transition from internal DOE oversight of occupational safety and health matters involving private-sector employees at GOCO facilities to external enforcement by OSHA. *See* [www.osha.gov/pls/oshaweb/owadisp.show\\_document?p\\_table=mou&p\\_id=244](http://www.osha.gov/pls/oshaweb/owadisp.show_document?p_table=mou&p_id=244) and 304. Neither document affects the status of Rocky Flats as a GOCO facility subject to the 1992 MOU.

In *Williams v. Mason & Hangar Corp.*, ARB No. 98-030, ALJ No. 97-ERA 14, 18-22 (ARB Nov. 13, 2002), the ARB addressed ERA coverage of employees engaged in decommissioning nuclear weapons – nuclear anti-submarine depth bombs – and determined that their safety complaints were protected under the ERA. In *Williams*, we held that employee concerns about exposure to radioactive sources are covered by the ERA, regardless of whether exposure to the public at large is implicated. *Williams*, slip op. at 24. Thus, complaints to supervisors about compliance with safety standards and requirements, departures from established safety procedures, and deficiencies in training are protected activity under the ERA, if these complaints bear a substantial relationship to nuclear safety. *Id.* at 24-27.

*Williams* dealt with a work environment in which the employees were decommissioning nuclear weapons. The rationale of that case extends to complainants, like those before us, who are involved daily in the decontamination and decommissioning of equipment once used to manufacture parts of nuclear weapons. As the Complainants note, the ALJ did not mention *Williams* in his decision, Complainants' Initial Brief at 35-38, relying instead on the "dichotomy" between occupational safety and environmental safety. However, in view of the ERA pre-emption and our prior holdings, the distinction is inapposite.

### **C. Complainants' complaints**

We have examined the complaints, grievances, and concerns that the six Complainants expressed during most of 2000 and January 2001 while working in Building 771. *See, e.g.*, RX 25, 28-29. Although all their complaints may not have been directly related to radiation exposure, the following incidents demonstrate that all six engaged in activities protected under the ERA.

#### **1. Miller, Rittenbach, and Martin**

In March 2000, Miller, Rittenbach, and Martin were cutting up contaminated piping in a glove box, which is an enclosed plastic, glass, or metal chamber, skirted with lead shielding and containing gloves sealed to its walls. The trio ran out of 15-inch bags used to ensure the seal around the ports through which the pipe is passed, and informed their supervisor. They were told to use smaller or larger bags and continue working, but refused because that would be a "nuclear unsafe practice." The job was shut down. TR at 72-75, 626-31.

During 2000, Miller, Rittenbach, and Martin voiced multiple complaints to their supervisors under the ALARA principle – that workers have as little exposure as possible to "hot" areas contaminated by radiation. Because of delays in supplying contaminated pipe for them to process, the trio would often have to sit for hours in the hot area near the glove box, thereby increasing their exposure. TR at 77-80, 1371-72, 1532-33.



In January 2001, Miller, Rittenbach, and Martin complained about a pressure problem in a glove box used to “bottle-batch,” transferring small bottles of contaminated residue left in the piping into sealed 55-gallon drums. TR at 91-92, 667-70. A supervisor told them to continue working, but, because of the negative pressure, a containment bag was sucked into the glove box, causing a breach. The alarms sounded, Miller’s gloved hands tested positive for radiation, and the job was shut down for about a week. TR at 95-100, 1391-97, 1543-48; CX 37.

## **2. Voorhies**

Voorhies was a RCRA (Resource Conservation and Recovery Act) inspector who filled out daily logs noting safety procedures and issues in Building 771. In the summer of 2000, she noticed an industrial hygienist taking air samples without wearing a respirator and complained to her supervisor about this safety violation. TR at 1222-23. She also complained about two valves in Room 174 that were continually leaking contaminated material, which required that she “decon” the room several times. TR at 1226-29. Voorhies repeatedly warned her supervisor about a containment bag on a pipe over the door to Room 114 that was expanding as contaminated residue filled it. TR at 1230-34.

Late in 2000, Voorhies reported problems with the magnahelic gauges that regulated negative pressure for three of the main ventilation systems in Building 771. TR at 1234-41. She explained that the gauges were reading in excess of the limit, which created an unsafe condition that could result in “uptakes,” the euphemism for inhalation of airborne contaminants by workers. TR at 1248-51. At the end of January 2001, Voorhies met with a DOE representative and a supervisor and told them that the ventilation system was a severe safety problem that had not been dealt with for quite a while. TR at 1253-54.

## **3. Devers and Sherman**

In November 2000, Devers and Sherman were working in the “birdcage,” a secondary structure built within a containment tent which was used for processing highly contaminated materials. TR at 240-42. When Sherman cut into a vacuum trap on a pipe, the sludge material began smoking and sparking. Sherman feared plutonium buildup but was instructed to continue cutting. When finished, he brought the contaminated sludge over to Devers at the tent’s port. Radiation readings were over the safe limit. The radiation technician told both workers to leave the tent, but a supervisor instructed the pair to keep working. Devers and Sherman angrily complained to management about the dangers to which they were exposed. TR at 253-65, 434-42; RX 59. The job was shut down. TR at 267; CX 9.

Later that year and in January 2001, Devers and Sherman were working in another room in Building 771 demolishing “water walls,” which were used on tanks as shields against contamination and radiation. During the operation, both noticed paint chips flaking off from air ducts and pipes in the ceiling and falling down on the workers.

The chips tested high for radiation, and Devers and Sherman complained to their supervisors that they had inadequate respiratory protection. As a result, work stopped for several weeks. TR at 273-79, 445-53, 727, 806.

#### 4. Analysis

Applying ERA pre-emption of the OSH Act and the *Mosley* and *Williams* precedents discussed above to the incidents we have referenced, we conclude that the Complainants engaged in ERA-protected activity. As in *Williams*, the Complainants here raised concerns that were directly related to the nuclear safety of themselves and their coworkers, and those concerns were founded on a reasonable belief that compliance with applicable nuclear safety standards was lacking. *Id.* at 19. Thus, for example, complaints and warnings about cutting up contaminated materials in a glove box, prolonged time in a hot area, exposure to leaking valves and containment bags, and faulty pressure gauges constitute protected activity under the ERA.

Therefore, the ALJ erred in finding that the Complainants had not engaged in protected activity under the ERA. Because the ALJ dismissed this case on that ground, he made no findings on the other elements of a whistleblower claim – employer knowledge, adverse action, and causation. Consequently, we do not adopt the ALJ’s recommended decision and remand this case for him to determine whether the Complainants have established by a preponderance of the evidence that their protected activity was a contributing factor in Kaiser-Hill’s involuntary transfer of them from Building 771.<sup>5</sup>

## II. Complainants’ Complaints not Covered under TSCA, SWDA, and CERCLA

We now consider coverage under the employee protection (whistleblower) provisions of the TSCA, SWDA, and CERCLA. Here we conclude, as the ALJ did, that the environmental whistleblower statutes “generally do not protect complaints restricted solely to occupational safety and health, unless the complaints also encompass public safety and health or the environment.” *Post v. Hensel Phelps Constr. Co.*, ALJ No. 94-CAA-13, slip op. at 2 (Sec’y Aug. 9, 1995) (complaint under the Clean Air Act (CAA), the TSCA, SWDA, and CERCLA).

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<sup>5</sup> The Complainants seek a remand if the ARB finds that they engaged in protected activity. Complainants’ Initial Brief at 45. Respondent argues that, even if the Complainants engaged in protected activity, their temporary reassignments to other buildings and duties did not constitute adverse action. Respondent’s Brief at 41-43. We note, without deciding, that the elements of employer knowledge and adverse action seem to be established in that Kaiser-Hill was well aware of Complainants’ concerns and the record contains evidence that at least some of the Complainants experienced reduced total income.

The TSCA, SWDA, and CERCLA prohibit an employer from discharging or otherwise discriminating against an employee with respect to compensation, terms, conditions or privileges of employment (taking adverse action), because the employee notified the employer of an alleged violation of the Acts, has commenced any proceeding under the Acts, has testified in any such proceeding, or has assisted or participated in any such proceeding (engaged in protected activity). 15 U.S.C.A. § 2622(a), 42 U.S.C.A. § 6971(a), 42 U.S.C.A. § 9610(a); *Schlagel v. Dow Corning Corp.*, ARB No. 02-092, ALJ No. 2001-CER-1, slip op. at 6-7 (ARB Apr. 30, 2004) (complaint filed under the TSCA and CAA).

To prevail on a complaint of unlawful discrimination under the environmental whistleblower protection provisions, a complainant must establish that: he or she engaged in protected activity of which the respondent was aware; he or she suffered adverse employment action; and the protected activity was the reason for the adverse action, i.e., that a nexus existed between the protected activity and the adverse action. *Jenkins v. United States Env'tl. Prot. Agency*, ARB No. 98-146, ALJ No. 1988-SWD-2, slip op. at 17-18 (ARB Feb. 28, 2003).

Protection extends to a range of activities that further the purpose of the environmental whistleblower statutes. *Jenkins*, slip op. at 15. To be protected, safety and health complaints must be related to the requirements of the environmental acts or the regulations implementing them. *Knox v. United States Dep't of the Interior*, ARB No. 03-040, ALJ No. 01-CAA-3, slip op. at 4 (ARB Sept. 30, 2004) (complainant filed under the TSCA and CAA). Complainants must prove that they raised internal or external concerns that further the purposes of the TSCA, SWDA, and CERCLA or relate to their administration or enforcement. *Culligan*, slip op. at 9; 20 C.F.R. § 24.2(a)-(b).

The complaint must be more than speculative or vague – it must inform the employer of the conduct that needs to be remedied. *Kesterson v. Y-12 Nuclear Weapons Plant*, ARB No. 96-173, ALJ No. 95-CAA-12, slip op. at 4 (ARB Apr. 8, 1997) (complaint filed under the TSCA, SWDA, CERCLA, ERA, and CAA). The safety or health hazard complained of must “touch upon” or be “reasonably perceived” as a hazard to the environment and *public* safety and health to be protected; hazards limited to a workplace but not endangering the public are not protected. *Mourfield v. Frederick Plaas & Plaas, Inc.*, ARB Nos. 00-055, 00-056, ALJ No. 99-CAA-13, slip op. at 4 (ARB Dec. 6, 2002); *Aurich v. Consolidated Edison Co.*, ALJ No. No. 86-CAA-2, slip op. at 3-4 (Sec’y Apr. 23, 1987).

Accordingly, we examine the purpose and scope of the three statutes to decide whether they provide coverage for the Complainants’ concerns.

#### A. TSCA

The Complainants’ concerns are not protected under TSCA. The TSCA provides for the testing of chemical substances and mixtures that “may present an unreasonable risk of injury to health or the environment” through their manufacture, distribution in

commerce, processing, use, or disposal, or a combination of such activities. 15 U.S.C.A. § 2603(a). Congress perceived unreasonable risks associated with the increasing marketing of chemical products whose potential toxicity was as yet untested; the TSCA establishes requirements for testing substances believed to pose unreasonable risks before they are dispersed by various means throughout the environment and are difficult, if not impossible, to control. 15 U.S.C.A. § 2603(b); *Natural Res. Def. Council v. Env'tl. Prot. Agency*, 595 F. Supp. 1255, 1257-58 (S.D.N.Y. 1984).

Section 2602 defines chemical substance as any organic or inorganic substance of a particular molecular identity. 15 U.S.C.A. § 2602(2)(A). Section 2603 provides for EPA issuance of rules requiring the testing of chemicals, which is to be carried out and financed by the manufacturers or processors of the chemical substances. 15 U.S.C.A. § 2603(b)(3)(B). Section 2604 provides for notice and testing of new chemical substances and new uses of chemicals manufactured or processed for commercial purposes. 15 U.S.C.A. § 2604.

Section 2605 covers the regulation of hazardous chemical substances and mixtures by prohibiting or limiting their manufacture, processing, or distribution in commerce and requiring warnings and instructions about their use. 15 U.S.C.A. § 2605(a). Thus, the overall purpose of the TSCA was to set up a comprehensive testing scheme to ameliorate the dangers of toxic substances to human and environmental health. *Rollins Env'tl. Services (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985).

The TSCA specifically excludes plutonium as a regulated toxic substance. 15 U.S.C.A. § 2602(2)(B)(iv); 42 U.S.C.A. § 2014(aa) (West 2003). Consequently, the Complainants' allegations about their exposure to radiation from residual plutonium in Building 771 are not within the ambit of TSCA. However, nitric acid is a chemical substance that the TSCA has listed as highly hazardous, 29 C.F.R. § 1910.119, App. A, and that was found in the piping system in Building 771. While actions under TSCA and similar environmental statutes may begin with an employee's personal health concern, they must serve the environmental protection purposes of the Act. *Melendez v. Exxon Chemicals Americas*, ARB No. 96-051, ALJ No. 1993-ERA-6, slip op. at 3 (ARB July 14, 2000).

The Complainants, Rittenbach, Devers, and Sherman, alleged that they were exposed to nitric acid fumes and refused to cut up pipe sections that had contained nitric acid without being supplied with in-line respiratory equipment. They complained to their supervisors about the dangers to their health of exposure to nitric acid odors with only face respirators for protection and insisted that a safety data sheet indicated that no cartridge-type respirator was adequate. TR at 231-40, 423-25, 1535-40. However, the Complainants' allegations about their personal exposure to nitric acid fumes did not

involve violations of the TSCA's testing or regulatory scheme. They alleged only that inhaling such odors was hazardous to their health and that of their coworkers.<sup>6</sup>

Simple exposure to nitric acid fumes is not enough to invoke coverage under the TSCA because the Complainants' health concerns did not touch on any hazards to the environment or public health and safety. The Complainants alleged no infractions of the TSCA's test requirements for nitric acid. They reported no violations of the TSCA regulations governing the manufacturing, processing, or distribution of this toxic chemical. Their complaints involved only their personal health and safety. Therefore, we conclude that their activity was not protected under the TSCA. *See* 15 U.S.C.A. § 2608(c) (EPA Administrator shall not exercise statutory authority to prescribe or enforce standards or regulations affecting occupational safety and health pursuant to section 653(b)(1) of Title 29); *Evans v. Baby-Tenda*, ARB No. 03-001, ALJ No. 01-CAA-4, slip op. at 7 (ARB July 30, 2004) (reversing ALJ's finding that the complainant engaged in protected activity because she expressed no concerns that paint fumes escaped into the outside, ambient air).

## **B. SWDA**

We next look at coverage under the SWDA. The SWDA, as amended, governs solid waste management, providing "a comprehensive framework" for the regulation of the treatment, transportation, storage, and disposal of hazardous wastes. 42 U.S.C.A. § 6902(a); *Hazardous Waste Treatment Council v. United States Env'tl. Prot. Agency*, 861 F.2d at 270, 271, (D.C. Cir. 1988); *Nathaniel v. Westinghouse Hanford Co.*, ALJ No. 91-SWD-2, slip op. at 8 (Sec'y Feb. 1, 1995). The Act is intended to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to human health and the environment. 42 U.S.C.A. § 6902(b); *Hall v. United States Army Dugway Proving Ground*, ARB Nos. 02-108, 03-013, ALJ No. 97-SDW-5, slip op. at 4 (ARB Dec. 30, 2004).

The SWDA, as amended by the RCRA, is aimed at lessening the dangers and risks to human health and the environment from products developed and distributed, and wastes generated, by private and public enterprises. *Culligan*, slip op. at 9-10. Section 6921(b)(1) requires the EPA to develop criteria for identifying hazardous wastes, and authorizes EPA to list wastes as hazardous according to criteria contained in section 6921(a). 42 U.S.C.A. § 6921(a)-(b). Wastes are considered hazardous if the EPA lists them as such or if they have one of four technical characteristics of hazardousness, ignitability, corrosiveness, reactivity, and toxicity. *See* 40 C.F.R. § 261.11, § 261.20-24 (2003).

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<sup>6</sup> As previously discussed, DOE has responsibility for handling the Complainants' personal nitric acid exposure inasmuch as the OSH Act is pre-empted, but that does not mean that such exposure is covered under the TSCA.

Under the SWDA, hazardous waste is defined as “solid waste, or [a] combination of solid wastes[.]” that, for enumerated reasons, creates public health and environmental dangers. 42 U.S.C.A. § 6903(5). Solid waste, however, does not include “source, special nuclear, or byproduct material as defined by the AEA at section 2014(e), 42 U.S.C.A. § 2014(e). 42 U.S.C.A. § 6903(27). *See generally United States v. Kentucky*, 252 F.3d 816 (6th Cir. 2001).

In this case, the Complainants expressed no concerns and raised no issues about solid waste. Their work and complaints were confined to Building 771 and focused on workplace hazards mainly involving their personal exposure to radiation rather than the environmental safety and health concerns that the SWDA encompasses. *See, e.g.*, TR at 77-80, 1371-72, 1532-33. They made no allegations that the pipes containing nitric acid residue or the radiation contaminated materials they encountered at work constituted solid waste as defined by the SWDA. 42 U.S.C.A. § 6903(27). Nor did they complain about the ultimate disposal of the equipment and materials on which they worked. While the contaminated soil at Rocky Flats could be considered solid waste, the Complainants’ concerns reflected only their personal safety and health within the confines of Building 771. *See, e.g.*, TR at 79; RX 1; Complainants’ Initial Brief at 6-32.

Nitric acid is listed as a hazardous waste, 40 C.F.R. § 261.33(f)(table), but the Complainants did not allege any conduct or activity regarding this chemical that violated any provisions of the SWDA. Their concerns did not touch on the effects of radiation and nitric acid fumes on the air, water, or soil. *See, e.g.*, TR at 1225-32, 1535-39; 42 U.S.C.A. § 6901(a)-(b) (congressional findings on the “rising tide of scrap, discarded, and waste materials”). Because solid waste was not among the Complainants’ articulated concerns, we find no coverage under the SWDA.<sup>7</sup>

### C. CERCLA

Finally, we address lack of coverage under CERCLA, which regulates the release of hazardous substances into the environment. 42 U.S.C.A. § 9501-75. CERCLA applies to the environment, which is defined as the navigable waters, the waters of the contiguous zone, and the ocean waters of which the natural resources are under the

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<sup>7</sup> We note that Kaiser-Hill was not engaged in generating or transporting solid waste. *See* 42 U.S.C.A. §§ 6922-23. Nor did Kaiser-Hill own or operate a facility for the treatment, storage, and disposal of hazardous waste. *See* 42 U.S.C.A. § 6924. Rather, Kaiser-Hill was a contractor with the DOE, hired to decontaminate and decommission a former nuclear weapons facility. 42 U.S.C.A. § 5851(a)(2)(D). *Cf. Williams v. TIW Fabrication & Machining, Inc.*, ALJ No. 88-SWD-3, slip op. at 4 (Sec’y June 24, 1992) (complainant’s activity protected under the Act because his employer was regulated as a generator of solid waste).

exclusive management authority of the United States under the Magnuson Fishery Conservation and Management Act [16 U.S.C.A. § 1801 *et seq.* (West 2000)], and any other surface water, ground water, drinking water supply, land surface or subsurface strata, or ambient air within the United States or under the jurisdiction of the United States. 42 U.S.C.A. § 9601(8). *Culligan*, slip op. at 10.

Through this Act, Congress sought to protect “public health and the environment.” *In Re Jenson*, 995 F.2d 925, 927 (9th Cir. 1993). The two main purposes of CERCLA are the prompt cleanup of hazardous waste sites and the imposition of all cleanup costs on the responsible party. 42 U.S.C.A. § 9604(a); *Meghrig v. KFC Western, Inc.*, 516 U.S. 479, 483 (1996); *Culligan*, slip op. at 10. Under this statute, the United States may use the Hazardous Substance Superfund to finance cleanup efforts, *see* 42 U.S.C.A. §§ 9601(11), 9604(c)(7); 26 U.S.C.A. § 9507, which it may then replenish by suits brought against, among others, “any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of” 42 U.S.C.A. § 9607(a)(2). *United States v. Bestfoods*, 524 U.S. 51, 55 (1998). However, CERCLA specifically excludes as a hazardous substance the release of special nuclear material subject to the AEA.<sup>8</sup> 42 U.S.C.A. § 9601(22).

While Rocky Flats is a Superfund site, CX 24 at 7-8, and is regulated by the EPA, the Complainants have not alleged any safety concerns or complaints that implicate any of the provisions of CERCLA that govern Superfund site cleanup. *See, e.g.*, CX 5-6, 9, 12-13, 18; RX 1. The Complainants did not report any real or potential releases of hazardous substances into the environment. 42 U.S.C.A. § 9601(22). Their concerns about exposure to radiation and nitric acid fumes did not involve any pollutants or contaminants escaping from Building 771. Nor did the Complainants specify any CERCLA-protected activities as the basis for their transfers. *See, e.g.*, RX 1. Because the Complainants never submitted a complaint alleging that their involuntary transfers involved CERCLA-protected activities, we dismiss the case under this statute. *Roberts*

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<sup>8</sup> The AEA regulates three different classes of radioactive material: source material, special nuclear material, and byproduct material. *See* 42 U.S.C.A. § 2014(e), (z), (aa). Source material includes uranium, thorium, and other materials that DOE deems necessary for the production of special nuclear material. 42 U.S.C.A. §§ 2014(z), 2091. Special nuclear material includes plutonium, enriched uranium, and other material capable of releasing substantial quantities of atomic energy. 42 U.S.C.A. §§ 2014(aa), 2071. Byproduct material includes “(1) any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material, and (2) the tailings or wastes produced by the extraction or concentration of uranium or thorium from any ore processed primarily for its source material content.” 42 U.S.C.A. § 2014(e). The AEA grants DOE and the Nuclear Regulatory Commission exclusive responsibility for regulating source, special nuclear, and byproduct material. *See* 42 U.S.C.A. § 2201(b), (i)(3).

*v. Rivas Env'tl. Consultants, Inc.*, ARB No. 97-026, ALJ No. 96-CER-1, slip op. at 3-4 (ARB Sep. 17, 1997).

In sum, we agree with the ALJ that the Complainants' concerns involved only their own health and safety and that of their coworkers. They did not express complaints that brought them under the protection of the whistleblower protection provisions of the three environmental statutes.

#### CONCLUSION

We hold that the Complainants engaged in activity protected under the ERA, but not under the TSCA, SWDA, and CERCLA. We therefore **AFFIRM** the ALJ's recommended dismissal under the TSCA, SWDA, and CERCLA but **REJECT** his decision under the ERA and **REMAND** the case for further proceedings consistent with this decision.

**SO ORDERED.**

**WAYNE C. BEYER**  
**Administrative Appeals Judge**

**M. CYNTHIA DOUGLASS**  
**Chief Administrative Appeals Judge**