not a ''significant regulatory action'' under Executive Order 12866; (2) is not a ''significant rule'' under DOT Regulatory Policies and Procedures (44 FR 11034; February 26, 1979); and (3) does not warrant preparation of a regulatory evaluation as the anticipated impact is so minimal. Since this is a routine matter that will only affect air traffic procedures and air navigation, it is certified that this rule, when promulgated, would not have a significant economic impact on a substantial number of small entities under the criteria of the Regulatory Flexibility Act.

List of Subjects in 14 CFR Part 71

Airspace, Incorporation by reference, Navigation (air).

Adoption of the Amendment

■ In consideration of the foregoing, the Federal Aviation Administration amends 14 CFR part 71 as follows:

PART 71—DESIGNATION OF CLASS A, B, C, D, AND E AIRSPACE AREAS; AIR TRAFFIC SERVICE ROUTES; AND REPORTING POINTS

■ 1. The authority citation for 14 CFR part 71 continues to read as follows:

Authority: 49 U.S.C. 106(g), 40103, 40113, 40120; E.O. 10854, 24 FR 9565, 3 CFR, 1959–1963 Comp., p. 389.

§ 71.1 [Amended].

■ 2. The incorporation by reference in 14 CFR 71.1 of the Federal Aviation Administration Order 7400.9P, Airspace Designations and Reporting Points, dated September 1, 2006, and effective September 15, 2006 is amended as follows:

Paragraph 6005 Class E airspace areas extending upward from 700 feet or more above the surface of the earth.

* * * * *

ANM UT E5 Beaver, UT [New]

Beaver Municipal Airport, UT
(Lat. 38°13′51″ N., long. 112°40′31″ W.)
Bryce Canyon VORTAC
(Lat. 37°41′21″ N., long. 112°18′14″ W.)

That airspace extending upward from 700 feet above the surface within a 5.0-mile radius of Beaver Municipal Airport and within 3 miles each side of the 261° bearing from the Airport extending from the 5.0-mile radius to 14.0 miles west of the Airport, and that airspace extending upward from 1,200 feet above the surface beginning at lat. 38°19′24″ N., long. 113°30′00″ W.; thence east on V–244 to lat. 38°22′22″ N., long. 112°37′47″ W.; thence south on V–257 to BRYCE CANYON VORTAC; thence west on V–293 to lat. 37°56′30″ N., long. 113°00′00″ W.; to point of beginning.

* * * * *

Issued in Seattle, Washington, on April 26, 2007.

Clark Desing,

Manager, System Support Group, Western Service Center.

[FR Doc. E7–15579 Filed 8–9–07; 8:45 am]

BILLING CODE 4910–13–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 Federal Environmental Statutes and Section 211 of the Energy Reorganization Act of 1974, as Amended

AGENCY: Occupational Safety and Health Administration, Labor.

ACTION: Interim final rule; request for comments.

SUMMARY: The Department of Labor amends the regulations governing the employee protection (''whistleblower'') provisions of Section 211 of the Energy Reorganization Act of 1974, as amended (''ERA''), to implement the statutory changes enacted into law on August 8, 2005, as part of the Energy Policy Act of 2005. The regulations also make the procedures for handling retaliation complaints under Section 211 of the ERA and the environmental whistleblower statutes listed in Part 24 as consistent as possible with the more recently promulgated procedures for handling retaliation complaints under other employee protection provisions administered by the Occupational Safety and Health Administration (''OSHA''), see 29 CFR parts 1979–1981.

DATES: This interim final rule is effective on August 10, 2007. Comments and additional materials must be submitted (postmarked, sent or received) by October 9, 2007.

ADDRESSES: You may submit comments and additional materials by any of the following methods:

Electronically: You may submit comments and attachments electronically at *http://www.regulations.gov*, which is the Federal eRulemaking Portal. Follow the instructions online for making electronic submissions.

Fax: If your submissions, including attachments, do not exceed 10 pages, you may fax them to the OSHA Docket Office at (202) 693–1648.

Mail, hand delivery, express mail, messenger or courier service: You must submit three copies of your comments and attachments to the OSHA Docket Office, Docket No. OSHA–2007–0028, U.S. Department of Labor, Room N–2625, 200 Constitution Avenue, NW., Washington, DC 20210. Deliveries (hand, express mail, messenger and courier service) are accepted during the Department of Labor's and Docket Office's normal business hours, 8:15 a.m.–4:45 p.m., e.t.

Instructions: All submissions must include the Agency name and the OSHA docket number for this rulemaking (Docket No. OSHA–2007–0028). Submissions, including any personal information you provide, are placed in the public docket without change and may be made available online at *http://www.regulations.gov.* Therefore, OSHA cautions you about submitting personal information such as social security numbers and birth dates. For further information on submitting comments plus additional information on the rulemaking process, see the ''Public Participation'' heading in the **SUPPLEMENTARY INFORMATION** section of this document.

Docket: To read or download submissions or other material in the docket, go to *http://www.regulations.gov* or the OSHA Docket Office at the address above. All documents in the docket are listed in the *http://www.regulations.gov* index; however, some information (e.g., copyrighted material) is not publicly available to read or download through the Web site. All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office.

FOR FURTHER INFORMATION CONTACT: Nilgun Tolek, Director, Office of Investigative Assistance, Occupational Safety and Health Administration, U.S. Department of Labor, Room N–3610, 200 Constitution Avenue, NW., Washington, DC 20210; telephone (202) 693–2199. This is not a toll-free number. The alternative formats available are large print, electronic file on computer disk (Word Perfect, ASCII, Mates with Duxbury Braille System) and audiotape.

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 amendments to the ERA apply to whistleblower claims filed on or after August 8, 2005, the date of the enactment of Section 629 of the Energy Policy Act of 2005. The changes to the regulations also affect the six environmental whistleblower statutes because the same procedures apply to each of the statutes covered in Part 24. The regulatory changes recognize the importance of consistency in the procedures governing the whistleblower statutes administered by OSHA.

II. Public Participation

Submission of Comments and Access to Docket

You may submit comments and additional materials (1) electronically at *http://www.regulations.gov,* which is the Federal eRulemaking Portal; (2) by facsimile (FAX); or (3) by hard copy. All submissions must identify the Agency name and the OSHA docket number for this rulemaking (Docket No. OSHA–2007–0028). You may supplement electronic submissions by uploading document attachments and files electronically. If, instead, you wish to mail additional materials in reference to an electronic or fax submission, you must submit three copies to the OSHA Docket Office (see **ADDRESSES** section). The additional materials must clearly identify your electronic submissions by name, date, and docket number so OSHA can attach them to your submissions.

Because of security-related procedures, the use of regular mail may cause a significant delay in the receipt of submissions. For information about security procedures concerning the delivery of materials by hand, express delivery, messenger or courier service, please contact the OSHA Docket Office at (202) 693–2350 (TTY (877) 889–5627).

Submissions are posted without change at *http://www.regulations.gov.* Therefore, OSHA cautions commenters about submitting personal information such as social security numbers and birth dates. Although all submissions are listed in the *http://www.regulations.gov* index, some information (e.g., copyrighted material) is not publicly available to read or download through *http://www.regulations.gov.* All submissions, including copyrighted material, are available for inspection and copying at the OSHA Docket Office. Information on using the *http://www.regulations.gov* Web site to submit comments, requests for hearings and attachments, and to access the docket is available at the Web site's User Tips link. Contact the OSHA Docket Office for information about materials not available through the Web site and for assistance in using the internet to locate docket submissions.

Electronic copies of this **Federal Register** document are available at *http://www.regulations.gov.* This document, as well as news releases and other relevant information, also are available at OSHA's Web page at *http://www.osha.gov.*

III. 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.

IV. Summary and Discussion of Regulatory Provisions

The regulatory provisions in this part have been revised in the interest of consistency to conform to the regulations implementing the employee protection provisions of the following statutes that are administered and enforced by the Secretary of Labor: Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (''AIR21''), codified at 29 CFR part 1979; the Sarbanes-Oxley Act of 2002 (''SOX''), codified at 29 CFR part 1980; and the Pipeline Safety Improvement Act of 2002 (''PSIA''), codified at 29 CFR 1981. The section numbers of this regulation also have been changed to correspond with the numbering under the regulations implementing AIR21, SOX, and PSIA. Although these regulations are intended to conform to those implementing AIR21, SOX, and PSIA, they make one change in terminology; they refer to actions brought under the employee protection provisions of these 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 employee protection 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 (i.e., race, gender, or religion). The burdens of proving a retaliation claim are the same as those of a standard discrimination claim. *See Essex* v. *United Parcel Service, Inc.*, 111 F.3d 1304, 1308 (7th Cir. 1997).

Section 24.100 Purpose and Scope

This section (formerly § 24.1) describes the purpose of the regulations implementing the employee protection 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 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 regulations that implement AIR21, SOX, and the PSIA. Thus, for example, former § 24.1 becomes current § 24.100.

Section 24.101 Definitions

This new section includes general definitions applicable to the employee protection provisions of the seven statutes listed in § 24.100(a). This section does not include program-specific definitions, which may be found in the statutes.

Section 24.102 Obligations and Prohibited Acts

This section (formerly § 24.2) describes the whistleblower activity that is protected under the statutes covered by this Part and the type of conduct that is prohibited in response to any protected activity. The language generally has been revised to conform to

the language in the regulations that implement the AIR21, SOX, and PSIA whistleblower provisions. The changes are not intended to be substantive. References to the statutes listed in 24.100(a) have deleted the adjective ''Federal'' as unnecessary. Paragraph (e) has been moved from former Sec. 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. *United States Department of Labor Administrative Review Board,* 173 F.3d 811, 814 (11th Cir. 1999) (petitioners knowingly conducted unauthorized and potentially dangerous experiments).

Section 24.103 Filing of Retaliation Complaint

This section (formerly § 24.3) has been revised to be consistent with the regulatory procedures implementing the whistleblower provisions of the AIR21, SOX, and PSIA. 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 the AIR21, SOX, and PSIA 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 Sec. 24.100(a) and a complaint under Section 11(c) of the Occupational Safety and Health Act.

Section 24.104 Investigation

This section (formerly § 24.4) has been revised so that its language will conform more closely to the language of the regulations implementing AIR21, SOX, and PSIA. Additionally, former paragraph (b) of § 24.5 has been revised and moved to this section, and former paragraph (d) of § 24.4 has been revised and moved to § 24.105, where it more appropriately appears under ''Issuance of findings and orders.''

This rule sets forth two different standards of causation—''motivating'' factor and ''contributing'' factor—depending on the whistleblower statute under which a complaint is filed. When investigating or adjudicating whistleblower complaints under the six environmental whistleblower statutes, the Department of Labor relies on the traditional standards derived from Title VII and other discrimination law as set forth under *Mt. Healthy City School District Board of Education* v. *Doyle,* 429 U.S. 274 (1977); *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248 (1981); and *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973). *See Dartey* v. *Zack Co. of Chicago,* No. 82–ERA–2, 1983 WL 189787, at *3–*4 (Sec'y of Labor Apr. 25, 1983 (discussing *Burdine,* 450 U.S. at 254–255)). Under these standards, a complainant seeking to prove retaliation must first establish a prima facie case that protected activity was a motivating factor in the adverse action, which creates a presumption of retaliation. *See, e.g., St. Mary's Honor Ctr.* v. *Hicks,* 509 U.S. 502 (1993). Once a complainant establishes a prima facie case, the employer has the burden of producing a legitimate, nonretaliatory explanation for its actions. If the employer presents such evidence, the presumption in favor of the complainant disappears, and the complainant must establish by a preponderance of the evidence that the employer's explanation was a pretext, that is, that the real reason for the adverse action was retaliation. A prima facie case, together with proof that the employer's explanation is pretext, permits (but does not require) a trier of fact to find retaliation. *See Reeves* v. *Sanderson Plumbing Products, Inc.,* 530 U.S. 133, 147–148 (2000); *St. Mary's Honor Center,* 509 U.S. at 519 (''It is not enough * * * to disbelieve the employer; the factfinder must believe the plaintiff's explanation of intentional discrimination.''); *Dartey* v. *Zack, supra.* Thus, under these principles, an employee must prove by a preponderance of the evidence that retaliation was a ''motivating factor'' for the adverse employment action. The Secretary can conclude from the evidence that the employer's reason for the retaliation was a pretext and rule for the employee, or that the employer was not motivated in whole or in part by protected activity and rule for the employer, or that an employer acted out of mixed motives. See *Dartey* v. *Zack,* 1983 WL 189787, at *4. If the Secretary concludes that the employer acted out of mixed motives, the employer can escape liability by proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of protected activity. Id. (discussing *Mt. Healthy,* 429 U.S. at 287).

Paragraph (b) 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 Sec. 24.100(a), have contained specific statutory standards for the dismissal and adjudication of complaints and for the resolution of mixed motive or dual motive cases. See 42 U.S.C. 5851(b)(3)(A) through (b)(3)(D); Public Law 102–486, section 2902, 106 Stat. at 3123–3124. The ERA requires that a complainant make an initial prima facie showing that protected activity was ''a contributing factor'' in the unfavorable personnel action alleged in the complaint, i.e., that whistleblowing activity, alone or in combination with other factors, affected in some way the outcome of the employer's personnel 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. *United States 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 unfavorable personnel action'' in the absence of the protected activity. 42 U.S.C. 5851(b)(3)(B). 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 unfavorable personnel action; or (2) the employer rebuts that showing by clear and convincing evidence that it would have taken the same unfavorable personnel action absent the protected activity.

Assuming that an investigation proceeds beyond the gatekeeping phase, the ERA provides 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. The Secretary therefore adheres to traditional Title VII discrimination law for that determination, i.e., the complainant must prove by a ''preponderance of the evidence'' that his protected activity contributed to his termination; otherwise, the burden never shifts to the employer to establish its ''clear and convincing evidence'' mixed-motive defense. See, e.g., *Dysert* v. *United States Secretary 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 unfavorable employment decision] 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).

Under traditional Title VII burden shifting principles applicable to the six environmental whistleblower statutes, if the Secretary concludes that the employer acted for both prohibited and legitimate reasons (i.e., a ''mixed motive'' case), the employer can escape liability by proving, by a preponderance of the evidence, that it would have reached the same decision even in the absence of the protected conduct. See *Dartey* v. *Zack,* 1983 WL 189787, at *4 (discussing Mt. Healthy, 429 U.S. at 287). However, the 1992 ERA amendments altered the employer's burden in a ''mixed motive'' case; 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).

Section 24.105 Issuance of Findings and Orders

The procedures set forth in this section formerly appeared under a paragraph of § 24.4, the Investigations section. This new section was created for purposes of clarification and consistency with the regulations implementing the AIR21, SOX, and PSIA whistleblower provisions. 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 the regulations implementing AIR21, SOX, and PSIA. 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 AIR21, SOX, and PSIA, it also offers the parties a more reasonable timeframe in which to consider whether to appeal the Assistant Secretary's findings.

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 § 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 e-mail communication is considered the date of the filing. 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, N 2716, 200 Constitution Ave., NW., 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).

Section 24.107 Hearings

This section has been revised to conform to the regulations implementing the whistleblower provisions under AIR21, SOX, and PSIA. It adopts 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, 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 unique 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 provides that the ALJ has broad authority to limit discovery. For example, an ALJ may limit the number of interrogatories, requests for production of documents, or depositions allowed. An ALJ also 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. 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.

Section 24.108 Role of Federal Agencies

This new section was added to conform these regulations to those implementing AIR21, SOX, and PSIA. As noted above, the substance of this section formerly was set forth under paragraphs (f) and (g) of § 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 Administrative Review Board 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.

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 § 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. 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 § 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 Administrative Review Board. The previous regulations have caused confusing delays to the complainant's right to immediate reinstatement. *See, e.g., McNeill* v. *Crane Nuclear, Inc.,* No. 02–002, 2002 WL 31932543, *1–*2 (Adm. Rev. Bd. Apr. 24, 2006). 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. Furthermore, the ALJ's order will be effective immediately whether or not the ALJ designates the decision and/or order as recommended. As the Administrative Review Board recently recognized, every decision of an ALJ is recommended until it becomes the final decision of the Secretary. *Welch* v. *Cardinal Bankshares Corp.,* No. 06–062, 2006 WL 861374, * 3 n. 13 (Adm. Rev. Bd. Mar. 31, 2006) (''The APA authorizes ALJs to issue recommended decisions. See 5 U.S.C. 554(d) ('The employee [i.e. ALJ] who presides at the reception of evidence pursuant to section 556 of this title shall make the *recommended decision* or initial decision required by section 557 of this title.* * *' (emphasis added); 5 U.S.C. 557(c) ('Before a *recommended,* initial,

or tentative decision, or a decision on agency review of the decision of subordinate employees * * *. All decisions, including initial, *recommended,* and tentative decisions, are a part of the record. * * *'') (emphasis added).'').

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, is addressed by the Rules of Practice and Procedure for Administrative Hearings Before the Office of Administrative Law Judges at 29 CFR 18.57.

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 Administrative Review Board. Upon the issuance of the ALJ's decision, the parties have 10 business days within which to petition the Board 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 whistleblower provisions of AIR21, SOX and PSIA, to provide that an appeal to the Board is no longer a matter of right but is accepted at the discretion of the Board. Congress intended these whistleblower actions to be expedited and this change may assist in furthering that goal. To facilitate review, the parties must specifically identify the findings and conclusions to which they take exception, or the exceptions ordinarily will be deemed waived by the parties. The Board has 30 days to decide whether to grant the petition for review. If the Board 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 Board 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 Board, any relief ordered by the ALJ, except for that ordered under the ERA, is inoperative while the matter is pending before the Board. 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 Board accepts a petition for review, its factual determinations will be reviewed under the substantial evidence standard. This standard also is applied to Board review of ALJ decisions under the whistleblower provisions of AIR21, SOX, and PSIA.

This section also provides that in the exceptional case, the Board 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 Board. 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.

Subpart C—Miscellaneous Provisions

Section 24.111 Withdrawal of Complaints, Objections, and Findings; 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.

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 Administrative Review Board 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. *United States 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 (D.C. 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).

Section 24.113 Judicial Enforcement

This section describes the Secretary's power under several of the statutes listed in Sec. 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.

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 one under the whistleblower provisions of SOX, but is otherwise unique among the whistleblower statutes administered by the Secretary. This statutory scheme creates the possibility that a complainant will have litigated a claim before the agency, will receive a decision from an ALJ, and will then file a complaint in district court while the case is pending review by the Board. The Act might even be interpreted to allow a complainant to bring an action in federal court after receiving a final decision from the Board, if that decision were issued more than one year after the filing of the complaint. The Secretary believes that it would be a waste of the resources of the parties, the Department, and the courts for complainants to pursue duplicative litigation. The Secretary notes that the courts have recognized that, when a party has had a full and fair opportunity to litigate a claim, an adversary should be protected from the expense and vexation of multiple lawsuits and that the public interest is served by preserving judicial resources by prohibiting the same parties making the same claims. *See Montana* v. *United States,* 440 U.S. 147, 153 (1979). When an administrative agency acts in a judicial capacity and resolves disputed issues of fact properly before it, which the parties have had an adequate opportunity to litigate, the courts have not hesitated to apply the principles of issue preclusion (collateral estoppel) or claim preclusion (res judicata) on the basis of that administrative decision. *See University of Tennessee* v. *Elliott,* 478 U.S. 788, 799 (1986) (citing *United States* v. *Utah Construction and Mining Co.,* 384 U.S. 394, 422 (1966)). Therefore, the Secretary anticipates that federal courts will apply such principles if a complainant brings a new action in federal court following extensive litigation before the Department that has resulted in a decision by an ALJ or the Secretary. Where an administrative hearing has been completed and a matter is pending before an ALJ or the Board 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.

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 Board may, upon application and notice to the parties, waive any rule as justice or the administration of the statutes listed in § 24.100(a) requires.

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.''

V. Paperwork Reduction Act

This rule contains a reporting provision (filing a retaliation complaint, § 24.103) which was previously reviewed and approved for use by the Office of Management and Budget (''OMB'') under 29 CFR 24.3 and assigned OMB control number 1218–0236 under the provisions of the Paperwork Reduction Act of 1995 (Pub. L. 104–13).

VI. Administrative Procedure Act

The notice and comment rulemaking procedures of Section 553 of the Administrative Procedure Act (''APA'') do not apply ''to interpretative 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 Section 553(b)(A) of the APA; the agency does not have legislative rulemaking authority under the applicable statutes. Therefore publication in the **Federal Register** of a notice of proposed rulemaking and request for comments is not required. Although this rule is not subject to the notice and comment procedures of the APA, we are providing persons interested in this interim final rule 60 days to submit comments. In so doing, we are following the agency's practice when it recently promulgated rules for the handling of whistleblower complaints under SOX, AIR21, and PSIA. Specifically, those rules, procedural in nature like this rule, were published as interim final rules; however, persons were given 60 days in which to submit comments. The Department carefully reviewed those comments and then issued its final rules. Similarly, in this instance, a final rule will be published after the agency receives and carefully reviews the public's comments.

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.

VII. 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.

VIII. 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, this 2nd day of August, 2007.

Edwin G. Foulke, Jr.,

Assistant Secretary 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 FEDERAL EMPLOYEE PROTECTION STATUTES

Subpart A—Complaints, Investigations, Issuance of Findings

Sec.

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), 5851, 6971, 7622, 9610.

Subpart A—Complaints, Investigations, Issuance of Findings

§ 24.100 Purpose and scope.

(a) This part implements procedures under the employee protection 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, 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).

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, 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 employee protection 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 employee protection 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, except that a complaint must be in writing and should include a full statement of the acts and omissions, with pertinent dates, which are believed to constitute the violations.

(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, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

(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, or e-mail communication will be considered to be the date of filing; if the complaint is filed in person, by hand-delivery, or other means, the complaint is filed upon receipt.

(e) *Relationship to section 11(c) complaints.* A complaint filed under any of the statutes listed in § 24.100(a) alleging facts that would 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 both a complaint filed under any of the statutes listed in § 24.100(a) and section 11(c). Similarly, a complaint filed under section 11(c) that alleges facts that would constitute a violation of any of the statutes listed in § 24.100(a) will be deemed to be both a complaint filed under any of the statutes listed in § 24.100(a) and section 11(c). Normal procedures and timeliness requirements for investigations 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, of the allegations contained in the complaint, and of the substance of the evidence supporting the complaint (redacted to protect the identity of any confidential informants). A copy of the notice to the respondent will also be provided 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) 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 29 CFR part 70.

(d) *Investigation under the six environmental statutes.* In addition to the investigative procedures set forth in § 24.104(a), (b), and (c), 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 unfavorable personnel 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 unfavorable personnel action; and

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

(3) 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 motivating factor in the unfavorable personnel action. The burden may be satisfied, for example, if the complainant shows that the adverse personnel 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 the respondent demonstrates by a preponderance of the evidence that it would have taken the same unfavorable personnel action in the absence of the complainant's protected activity.

(e) *Investigation under the Energy Reorganization Act.* In addition to the investigative procedures set forth in § 24.104(a), (b), and (c), 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 unfavorable personnel 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 unfavorable personnel action; and

(iv) The circumstances were sufficient to raise the inference that the protected activity was a contributing factor in the unfavorable 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 unfavorable personnel action. The burden may be satisfied, for example, if the complainant shows that the adverse personnel 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 will be so advised 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 unfavorable personnel 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 unfavorable personnel 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 discriminated 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. Where the respondent establishes that the complainant is a security risk (whether or not the information is obtained after the complainant's discharge), an order of reinstatement would not be 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. The letter accompanying 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 pursuant to paragraph (b) of this section, unless an objection and 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, 200 Constitution Ave., NW., N 2716, U.S. Department of Labor, Washington, DC 20210.

(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 for administrative hearings before the Office of Administrative Law Judges, codified at subpart A, 29 CFR part 18.

(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. Administrative law judges have broad discretion to limit discovery in order to expedite the hearing.

(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.

(d) Formal rules of evidence will not apply, but rules or principles designed

to assure production of the most probative evidence available will be applied. The administrative law judge may exclude evidence that is immaterial, irrelevant, or unduly repetitious.

§ 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 proceedings. 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 pleadings 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, 200 Constitution Ave., NW., N 2716, Washington, DC 20210.

(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 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 administrative law judge will contain appropriate findings, conclusions, and an order pertaining to the remedies provided in paragraph (c) of this section, as appropriate. 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 unfavorable personnel action alleged in the complaint. In cases arising under the other six 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 was a motivating factor in the unfavorable personnel action alleged in the complaint.

(b) In cases under the Energy Reorganization Act, if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a contributing factor in the unfavorable personnel 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 unfavorable personnel action in the absence of any protected activity. In cases under the other six statutes listed in § 24.100(a), even if the complainant has demonstrated by a preponderance of the evidence that the protected activity was a motivating factor in the unfavorable personnel 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 unfavorable personnel action in the absence of any protected activity.

(c) Neither the Assistant Secretary's determination to dismiss a complaint without completing an investigation pursuant to § 24.104(d) nor the Assistant Secretary's determination to proceed with an investigation is subject to review by the administrative law judge, 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 administrative law judge will hear the case on the merits.

(d)(1) If the administrative law judge 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 administrative law judge 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 administrative law judge 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 Administrative Review Board.

(3) If the administrative law judge 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. Any administrative law judge'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 Administrative Review Board. An administrative law judge'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 administrative law judge must file a written petition for review with the Administrative Review Board (''the Board''), 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 administrative law judge will become the final order of the Secretary unless, pursuant to this section, a timely petition for review is filed with the Board. The petition for review must specifically identify the findings, conclusions or orders to which exception is taken. Any exception not specifically urged ordinarily will be deemed to have been waived by the parties. A petition must be filed within 10 business days of the date of the decision of the administrative law judge. 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 Board. 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, 200 Constitution Ave., NW., N 2716, Washington, DC 20210.

(b) If a timely petition for review is filed pursuant to paragraph (a) of this section, and the Board, 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 administrative law judge will be inoperative unless and until the Board issues an order adopting the decision, except that an order by an administrative law judge 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 Board, unless the Board grants a motion by the respondent to stay the order based on exceptional circumstances. The Board will specify the terms under which any briefs are to be filed. The Board will review the factual determinations of the administrative law judge under the substantial evidence standard. If a timely petition for review is *not* filed, or the Board denies review, the decision of the administrative law judge will become the final order of the Secretary and is not subject to judicial review.

(c) The final decision of the Board 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 to the last known address. 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, 200 Constitution Ave., NW., N 2716, Washington, DC 20210, even if the Assistant Secretary is not a party.

(d) If the Board 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 Board will assess against the respondent all costs and expenses (including attorney's fees) reasonably incurred.

(e) If the Board 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 findings; 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.

(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 findings or order become final, a party may withdraw his or her objections to the findings or order by filing a written withdrawal with the administrative law judge, or, if the case is on review, with the Board. The judge or the Board, as the case may be, will determine whether to approve the withdrawal. 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 administrative law judge if the case is before the judge, or by the Board if a timely petition for review has been filed with the Board. A copy of the settlement must be filed with the administrative law judge or the Board, as the case may be.

(e) Any settlement approved by the Assistant Secretary, the administrative law judge, or the Board 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 paragraphs (b), (c), and (d) of this section, within 60 days after the issuance by the Board 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 Board 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 Board 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 Board 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 Board 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 Board 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 Board to the appropriate court pursuant to the local rules of the court.

§ 24.113 Judicial enforcement.

Whenever any person has failed to comply with an order by an administrative law judge issued under the Energy Reorganization Act, with the exception of any award of compensatory damages, or with a final order of the Secretary issued by the Board, 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 administrative law judge issued under the Energy Reorganization Act, with the exception of any award of compensatory damages, or with a final order of the Secretary issued by the Board 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 the Board has not issued a final decision within one year of the filing of a complaint under the Energy Reorganization Act, and there is no showing that there has been delay due to the bad faith of the complainant, the complainant may bring an action at law or equity for de novo review in the appropriate district court of the United States, 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 administrative law judge, or the Board, 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, 200 Constitution Ave., NW., N 2716, Washington, DC 20210.

§ 24.115 Special circumstances; waiver of rules.

In special circumstances not contemplated by the provisions of this part, or for good cause shown, the administrative law judge or the Board 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

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Your Rights under the Energy Reorganization Act

The Energy Reorganization Act (ERA), makes it illegal to discharge or otherwise retaliate against an employee in terms of compensation, conditions, or privileges of employment 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 must be ***in writing*** and may be in person or by mail at the nearest local office of the Occupational Safety and Health Administration (OSHA), Department of Labor (DOL), or with 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.osha.gov.

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

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