

U.S. Department of Labor

Office of Administrative Law Judges
90 Seventh Street - Suite 4-800
San Francisco, CA 94103

(415) 625-2200
(415) 625-2201 (FAX)



Issue Date: 30 December 2010

CASE NO.: 2009-CAA-00008

In the Matter of

EDWARD TOMLINSON,
Complainant,

v.

EG&G DEFENSE MATERIALS, INC.,
Respondent.

Appearances:

Mick G. Harrison, Esq.,
For the Complainant

Thomas Hazzard, Esq.,
H. Douglas Owens, Esq.,
For the Respondent

Before: GERALD M. ETCHINGHAM
Administrative Law Judge

DECISION AND ORDER DISMISSING COMPLAINT

Edward Tomlinson (“Complainant”) filed a complaint of employment discrimination against EG&G Defense Materials, Inc. (“Respondent”) under the employee protection provisions of Section 322 of the Clean Air Act (“CAA”), 42 U.S.C. § 7622; Section 110(a) of the Comprehensive Environmental Response, Compensation and Liability Act (“CERCLA”) 42 U.S.C. § 9610, Section 1450(i)(1)(A-C) of the Safe Drinking Water Act (“SDWA”), 42 U.S.C. § 300j-9(i), Section 7001(a) of the Solid Waste Disposal Act (“SWDA” or “RCRA”), 42 U.S.C. § 6971, Section 507(a) of the Federal Water Pollution Control Act (“FWPCA”), 33 U.S.C. § 1367; or Section 23(a) of the Toxic Substances Control Act (“TSCA”), 15 U.S.C. § 2622. Complainant claims he internally and externally reported apparent unsafe employee exposure to sulfur dioxide (“SO₂”) from the Metal Parts Furnace (“MPF”) of the Brine Reduction Area/Residue Handling Area (“BRA/RHA” or “cooldown area”) at Respondent as a workplace hazard. He also reported inadequate air monitoring for SO₂, and he participated in a Department of Labor Occupational Safety and Health Administration (“OSHA”) proceeding investigation involving alleged workplace hazards during the timeframe of late 2006 to October 2008. He claims that in

retaliation for this reporting or participation, his employment at Respondent was terminated on October 23, 2008.

On October 30, 2008, Complainant filed a complaint with OSHA alleging Respondent violated the environmental acts. The complaint alleges, among other things, that Complainant reported incidents to OSHA officials involving immediately dangerous to life and health (“IDLH”) conditions as a result of SO₂ exposure in the Metal Parts Furnace Cool-down Room and adjacent areas posing a risk of release of SO₂ and the release of other pollutants into the environment. Complainant further alleged that this information reflected that some or all of the SO₂ migration and exposure incidents could have been prevented by more timely action by Respondent’s management.

On April 3, 2009, OSHA issued its findings in Complainant’s case (the “Secretary’s Findings”) which determined that Complainant’s voicing concerns to management about the monitoring and potential release of SO₂ was not a contributing factor to his termination on October 23, 2008. On May 7, 2009, Complainant’s counsel filed a request for hearing, objections, and appeal of the Secretary’s Findings. On May 15, 2009, the case was assigned to me.

Trial in this matter was continued three times to accommodate the parties’ preparation. I conducted a hearing in this matter in two separate phases. The first phase occurred from March 8-12, 2010, and the second phase occurred from March 17-19, 2010, in Salt Lake City, Utah. During the hearing, I admitted Complainant’s Exhibits (“CX”) 1-9, 11-23, and 25-26, Hearing Transcript (“TR”) at 10-14, as well as Respondent’s Exhibits (“RX”) 1-142 into evidence. TR at 14-15. I also admitted into evidence Administrative Law Judge’s Exhibits (“ALJX”) 1-13. TR at 15-19. Finally, I admitted into evidence on July 1, 2010, Complainant’s post-hearing brief marked as ALJX 14. On August 9, 2010, I admitted into evidence Respondent’s Proposed Findings of Fact and Conclusions of Law post-hearing brief marked as ALJX 15. Finally, on August 24, 2010, I admitted into evidence Complainant’s post-hearing reply brief marked as ALJX 16 – thereby closing the record.

I. Stipulations

The parties included no stipulations in their pretrial materials and none were offered at trial. TR at 8, 19-20. It is undisputed, however, that Complainant was at all relevant times an employee of Respondent. It is also undisputed that Respondent is an employer subject to the jurisdiction of the applicable environmental acts, being involved generally in the process of incinerating chemical agents. It is not disputed that Complainant was suspended by Respondent on October 14, 2008 and terminated from his employment on October 23, 2008. ALJX 14 at 7; ALJX 15 at 9.

I also note Complainant and Respondent agree that Complainant proceeded before me and streamlined his argument concerning the number of applicable environmental acts for his alleged protected activities in this case to the TSCA, SWDA/RCRA, and CAA *only*, (collectively the “Environmental Acts” or the “Acts”) thereby dismissing all argument that the SDWA, FWPCA, and CERCLA also apply to his interpretation of protected activities in this case. *See*

ALJX 14 at 12-17; ALJX 15 at 11-17; ALJX 16 at 17-19. I therefore limit my analysis below in accordance with the alleged Environmental Acts discussed in Complainant's post-trial briefs.

II. Issues Presented for Adjudication

Complainant presents several issues for adjudication and this Decision focuses primarily on whether Complainant engaged in protected activity.

III. Summary of Decision

I ultimately conclude Complainant's SO₂, deficient respirator, and faulty personal monitor concerns involved concerns for only his own health and safety and that of his coworkers in the workplace. At trial, he did not produce any evidence of expressed concerns for the environment or public health and safety that would bring his concerns under the protection of the whistleblower protection provisions of the three Environmental Acts raised in his complaint. I find that Complainant did not harbor any actual or reasonable belief that his exposure to SO₂ was anything more than a workplace hazard. That is, Complainant did not reasonably believe that the SO₂ posed any threat to the environment or ambient outside air. Consequently, I dismiss Complainant's complaint.

IV. Findings of Fact

A. Complainant's Employment with Respondent

Complainant was employed by Respondent at the Army's Tooele Chemical Demilitarization Facility ("TOCDF"). TR at 1339; CX 1. Respondent operates TOCDF, which generally incinerates the Army's stockpile of chemical weapons. TR at 1446-47.

One of the incinerator systems at TOCDF is the MPF. TR at 183, 1315-20. The MPF heats metal objects – including storage tanks ("ton containers"), projectiles and shell casings – that have been in contact with chemical warfare agents to decontaminate them. *Id.* When the parts emerge from the MPF, they are kept in the cooldown area to cool. *Id.* Employees working in the cooldown area, known as BRA/RHA operators, use a plasma cutter (a type of blow torch) to disable or destroy the part or munition by cutting a large hole in it so it cannot be re-used, while other BRA/RHA operators vacuum the parts and cutting area to remove dust, paint flakes, and the like. *Id.* at 1339-40. After the cutting, one of the BRA/RHA operators uses one of the telephones located inside or outside the cooldown area to call TOCDF's internationally staffed Treaty Compliance Office ("Treaty"), which verifies the disabling of the parts. *Id.* at 383, 1339-40.

Complainant was a BRA/RHA operator assigned to the B Team, which was one of five rotating shifts that worked in the cooldown area. *Id.* at 149-50. Complainant commonly operated the plasma cutter. *Id.* at 409.

B. Sulfur Dioxide and Respirator Requirements

Beginning in September 2006, TOCDF first began incinerating and destroying ton containers that exposed workers to SO₂ from burning the remaining chemical agent residue after being drained of mustard gas. TR at 693, 1081, 1532, 1535; CX 14 at 669; RX 114 at 1340. The remaining residue was called the “heel,” which was described as having the consistency of mashed potatoes. TR at 1316-17. Respondent quickly found that after incineration a residue was left at the bottom of the containers or tons which, when exposed to air in the cooldown area, could generate smoke or gas consisting at least of SO₂. TR at 1532-33, 1535-36, 1729-31; CX 14 at 669. Mr. Joe Majestic, Respondent’s Deputy General Manager of Technical Support and Risk Management, explained that SO₂ is a respiratory irritant that can have acute health effects as it will attack the mucus membranes in the respiratory tract and can also affect the eyes. TR at 1541, 1718.¹

Mustard gas is full of elemental sulfur, and when this sulfur combines with heat and the presence of oxygen Respondent gets SO₂ in the cooldown area. TR at 1532. This became the basis of complaints as well as concerns about the monitoring and controls at the time. *Id.* The emptied mustard gas ton containers being processed in the cooldown area were the end of the process for the ton containers and would create SO₂ from exhaust gas from the ton and also the cutting of the ton to destroy it. TR at 181, 1532; CX 14 at 669.

Management believed that if they could take away the oxygen from the cool-down process, they could effectively control the level of SO₂. TR at 1535-36. Mr. Majestic explained how the ton containers come out of the cooldown area for a final cleaning and destruction after the mustard chemical agent had been drained through two holes punched into the top of the container at some other location. *Id.* at 1527, 1532, 1535-36. Mr. Majestic is responsible for all safety, medical, engineering, training, document control, information services, and quality assurance, as well as analytical and monitoring at Respondent’s entire facility. *Id.* at 1529. Respondent’s safety and industrial hygienist personnel report to Mr. Majestic. *Id.* Paul Anderson, Respondent’s Safety Manager in 2008, reported to Mr. Majestic. *Id.* at 502, 504.

Mustard gas was removed from ton containers with the aid of robotics at a different site location called toxic areas at Respondent. *Id.* at 1315-16. It was then incinerated in liquid incinerators under a much more controlled atmosphere given the highly toxic and dangerous propensities of the chemical agent mustard gas. *Id.* Unlike the incineration process of the emptied ton containers at the cooldown area, Respondent’s employees working in toxic operations at the chemical agent incinerator wear full protection M-40 SCBA masks rather than the North Industrial respirators worn by Complainant and his co-workers. *Id.* at 1315-16, 1322, 1609-10, 1621

The ton containers do not exit the MPF until the air is tested and it is determined that there is no mustard gas above the reportable limit. *Id.* at 1319. There are approximately eighty to one-hundred air testing systems around Respondent’s entire facility, including the MPF, in

¹ In contrast, mustard gas is also described as a vesicant chemical warfare agent with the ability to form large blisters on exposed skin. Ctrs. for Disease Control and Prevention, Facts About Sulfur Mustard, <http://www.bt.cdc.gov/agent/sulfurmustard/basics/facts.asp> (last visited Dec. 29, 2010).

which, according to Mr. Vance, mustard gas is tested for every seven minutes. *Id.* at 1319-20. The MPF Control Room gets the air sample information and also monitors the ton containers that come out of the MPF by looking for smoke or any indication the ton needs to be returned to the MPF for further incineration. *Id.*

Ms. Vance and Mr. Majestic also explained how the ton containers exit the MPF at about seven-hundred degrees and how the sulfur is held in a solid field or heel at the bottom of the container, not fully consumed mostly as metal and ash. *Id.* at 1318-19, 1536, 1731. Ms. Vance testified that none of the ash test samples coming out of the MPF ever tested positive for chemical agents. *Id.* at 1321. Mr. Majestic also confirmed that live chemical agent was never present in the cooldown area nor was it expected to be present while the ton containers were being destroyed. *Id.* at 1621. The most effective control at the time, according to Mr. Majestic, was to cover the ton container with a heat-resistant K-wool blanket. *Id.* Mr. Majestic further explained that the K-wool cover effectively shuts off the oxygen and solves the SO₂ problem until the ton containers are cooled to about 100 degrees Fahrenheit at which time they are uncovered and the containers are cut for destruction and cleaned of ash and clinkers. *Id.* at 1536-37.

Clinkers were explained by Ms. Vance and Mr. Majestic as occasional hot spots of unburned sulfur beneath a hard crust combined primarily with hot metal and ash that would remain hot sometimes for weeks and when uncovered and exposed to oxygen would emit SO₂. *Id.* at 1323, 1537, 1566. Ms. Vance and Mr. Majestic testified that none of the clinkers tested positive for chemical agents. *Id.* at 1323, 1334, 1336, 1621. Incinerated heel material is considered to be a hazardous waste under Respondent's RCRA permit and must be removed from the ton container before the ton container is sent for final disposal in a hazardous waste landfill. *Id.* at 1536. Jason Sweat, a BRA/RHA operator, similarly described "clinkers" in the context of the cooldown area as "[c]hunks of ash residual stuff that was left after the munitions had gone through the furnace." *Id.* at 1084. He further testified that in tons the clinkers created heat, smoke, and once even flame issues for BRA/RHA workers. *Id.*

The K-wool covering did not entirely solve the problem, so Respondent installed a canopy-type hood to ventilate and direct the SO₂ from the cooling tons, away from the workers, and out the roof of the facility without filtration.² *Id.* 1319-20, 1600-03, 1773-75, 1868-69; RX 14 at 1350. Sheila Vance, Respondent's environmental manager, testified that Respondent issued a notice of intent and ultimately a permit change to the CAA permit order and Title 5 permit to add extra ventilation in the cooldown area associated with SO₂. TR at 1292. She explained Respondent has an RCRA permit for all of its hazardous waste operations to include storage, treatment, and ultimate disposal. *Id.* at 1290. She continued by stating Respondent also has a CAA permit with the Utah Department of Air Quality that is rolled into a Title 5 operating permit for Respondent's air emission sources at its facility. *Id.* Opening the outside pull-down doors to the cooldown area to limit SO₂ accumulation was not a compliance issue and not a permitting issue.³ CX 18 at 386.

² There are particulate filters for ash which do not filter the SO₂, however. TR at 1324, 1330, 1602, 1775.

³ Ms. Brenda Mugleston confirmed this and testified that there was some exhaust ducts that were in the top of the building but they did not relieve the air out of the MPF Cool-down Room so the SO₂ remained in the cooldown area. The only thing that relieved this situation was to open the outside pull-down doors. *Id.* at 842-43.

Ms. Vance further testified that in the fall of 2007, when she was a permitting supervisor, Respondent added a ventilation hood over the conveyer coming from the discharge airlock of the MPF to be able to direct SO₂ out of the cooldown area. Respondent's permits were also amended in early 2008 to add the ventilation hood. TR at 1292-93, 1601-02; CX 14, 18. Ms. Vance testified that talks were had with representatives from the State of Utah Department of Environmental Quality about the potential emissions of SO₂ from the cooldown area – an area she described as an “insignificant emissions source under our permit” – and that any changes to add ventilation to the cooldown area would require a permit modification. TR at 1296. Before and after the hood was to be added, Ms. Vance did not believe that the cooldown area was part of Respondent's HVAC system that pulled the air into a set of filters. *Id.* at 1296-97, 1324. While the amount of SO₂ being emitted into the atmosphere from the cooldown area was viewed as insignificant by Ms. Vance, she further testified that Respondent's concern about high SO₂ readings and controlling SO₂ was focused more on helping Respondent's BRA/RHA operators' work hazard concerns than on any negative environmental issues. *Id.* at 1312; CX 18 at 386. Respondent also provided BRA/RHA workers with various personal monitoring systems and later installed permanent wall monitors to monitor SO₂ in the cooldown area. TR at 1599-1600.

In addition to these controls and monitoring systems, Respondent revised its practices and procedures, including Standard Operating Procedure 24 (“SOP-24”). RX 2. SOP-24 requires that all persons entering or working in the cooldown area wear respirators whenever the SO₂ level in the area exceeds five parts per million (“ppm”). RX 2 at 14-19. If the level exceeds twenty-five ppm, evacuation of the cooldown is required. *Id.* SOP-24 also requires all employees to wear respirators whenever cutting, vacuuming or sweeping operations are being performed in the cooldown area, even if SO₂ readings are below five ppm. TR at 183-84. All BRA/RHA operators were trained in and required to comply with SOP-24. *Id.* at 264-65.

Long before the SO₂ issue arose, Respondent had required cooldown area workers to wear respirators. *Id.* at 1598, 1728. These respirators were used to protect workers from SO₂. *Id.* at 1728-29. The respirators are protective up to 250 ppm of SO₂, although OSHA does not allow their use if the level exceeds a concentration that is IDLH, which is ninety-nine ppm for SO₂. *Id.* 1569-71, 1719-20; RX 110.

When the mustard gas campaign began, the BRA/RHA team members – including Complainant – did not wear any type of respirator protection. TR at 256-57. There was an upgrade to the North industrial respirator after concerns about SO₂ were raised by BRA/RHA team members in 2006. *Id.* Other upgrades to attempt to solve the SO₂ exposure problem included: (1) K-wool covering over the ton containers; (2) extended cooling time; (3) personal air monitors; (4) an HVAC unit with hood and fan to vent the SO₂ fumes away from the workers; and (5) later permanent area wall air monitors. TR at 254-57, 1156, 1535-37. Ms. Bobbi Rae Earp, a BRA/RHA operator, credibly testified that it took Respondent between eighteen months and two years finally to come to a solution by spraying or “quenching” the tons with water so that workers were no longer exposed to “very strong” levels of SO₂ in the cooldown area. TR at 1153-54.

The North industrial respirator mask worn by the B-Team members during the mustard or “HD” campaign was intended to protect them until a level of ninety-nine ppm of SO₂ exposure, after which the M-40 SCBA gas mask should replace the North industrial respirator for safety. TR at 698-700, 1569-71, 1597-98, 1968-69. In addition, the manufacturer will not guaranty the mask cartridge of the North industrial respirator mask for any interval of time after exposure to more than ninety-nine ppm. *Id.* at 699.

Jason Sweat worked in the cooldown area from 1998 through December 2006 and recalled working for three or four months when the SO₂ issues first started at the end of 2006. TR at 1085-86. He also recalled SOP-24 was operational in 2006 and discussed how to handle various chemical agent residues and referenced safety procedures, what protective equipment was required, and the order of using the Personal Protective Equipment (“PPE”). TR at 1097. He credibly testified that BRA/RHA workers in 2006 routinely lifted their respirators to call Treaty because Treaty “couldn’t understand what you were saying and didn’t know what was going on if you didn’t talk to them without a respirator” *Id.* at 1081-82. He further stated that because operations were busy in the cooldown area, he was sure that operations were still going on when someone would call Treaty after lifting off their respirator. *Id.* at 1082. Mr. Sweat admitted pulling his respirator mask up and talking on the telephone in the cooldown area when operations were ongoing in 2006. *Id.* at 1090. Mr. Sweat stated he called to tell his supervisor Ged Minor and plant shift manager Bert Latham about a purple flame coming from a cut ton container when he was scooping clinkers out of the ton container, and that they knew he was not wearing his respirator mask by the way he was able to talk on the telephone. *Id.* at 1087-90, 1098. Mr. Minor and Mr. Latham took a photograph of the purple flame while operations were ongoing in the cooldown area without wearing any protective respirator masks. *Id.* at 1098-99. He concluded by saying that he was unaware of any employee before Complainant who lost his or her job for removing a respirator to call Treaty before operations had stopped in the cooldown area. *Id.* at 1081-82. Mr. Hunter, Complainant’s immediate supervisor, also testified that BRA/RHA workers would call Treaty after cutting was complete to get the process started and resume operations in the cooldown room after Treaty was called or after they inspected the cut tons. *Id.* at 656-57.

C. Respondent Holds Meetings with BRA/RHA Regarding SO₂ Concerns

In 2007 and 2008, Respondent’s Management, Safety Department, and its Industrial Hygienists (“IHs”) held several meetings with the five BRA/RHA teams to discuss their questions and concerns about SO₂. *Id.* at 1534. Although the teams had different levels of concern about the SO₂ issue, Complainant’s B-Team was the most vocal and had the highest level of concern. *Id.* at 1534-35. B-Team’s concerns focused on the effectiveness of the cooldown area’s monitoring system and whether the respirators were adequately protective. *Id.* at 179-80, 1597-98. Complainant was not particularly outspoken during these meetings, though on one occasion he displayed his frustration by speaking loudly and questioning Mr. Jensen, the individual most responsible for solving the SO₂ problem at Respondent. *Id.* at 367, 462. Complainant’s immediate supervisor believed the B-Team was frustrated thinking management and the IHs did not have the same urgency that the B-Team thought they should have in resolving the SO₂ exposure issue. *Id.* at 653. In addition, Mr. Hunter believed that the B-Team

thought Mr. Jensen was incompetent in addressing the real issue which should have been SO2 containment. *Id.* at 654.

Complainant attended meetings with Respondent's management between late 2006 and before his termination in October 2008 regarding the SO2 problem. TR at 313. Complainant was concerned about his health and safety too like the rest of the B-Team. *Id.* Specifically, Complainant was concerned that Respondent was not doing its best job to protect him and the entire B-Team from the SO2 in the cooldown area. *Id.* at 180, 696. Other concerns involved smelling SO2 even while wearing respirators and that different personal monitors were giving inconsistent readings for SO2. *Id.* at 179-180. Complainant's expressed contaminant complaints were limited to SO2. Other expressed concerns at meetings on December 9 and 13, 2007 attended by Complainant included the new HVAC hood not working and what its function was; local monitors for SO2 becoming desensitized or not working correctly; and management disinterest in the SO2 concerns. *Id.* at 1105-10; ALJX 14 at 7; CX 6. Shawn Palmer, Complainant's safety representative, worked to try to correct safety concerns at Respondent or passed such concerns up the chain of management for answers. *Id.* at 1106-07. Mr. Palmer looked into the BRA/RHA team members' concerns about desensitized area monitors by placing three monitors spread out in the cooldown area. These three monitors tested with the same results as to SO2 levels. *Id.* at 1113-14.

Also attending those SO2 problem meetings from time to time on behalf of Respondent's management were Mr. Majestic, Jim Brewer, Cody Hunter, Scott Sorenson, Jose Contreras, Tom Ball, Mike Jensen, Daylene Nicholson, Shawn Palmer, and Jim Hunt. *Id.* at 182, 313-14, 694-95, 1114-16, 1330-31, 1530-31, 1534-35, 1713-14. While perhaps not directly attending a meeting with B-Team members to discuss the concerns about SO2, Respondent's Senior Management Committee members Gary McClusky, Elizabeth Lowes, and Debbie Sweeting were aware of the B-Team raising concerns about SO2 before Complainant's termination in October 2008. *Id.* at 1003. BRA/RHA operator Ms. Earp testified that Respondent's IHs tried to solve the SO2 problem for years but could not find the solution until the water quenching was implemented. *Id.* at 1153-56.

On September 22, 2008, Mr. Majestic was copied on an e-mail alerting him that Complainant was asked to speak with an OSHA inspector in "response to SO2 alarm conditions." *Id.* at 1530-32; CX-11. Mr. Majestic testified that OSHA's investigation resulted from a complaint filed about the presence of SO2 in an area of the cooldown area. TR at 1532. He further stated that when Respondent first started to process mustard, ton containers put out quite a bit of SO2 when immediately exiting the cooldown area. *Id.* Mr. Majestic opined that this was a legitimate health concern for Respondent's employees, and Respondent needed to take care of it and reacted appropriately to it. *Id.* Mr. Majestic further testified that monitoring the SO2 and controlling it were also concerns in the cooldown area at the time. *Id.* at 1532-33. He added that the SO2 concerns among the various four BRA/RHA teams substantially differed with Complainant's B-Team being the most vocal. *Id.* at 1534-35.

D. *The OSHA Initial Notice of Safety Hazards*

On July 18, 2008, Respondent received a letter from OSHA stating it had received notice of four health hazards in response to a complaint about the presence of SO₂ in the cooldown area. *Id.* at 506, 1531-32; RX 60. The complaint was actually filed by Brenda Mugleston, the wife of Complainant's co-worker Jeff Utley, sometime in July 2008. TR at 136, 692-93, 725-26. As requested by OSHA, Respondent conducted an internal investigation of the hazards, and on July 28, 2008, Respondent provided OSHA with a written response. *Id.* at 506, 531-32; RX 79. On August 18, 2008, OSHA Investigator Brian Oberbeck conducted a two-day, on-site inspection of Respondent concerning the items in the letter. TR at 509, 2146-50. Mr. Oberbeck toured the entire facility and inspected the demilitarization entry support area, the pollution abatement system, and the cooldown area, which were all specifically mentioned in the letter. CX 21 (Answer to Interrogatory 19); RX 60. After speaking informally with a number of employees, Mr. Oberbeck asked to interview employees from specific areas of the facility, including the cooldown area. TR at 2147. Mr. Anderson obliged Mr. Oberbeck's request and through various managers arranged for him to interview approximately twenty employees. *Id.* at 2147-49. Respondent kept no records of who was interviewed and made no effort to find out what was discussed. *Id.* at 2149.

At the completion of his inspection, Mr. Oberbeck told Respondent that his focus was limited to SO₂ in the cooldown area, and that he did not intend to pursue the other issues in the notice. *Id.* at 512; CX 21 (Answer to Interrogatory 19).

E. *OSHA Interviews Respondent Employees, Including Complainant*

Based on testimony, the OSHA investigation centered on potential working condition violations at the site. Mr. Jensen agreed Respondent had received notice of a complaint from OSHA, which was followed by an inspection, and OSHA issued a citation "in reference to monitoring."⁴ TR at 1051; RX 122 at 1551-52. Mr. Jensen also agreed the subject of the citation was "the metal parts furnace cool down, at least in substantial part, and the workers' concerns about exposure to sulfur dioxide." TR at 1051. He further indicated the monitors being discussed were the ITX monitors, which Complainant agreed was a type of personal monitor. *Id.* at 1068, 1401. The routine procedure when personal monitor readings for SO₂ exceeded ninety-nine ppm was for the employee to evacuate the cooldown area for their protection and reset their personal monitors by turning them off. *Id.* at 552-53, 558-59.

Complainant testified he spoke with a representative from OSHA on September 22, 2008, prior to his discharge. *Id.* at 1333-35, 1344; *see* CX 11. The substance of that discussion centered on the readings from his personal monitors and how those readings were problematic regarding the nature of his respirator. TR at 1346. Prior to the telephone conference, Mr. Jensen provided Complainant with a copy of the results of readings from Complainant's personal monitor. *Id.* at 1333-34, 1345, 1786-88; CX 2; CX 11. The Mr. Oberbeck attempted to explain those readings and their import to Complainant during the conversation. TR at 1335, 1346. He inquired about Complainant's opinion of the adequacy of the personal monitors, to which

⁴ Mr. Jensen further agreed the citation had been reduced to a non-serious violation following a meeting with OSHA. TR at 1052

Complainant responded he found them inadequate. *Id.* According to Complainant, the discussion was fairly short and lasted only about four or five minutes. *Id.* at 1409.

Complainant testified that before his interview with Mr. Oberbeck, nobody from Respondent attempted to coach him on what to say, and that after the interview, nobody from Respondent made any effort to find out what he and Mr. Oberbeck had discussed. *Id.* at 1407-08, 1410.

F. OSHA Issues a Notice of Citation

Following the interviews, OSHA issued a notice of citation to Respondent. RX 122. In that notice, OSHA cited Respondent with one serious violation consisting of three parts: failure to prevent atmospheric contamination; failure to provide workers in the cooldown area with the proper level of respiratory protection; and failure to provide workers specific training on response to an IDLH condition.⁵ TR at 537-39; RX 122. Respondent was not cited for any willful violations. TR at 2172.

On October 9, 2008, Respondent and OSHA held an informal conference in Denver to review the citation. *Id.* at 2158-60. Mr. Anderson, Mr. Majestic, and Mr. Jensen attended the conference on behalf of Respondent, while Christine Lorenzo appeared on behalf of OSHA. *Id.* at 565-67, 1052-53; CX 21 (Answer to Interrogatory 19). At the meeting, Respondent presented the its analysis of SO₂ spikes over ninety-nine ppm in the monitoring data, as well as a report from Industrial Scientific, the manufacturer of the ITX personal monitors, that suggested many of the spikes shown in the monitoring data were caused by radio frequency interference likely from the ton plasma cutters. *Id.* at 1068-69, 1561-64, 2160-63; RX 84. Ms. Lorenzo said that if the spikes were in fact caused by an interference and not SO₂, the citation issued to Respondent would change. TR at 2166-67. However, before any change in the citation would be made, Ms. Lorenzo asked Respondent to conduct a controlled study to verify that Respondent's personal monitors were being affected by radio frequency interference. *Id.* at 2167. During the Denver conference, none of the participants from Respondent discussed the B-Team or its members. *Id.* at 1864.

Respondent conducted the study requested by Ms. Lorenzo, which showed that radio frequency interference from the plasma cutters and acetylene⁶ cutters on some occasions were affecting Respondent's ITX monitors, causing in many cases artificially high SO₂ readings. *Id.* at 1561-64, 2167-68; RX 116. After receiving the study, OSHA issued a revised citation, which deleted all serious citations and cited Respondent with only one "other than serious" citation. TR at 2168-69; RX 70. Respondent agreed to the revised citation and paid a fine of \$1,875. TR at 2168-29, 2172; RX 70; RX 122 at 1552. Based on the shape of the spikes and the impossibility of a negative quantity of SO₂, I find that most of the spikes and all negative SO₂ readings from

⁵ A review of the citation shows that "atmospheric" for purposes of the claimed violation means the indoor workplace air in the cooldown area and not the outside ambient air. *See* RX 122 at 1551.

⁶ Throughout the transcript, there are a number of incorrect references where the correct term "acetylene" is incorrectly referenced as "the settling" or "a settling" when used to describe the less popular and slower second method of cutting holes in tons with an acetylene torch in contrast to the more favored plasma cutters Complainant used. *See* TR at 1563-64, 1604-05.

the employees' personal monitors were being caused by electrical interference, and that other spikes did represent actual IDLH levels of SO₂ at alarm level. TR at 1563-64, 1573, 1608, 1622, 1762-65, 1786-88, 1831; 2206-08; CX 2; CX 3.

G. *The October 10, 2008 Incident and Events Leading to Complainant's Suspension and Termination of His Employment with Respondent*

On October 10, 2008, the very next day after meeting in Denver with his two immediate supervisors and an OSHA representative, Mr. Jensen went to the cooldown area to help Mr. Palmer, the B-Team Shift Safety Representative, arrange monitors for B-Team members, including Complainant, Mr. Utley, and Jeff Youngberg. TR at 1684. Mr. Jensen then went to the Control Room to watch cooldown operations through a closed circuit television camera. *Id.* at 1684, 1699. He never had done this before. *Id.* at 1055, 1114-16. On the monitor, Mr. Jensen alleges he saw Complainant finish cutting a ton. *Id.* at 1685-86. Complainant then moved out of the camera's view and Mr. Jensen saw two of Complainant's co-workers, Mr. Youngblood and Mr. Utley, cleaning and vacuuming ton containers in the cooldown area. *Id.* at 1686. Mr. Hogan moved the video camera at Mr. Jensen's request and saw Complainant talking on the telephone with his respirator raised to the top of his forehead. *Id.* at 1686-87. Mr. Jensen with Mr. Hogan noted that the SO₂ level in the cooldown area was 2 ppm. *Id.* at 1686. SOP-24 states that an operator shall not remove a respirator if vacuuming operations are ongoing at the time. *Id.* at 183-84, 1363-65.

Complainant denied intentionally or knowingly removing his respirator while operations were ongoing. *Id.* at 1335-37, 1345-46. He credibly testified visually confirming operations had ceased in the MPF cooldown area before he went to call Treaty and lifted his respirator; that he did not hear any noise until after he lifted his respirator and then removed his ear plugs; and on hearing a noise which might have been an indication that operations had resumed, he immediately replaced his respirator. *Id.* He also disclosed he checked the personal air monitor readings to confirm there were no elevated or alarm-level SO₂ readings before lifting his respirator to call Treaty. *Id.* at 1057, 1239-41, 1335.

Instead, Complainant more credibly characterized the October 10th incident as an inadvertent mistake where he checked the SO₂ level to see it was safe and thought operations had concluded before he lifted his North industrial respirator to call Treaty. *Id.* at 658-59, 1335-37, 1345-46; 1439-40. Complainant's immediate supervisor, Cody Hunter, thought Complainant should have received a one- or two-day suspension for the October 10th incident and not be terminated because he was a valuable employee with no prior disciplinary problems. *Id.* at 621-24. Mr. Hunter tried to convince HR representative Ms. Sweeting that Complainant's October 10th incident did not warrant termination, as any prior employee terminations involved different situations with the M-40 gas masks. Later Mr. Hunter admitted that cutters like Complainant might call Treaty before or after operations were complete depending on the team. *Id.* at 624-26, 656-57, 660-61.

Immediately following the October 10 incident, Mr. Jensen did not communicate with Complainant to have him replace his respirator. *Id.* at 1695-96, 1790-91. Instead, Mr. Jensen exited the Control Room and spoke to Complainant's safety manager Shawn Palmer, who was

standing outside the cooldown area but Mr. Jensen did not tell Mr. Palmer what he just saw with Complainant having lifted his mask to call Treaty while operations seemed to be ongoing in the cooldown area. *Id.* at 1696-97. Mr. Jensen waited until he walked back to his safety office where he reported the October 10 incident to his supervisor Paul Anderson. *Id.* at 1061-62, 1697-98, 2133. Mr. Anderson and Mr. Jensen telephoned Complainant's supervisor Scott Sorenson to report the October 10 incident. *Id.* at 154-55, 1062-63, 1698, 2133-34. Mr. Jensen later prepared a written statement about the October 10 incident. *Id.* at 1063-64, CX 8.

Next, Mr. Sorenson instructed his back-up supervisor to shut down cooldown operations for the shift and speak to Complainant about the October 10 incident and meet with the B-Team to go over the respirator requirements of SOP-24. *Id.* at 155-56. The back-up supervisor met with Complainant and told him that he had been observed without his respirator while operations were ongoing in the cooldown area. *Id.* at 188-89.

The meeting with the B-Team operators took place the next day on October 11, 2008, before the shift started with Cody Hunter conducting the meeting. At the meeting, Complainant apologized to Mr. Hunter for the October 10 incident. *Id.* at 156, 614-16.

On October 14, 2008, Mr. Anderson forwarded Mr. Jensen's description of the October 10 incident to Plant Operations Manager Jeff Hunt. CX 8. After Mr. Jensen's email description of the October 10 incident was sent to Mr. Hunt, neither Mr. Jensen nor Mr. Anderson had any further involvement with the October 10 incident or its later investigation. *Id.* at 1701, 2139.

After receiving Mr. Jensen's email, Mr. Hunt emailed Mr. Sorenson and told him that the October 10 incident was a serious offense for failure to follow procedure and that Mr. Sorenson must suspend Complainant pending investigation. *Id.* at 922, 961-62. Respondent suspended Complainant on October 14, 2008 for the October 10 incident. *Id.* at 120, 161, 211, 1954-56; CX 8.

I. Respondent's Incomplete Internal Investigation of the October 10th Incident

In response to the October 10th incident, the management committee decided to terminate Complainant based primarily on the investigation conducted by HR representative Debra Sweeting and to a lesser extent by operations manager Jeff Hunt. *Id.* at 1583-87. The committee was told by Ms. Sweeting that Complainant had knowingly or intentionally violated Respondent's safety procedure SOP-24 by removing his respirator on October 10, 2008 while operations were still going on in the cooldown area. *Id.* at 105-06, 1212, 1264-65, 1585-87; CX 1. Mr. Majestic also testified that the potential harm from Complainant's respirator removal on October 10, 2008 "could have been only to himself" and not affected other coworkers at Respondent's facility. TR at 1589-90. He further opined that Complainant did not actually endanger himself by removing his respirator on October 10, 2008 "[o]nly because he knew what the room readings were at the time." *Id.* at 1335, 1616.

Respondent also stated it concluded Complainant should be terminated because it had a zero tolerance for employees who remove their North industrial respirators during operations in the cooldown area. *Id.* at 1214-16. Moreover, Respondent also concluded Complainant's action

in removing his respirator was dangerous and could have caused harm. *Id.* at 1209, 1214-16, 1238-39, 1249, 1268-69.

Respondent's decision to terminate Complainant also departed from its progressive discipline policy. *See Id.* at 1231, 1238, 1330; CX 9; CX 10. In addition, Respondent for the first time suspended Complainant while its investigation interviews were incomplete, recorded inaccurate facts, and still in progress. *See TR* at 1229-31, 1267-68. Taking disciplinary action against Complainant was unusual without consulting his two immediate supervisors who disagreed with the decision to terminate Complainant. *TR* at 91, 161, 1251-52.

J. Complainant's Termination

Respondent terminated Complainant's employment on October 23, 2008, once it concluded its internal investigation. *Id.* at 604, 1007-08, 1022-23; CX 1.

On or before October 28, 2008, Complainant spoke to Mr. Utley for assistance about his complaint and his wife, Mr. Mugleston, wrote the complaint for Complainant. *TR* at 1390-91.

After Complainant was terminated at Respondent, the mustard gas ton containers existing from the MPF were quenched with water to reduce or eliminate SO₂. *Id.* at 252, 1735-36. This process was much more successful in reducing SO₂ emissions coming from BRA/RHA groups' work in the cooldown area. *TR* at 1540.

Complainant became the first employee at Respondent terminated for removing his North industrial respirator, which differed from other employees and managers who engaged in the same or more serious conduct but who were not terminated. *See, e.g.,* 76-78, 84-87, 105, 117-18, 126-29, 137-39, 702-05, 943-50, 1025, 1027, 1031, 1077-78, 1084-85, 1087-89, 1096-98, 1155-60, 1169-70, 1179-81, 1193-1200, 1234-37, 1341, 1652-54, 1815-16, 1916-17, 1934-35; CX 20, CX 22; CX 23.

V. Analysis

I base the following findings of fact and conclusions of law on my observation of the appearance and demeanor of the witnesses who testified at the hearing; analysis of the entire record; arguments of the parties; and applicable regulations, statutes, and case law. 29 C.F.R. §§ 18.57, 24.109. In deciding this matter, I am entitled to determine the credibility of witnesses, to weigh the evidence, and to draw my own inferences from it. *See Id.* § 18.29. Furthermore, although Complainant and Respondent previously engaged in proceedings regarding Complainant's whistleblower complaint at the OSHA level, my review of the record and evidence is conducted *de novo*. *Id.* § 24.107(b).

Below I set forth an analysis of Complainant's whistleblower complaint. In Part I., I discuss the credibility of various witnesses, including the Complainant, who provided brief testimony at the hearing. In Part II, I analyze the applicable law under the Environmental Acts at issue, ultimately discussing Complainant's first alleged protected activity. In Part III., I analyze Complainant's second alleged protected activity, ultimately concluding that while Complainant

may be protected under the OSH Act, he has not shown his participation in the OSHA investigation was a protected activity over which this Office has coverage. In Part IV., I analyze Complainant's third alleged protected activity and once again find that Complainant's case must be dismissed as he cannot rely on the protected activity of others to shield him from adverse action. Finally, in Part V., I conclude that Complainant's last alleged protected activity is too speculative and unsupported by binding legal authorities.

A. Credibility

Various levels of witnesses in this case provided testimony at the hearing and some of it was cumulative and repetitive: Complainant; Mr. Sweat; Complainant's immediate line supervisors/managers, Scott Sorenson and Cody Hunter; Supervisor Ged Minor; IHs; Safety and Environmental personnel Mr. Jensen, Mr. Anderson, Mr. Majestic, and Ms. Vance; and HR and Operations Managers Ms. Sweeting and Mr. Hunt. Consequently, I set forth below my findings as to the credibility of each of these witnesses based on their testimony at the hearing and my observations of such.

I. Complainant's Credibility

Overall, I find Complainant to be a credible witness. His short testimony occurred at the end of his case in chief after most of his coworkers and other witnesses had testified. I observed him to be sincere and for the most part consistent and believable. His brief responses were in large part not the result of leading questions, and I found him to be largely consistent in his recollection of events on both direct and cross-examination, most significantly as to his negligent mistake on October 10, 2008 when he removed his respirator after checking for safe SO₂ levels and before realizing that operations in the cooldown area were ongoing. I find that while it is clear that Complainant was concerned about being exposed to SO₂ in the cooldown area and also had concern about the accuracy of his personal monitors in reading SO₂ levels at the workplace, he never expressed any concern to management about his exposure to any other contaminant other than SO₂. *See contra* ALJX 14 at 7.

Complainant's testimony is in direct conflict with the testimony of Human Ms. Sweeting, who conducted the investigation into the October 10, 2008 incident; Mr. Jensen, who claims to have witnessed the October 10, 2008 incident; and the position Respondent's upper management relied on to terminate his employment. As explained below, I do not find Ms. Sweeting or Mr. Jensen credible as to the underlying facts of the October 10, 2008 incident or the quality of Ms. Sweeting's "investigation."

II. Jason Sweat Was a Credible BRA/RHA Witness

Mr. Sweat testified about conditions working in the cooldown area when the mustard gas campaign first began in the fall of 2006 and Respondent's policy concerning the North industrial respirators worn by BRA/RHA workers during operations. Mr. Sweat was a credible witness who had a good recollection of conditions in the cooldown area in 2006. His testimony was confirmed by Complainant, Mr. Minor, Mr. Hunter, and others as to the lax policy and enforcement of SOP-24 for everyone other than Complainant as there were several similar

incidents mentioned where someone would enter the cooldown area or remove their industrial respirators while operations were ongoing without any discipline taken against them by Respondent.

III. Scott Sorenson, Cody Hunter, and Ged Minor Were Credible Witnesses

Complainant's immediate supervisors, Mr. Sorenson and Mr. Hunter, were very credible witnesses, most particularly in their role as adverse management witnesses. They were most credible when asked questions by Complainant's counsel, and they agreed with Complainant that his termination resulting from the October 10, 2008 incident was overly harsh, unprecedented, and inappropriate under the circumstances, especially in view of Complainant's lengthy employment at Respondent and stellar work performance without prior disciplinary incidents. TR at 153, 621-24.

Mr. Minor also testified for Respondent as a manager of a different BRA/RHA team and was very credible in his recollection of incidents similar to Complainant's October 10, 2008 incident where others, including Mr. Minor, entered the cooldown area when operations were ongoing without respirators and were not disciplined by Respondent. TR at 1635-38. Others also testified the only discipline noted at Respondent for anything involving removal of a breathing apparatus actually involved the much different M-40 gas masks worn at a different location than the cooldown area by Respondent's employees who directly worked with live chemical warfare agent. *See* TR at 157-58, 1590, 1984-85; CX 22.

IV. Sheila Vance and Joe Majestic Were Credible as to Background Facts

I also found Ms. Vance and Mr. Majestic to be credible and consistent as to their testimony regarding Respondent's handling of the SO₂ problem in 2006 through 2008, that there was never a positive testing of chemical agent present in the MPF Cooldown area, and that the State of Utah's Air Quality department allowed SO₂ to be released outside Respondent's facility as the levels insignificant to raise any concerns under the CAA or the SWDA/RCRA. TR at 1295, 1321, 1323-24, 1330, 1336, 1602, 1621, 1775. This line of testimony is directly contrary to Complainant's closing argument which I find to be inaccurate and in conflict with Ms. Vance's actual credible testimony referenced above. *See* ALJX 14 at 13. Respondent's amending its CAA permit related to its attempt to improve the potential SO₂ byproduct workplace hazard that had developed when it switched to the incineration of mustard gas in late 2006.

V. Mark Jensen, Debbie Sweeting and Jim Hunt Lacked Credibility in Some Respects

Unlike Complainant, I find that Respondent's HR representative, Ms. Sweeting, and senior IH Mr. Jensen were not very credible witnesses primarily as to the October 10, 2008 incident, its investigation, and the motivation leading to Complainant's termination of employment on October 24, 2008. I find Mr. Jensen credible as to his testimony of the events leading up to October 10, 2008 incident including his efforts to resolve the SO₂ problems in the cooldown area. I adopt Complainant's rationale and argument as to Mr. Jensen's and Ms. Sweeting's true motivations in terminating him. This is evidenced by the disparate treatment of Complainant for inadvertently removing his respirator in the cooldown area when others before

him had done the same thing with no discipline taken against them. *See* ALJX 14 at 19-28. I further find that removing or failing to wear an M-40 gas mask is very different, distinguishable for disciplinary purposes, and much more dangerous in the presence of live chemical agent than removing the North industrial respirator in the cooldown area when SO₂ levels were shown to be safe. Particularly telling about the inadequacy of Ms. Sweeting's and Respondent's Operations Manager Mr. Hunt's "investigation" came from the testimony of management committee member Marshall Thompson who thought Complainant was wearing the M-40 gas mask at the time of his inadvertent removal of the North industrial respirator on October 10, 2008. TR at 1443, 1446.

B. Complainant's First Protected Activity: Reports Regarding Sulfur Dioxide Emissions

I. Applicable Law

Congress created the Occupational Safety and Health Act ("OSH Act") and the Environmental Acts to address policies for which government oversight was necessary. To supplement that oversight, Congress encouraged employees to report actual, or even potential, violations of those statutes. *See Marshall v. Whirlpool Corp.*, 593 F.2d 715, 722 (6th Cir. 1979), *aff'd*, 445 U.S. 1 (1980) (citing legislative history of the OSH Act); *Poulos v. Ambassador Fuel Oil Co.*, 86-CAA-1, slip op. at 7 (Sec'y Apr. 27, 1987) (noting employees engaging in protected activities further the goals of the Environmental Acts). Aware of the possibility for retribution, Congress also created havens in the statutes to shield workers from employers' adverse actions. *See* 29 U.S.C. § 660(c) (OSH Act); 33 U.S.C. § 1367 (FWPCA); 42 U.S.C. §§ 300j-9 (SDWA), 6971 (SWDA), 7622 (CAA), 9610 (CERCLA). The overlap in the protective nature of the acts may lead to confusion regarding the applicability of a statute to a given set of facts. Nevertheless, the aims of the OSH Act and the environmental acts are different, and the Administrative Review Board ("ARB") has consistently maintained a boundary between them. *See e.g., Evans v. U.S. EPA*, No. 08-059, slip op. at 8 (ARB Apr. 30, 2010); *Culligan v. Amer. Heavy Lifting Shipping. Co.*, No. 03-046, slip op. at 7-10 (ARB June 30, 2004); and *Aurich v. Consol. Edison Co. of N.Y., Inc.*, No. 86-CAA-2, slip op. at 3 (Sec'y Apr. 23, 1987).

The OSH Act serves "to assure so far as possible every working man and woman in the [n]ation safe and healthful working conditions" through the promulgation of standards for worksites and the oversight and enforcement of those standards. 29 U.S.C. § 651(b). The OSH Act protects employees who report violations or who participate in proceedings to adjudicate violations. *Id.* § 660(c); *see also Reich v. Hoy Shoe Co.*, 32 F.3d 361, 368-69 (8th Cir. 1996) ("The OSH Act's requirement that employers not retaliate against complaining employees, like the Act generally, should be read broadly, 'otherwise the Act would be gutted by employer intimidation.'") (quoting *Marshall*, 593 F.2d at 722). Employees who suffer retaliation have a cause of action against their employers in federal district courts. 29 U.S.C. § 660(c)(2); *see also Bucalo v. UPS*, No. 08-087, slip op. at 7 (ARB July 30, 2010) ("[W]orker protection for whistleblowing activities related to occupational safety and health is governed by Section 11 of the [OSH] Act, and enforced in United States Federal District Courts.").

Congress employed similar language in the protective sections of the Environmental Acts, and courts have interpreted these sections comparably. *See e.g., Hoy Shoe*, 32 F.3d at 365 ("In considering retaliation cases, this Court has adopted a three-pronged framework for

analysis.”); *Schlagel v. Dow Corning Corp.*, No. 02-092, slip op. at 13 n.1 (ARB Apr. 30, 2004) (establishing the same three-prong framework for burden shifting in Environmental Acts retaliation cases). The parallel language, however, does not dissolve the substantially different aims of the two types of statutes. The Environmental Acts *safeguard the public* from various potential polluting behaviors. *See e.g.*, 15 U.S.C. §§ 2601-29 (TSCA) (regulating disposal of toxic substances to prevent pollution and public health risks); 42 U.S.C. §§ 7401-31 (CAA) (controlling emissions of airborne pollutants), 6901-92k (SWDA) (regulating methods of solid waste disposal to avoid public endangerment and pollution of resources). Alternatively, the OSH Act protects employees from *workplace* hazards. While both the OSH Act and the Environmental Acts serve to prevent harm, they regulate two different kinds of harm. The protected activities which each is designed to protect, therefore, are distinct.

The division between the protections afforded under the OSH Act and the Environmental Acts is critical because Complainant’s failure to establish a protected activity stems directly from confusion over their coverage. As noted below, Complainant alleges his internal complaints involved violations of the Environmental Acts, ALJX 14 at 12-13, but his testimony reveals his objections focused on the inadequacy of workplace safeguards. Those activities are protected, but not under the Environmental Acts and not by this adjudicator. Complainant could have pursued his claim under the OSH Act in federal district court.

In order to prove retaliation, Complainant must have engaged in an activity protected by one of the Environmental Acts. *Stojicevic v. Ariz.-Am. Water*, No. 05-081, slip op. at 5 (ARB Oct. 30, 2007). The Environmental Acts shield employees who report violations of the acts or the regulations promulgated thereunder, or who participate in investigations into potential violations of an environmental act. *See* 33 U.S.C. § 1367 (FWPCA); 42 U.S.C. §§ 300j-9 (SDWA), 6971 (SWDA), 7622 (CAA), 9610 (CERCLA). Commencing or causing to be commenced proceedings stipulated in the acts; testifying in such proceedings; or “assist[ing] or participat[ing] . . . in any manner” in such a proceeding constitute activities subject to protection. 29 C.F.R. § 24.102(b)(1)-(3).

In addition, a complainant must have an actual, reasonable belief the environmental act is being violated. *Melendez v. Exxon Chem. Am.*, No. 96-051, slip op. at 25-26 (ARB July 14, 2000); *Minard v. Nerco Delamar Co.*, No. 92-SWD-1 (Sec’y Jan. 25, 1994). A complainant’s belief must be scrutinized under both an objective and subjective standard: he must have actually believed the respondent was violating the environmental act, and that belief had to be reasonable given the employee’s position and circumstances. *Melendez*, No. 96-051, slip op. at 25. The complainant’s motive, however, is not relevant in determining whether the activity was protected. *Smith v. W. Sales & Testing*, No. 02-080, slip op. at 8 (ARB Mar. 31, 2004). As long as the complainant reasonably believed the respondent violated one of the Environmental Acts, “other motives . . . for engaging in protected activity are irrelevant.” *Id.* Moreover, the complainant does not have to be accurate in believing a violation existed; as long as the belief goes beyond a “vague notion” or “speculation,” his activities are protected. *Erickson v. U.S. EPA*, No. 04-024, slip op. at 8 (ARB Oct. 31, 2006).

While the complained-of activity does not have to be an actual violation, the complainant's grievances have to be directly related to violations of the Environmental Acts in order to be protected. *See Carpenter v. Bishop Well Serv.*, No. 07-060, slip op. at 8 (ARB Sept. 16, 2009) (holding complaints "which describe hazards limited to a workplace but not endangering the public are not protected under the environmental statutes"); *see also Mourfield v. Frederick Plaas & Plaas, Inc.*, Nos. 00-055, 00-056, slip op. at 4 (ARB Dec. 6, 2002); *Aurich v. Consol. Edison Co.*, No. 86-CAA-2, slip op. at 3- 4 (Sec'y Apr. 23, 1987). Complaints exclusively about working conditions are not protected activities under the Environmental Acts. *See Evans*, No. 08-059, slip op. at 8 ("[S]uch complaints involving purely occupational hazards are not protected under the employee protection provisions of the whistleblower acts."). Though complaints about working conditions are protected activities under the OSH Act, they are properly adjudicated in federal district court. *Tucker v. Morrison & Knudson*, No. 96-043, slip op. at 4 (ARB Feb. 28, 1997).

II. *Complainant's Protests Regarding Workplace Hazard SO2 Are Not Covered Under the Environmental Acts*

For Complainant's protests about SO2 to be a protected activity, Complainant must show he had an actual belief Respondent was violating one of the Environmental Acts, and show the belief was reasonable. *Melendez*, No. 96-051, slip op. at 25. He must show, therefore, he believed the emissions were endangering public health. *Carpenter*, No. 07-060, slip op. at 8. Unfortunately, Complainant is in the novel position of meeting the objective prong but not the subjective prong relating to protected activity. While a reasonable person in Complainant's position may have believed the emissions violated an environmental act, Complainant's testimony does not reveal an actual belief or concern the emissions were violations of the acts.

Complainant was alarmed about the SO2 exposure while working for Respondent. He expressed concern for his health, saying "Well, I kind of want to be around to watch my grandkids grow up, you know." TR at 1342. When questioned about the types of concerns he had, Complainant responded "just to . . . health and stuff like that" regarding he and his co-workers. *Id.* at 1342. Probed further, Complainant indicated he suffered headaches and sore throats following shifts during which he was exposed to SO2. *Id.* He also explained he raised his concerns with his management. *Id.* at 1342-43. His complaints centered on management's inability to resolve the high SO2 readings in the workplace. *Id.* at 1342. He did not express in this line of questioning a belief the SO2 emissions violated the Environmental Acts, endangered the public, or, more broadly, were escaping into the ambient air. *See Aurich*, No. 86-CAA-2, slip op. at 2-5 (finding complaint about asbestos was protected activity if expressed concerns extended to the ambient air, but not if only within workplace).

Complainant's concern for his own health as his primary motive in engaging in protected activity does not negate the status of the protected activity. *Smith*, No. 02-080, slip op. at 8. Complainant, however, did not prove he believed the SO2 exposure violated the Environmental Acts. His unease about the emissions did not extend beyond himself and his coworkers. His concerns, therefore, were with the working conditions inside the cooldown area, rather than directed toward the possibility the emissions were endangering the public and seeping into the ambient air.

On cross-examination, Complainant admitted his protests centered on the working conditions at his worksite. He agreed his primary concerns at the meetings with management were with the SO₂ monitors and the personal monitors he wore during his shift. TR at 1400-01. He further agreed he was only concerned about the personal monitors not working correctly because they were inconsistent in their alarms. *Id.* at 1401. Complainant explained he became upset in a meeting with the IH departments “over the monitors” because he was “tired of hearing the same stuff over and over and nothing ever being done about it.” *Id.* at 1404. Complainant did not specify any belief the faulty monitors violated the Environmental Acts or, more generally, posed any danger to the public.

Witnesses to Complainant’s protests also indicate the primary focus was the adequacy of the personal monitors. Mr. Palmer testified the concerns of Complainant’s B-Team as reported to him over a series of months were “that the local monitors for SO₂ were becoming desensitized.” *Id.* at 1108. Upon further clarification, Mr. Palmer explained the employees worried the monitors were not registering SO₂ properly. *Id.* Mr. Jensen, the IH supervisor, agreed the substance of the Complainant’s B-Team’s concerns was their exposure to SO₂ and potentially inadequate monitoring of the SO₂. *Id.* at 1052. In addition, Ms. Earp, a fellow BRA/RHA operator, indicated in her testimony her own concerns about the SO₂ exposure, which she believed she shared with other operators including Complainant, centered on the inadequacy of the personal monitors and the health risks of exposure to SO₂. *Id.* at 1155-56; *see also id.* at 313 (Testimony of Mr. Youngberg) (“Q: Do you recall what types of things Ed would say in these meetings — Mr. Tomlinson? A: He was just concerned about his health and safety too, like the rest of us.”); *id.* at 696 (Testimony of Mr. Utley) (“Q: Do you know what his [Complainant’s] concern was [at the B-Team meetings with management and safety]? A: His concern is that we believed that the company wasn’t doing their best job to protect us from the SO₂ in the cool down.”).

Furthermore, Complainant has not shown that he expressed a concern for the environment or those outside Respondent’s facility related to a potential failure of his personal monitors to properly detect the workplace hazard SO₂. Complainant produces parts of Respondent’s SWDA/RCRA permit to argue his protests are covered by at least one environmental act. The permit requires the reporting of “a release or discharge of hazardous waste . . . which could threaten the environment or human health” and “[a]n assessment of actual or potential hazard to the environment and human health.” ALJX 14 at 14. The permit also requires Respondent to construct the disposal system to avoid the release of hazardous waste “to air, soil, groundwater, or surface water.” *Id.*

While Respondent may have violated the stipulations in these permits, Complainant has not sufficiently linked his protests to those violations. Complainant has not shown he criticized reporting about the incinerator releases or about the incineration process itself, nor has he shown he had any impression Respondent’s disposal process led to pollution of the air, soil, ground water, or surface water. Moreover, Complainant never stated he had awareness that the excessive levels of SO₂ on his monitors signaled a potential pollutant issue. In fact, Ms. Vance, Respondent’s environmental manager, credibly testified that discharging SO₂ into the

environment was reported to the State of Utah environmental agencies but viewed as an insignificant emissions source under the CAA permit. TR at 1296.

Once again, “[p]ursuant to case law developed under the Environmental Acts and analogous whistleblower provisions covered by 29 C.F.R. § 24.1(a), protection for activities that would otherwise qualify as furthering a statutory purpose is contingent on proof that the whistleblower held a reasonable belief that the employer was acting in violation of the statute.” *Melendez*, No. 96-051, slip op. at 11-12, 25-26; *see also Mugleston v. EG&G Defense Materials, Inc.*, No. 2002-SDW-4, slip op. at 71 (ALJ Feb. 12, 2004) (finding complainant “must have actually believed that respondent was not properly destroying PCBs or otherwise acting in violation of the TSCA and her belief must be reasonable for an individual in [her] circumstances”). Complainant failed to produce any evidence that he subjectively believed the SO₂ issue was resulting in a violation of one of the Environmental Acts. Accordingly, his activity was not protected.

Reaching the same result, I now examine the purpose and scope of the three specific Environmental Acts to confirm they do not provide coverage for the Complainant’s concerns.

(a) *The TSCA*

Complainant’s 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, in passing the TSCA, perceived unreasonable risks associated with the increasing marketing of chemical products whose potential toxicity was as yet untested, and it 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. EPA*, 595 F. Supp. 1255, 1257-58 (S.D.N.Y. 1984).

Sulfur dioxide is a chemical substance that the TSCA has listed as highly hazardous, 29 C.F.R. § 1910.119, App’x A, and that was found in Complainant’s MPF Cool-down area. 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 TSCA. *Melendez*, No. 96-051, slip op. at 3, 17.

Complainant and several other coworkers alleged that they were exposed to SO₂ fumes and complained that their personal monitors which measured the level of SO₂ exposure were improperly functioning. They complained to their supervisors about the dangers to their health of exposure to SO₂ odors with only face respirators for protection. TR at 313, 696, 1108, 1155-56, 1342-43, 1400-04. However, Complainant’s allegations about his and his co-workers’ personal exposure to SO₂ fumes did not involve violations of the TSCA’s testing or regulatory scheme. He alleged only that inhaling such odors was hazardous to his and his coworkers’ health.

Simple exposure to SO₂ fumes is not enough to invoke coverage under the TSCA because Complainant's health concerns did not touch on any hazards to the environment or public health and safety. *See Devers v. Kaiser-Hill Co.*, No. 03-113, slip op. at 12 (ARB March 31, 2005) (same discussion as to nitric acid odors). Complainant alleged no infractions of the TSCA's test requirements for SO₂ which do not govern workplace exposure. He reported no violations of the TSCA regulations governing the manufacturing, processing, or distribution of this toxic chemical. His complaints involved only his personal health and safety and that of his co-workers. They did not extend to any expressed concern for the environment or those outside Respondent's facility. Therefore, I conclude his activity was not protected under the TSCA. *See* 15 U.S.C. § 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*, No. 03-001, slip op. at 7 (ARB July 30, 2004) (reversing ALJ's finding that complainant engaged in protected activity because she expressed no concerns that paint fumes escaped into outside, ambient air).

(b) *The SWDA/RCRA*

Next I look at coverage under the SWDA or RCRA. 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. § 6902(a); *Hazardous Waste Treatment Council v. U.S. EPA*, 861 F.2d at 270, 271, (D.C. Cir. 1988); *Nathaniel v. Westinghouse Hanford Co.*, No. 91-SWD-2, slip op. at 8 (Sec'y Feb. 1, 1995). The SWDA 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. § 6902(b); *Hall v. U. S. Army Dugway Proving Ground*, Nos. 02-108, 03-013, 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*, ARB No. 03-046, 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 § 6921(a). 42 U.S.C. § 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, or toxicity. *See* 40 C.F.R. §§ 261.11, 261.20-24.

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. § 6903(5). In this case, Complainant expressed no concerns and raised no issues about solid waste. His work and complaints were confined to the cooldown area and focused on workplace hazards involving his and his coworkers' exposure to SO₂ rather than the environmental safety and health concerns that the SWDA encompasses. *See, e.g.*, TR at 1108, 1155-56, 1342-43, 1400-04. He made no allegations that the SO₂ he encountered at work constituted solid waste as defined by the SWDA. *See* 42 U.S.C. § 6903(27). Nor did he complain about the ultimate disposal of the materials on which he worked. While Complainant worked near substances that could be considered solid waste, his concerns were limited and specific to he and his coworkers' personal safety and health in response to exposure to SO₂

within the confines of the cooldown area. *See, e.g.*, TR at 313, 696, 1108, 1155-56, 1342-43, 1400-04; ALJX 14 at 7.

SO₂ is not listed as a hazardous waste. 40 C.F.R. § 261.33(f). Even if it was a listed hazardous waste, Complainant did not allege any conduct or activity regarding this hazardous chemical that violated any provisions of the SWDA. His concerns did not touch on the effects of SO₂ fumes on the water, soil, or air outside of Respondent's enclosed workspace. *See, e.g.*, TR at 313, 696, 1108, 1155-56, 1342-43, 1400-04; *see* 42 U.S.C. § 6901(a)-(b) (congressional findings on the "rising tide of scrap, discarded, and waste materials"). Because solid waste was not among Complainant's articulated concerns, I find no coverage under the SWDA.

(c) *The CAA*

The purpose of the CAA is to protect and enhance the quality of the nation's air resources so as to promote the public health and welfare and the productive capacity of its population. 42 U.S.C. § 7401(b)(1). *See Nat'l Res. Def. Council, Inc. v. EPA*, 725 F.2d 761, 764 (D.C. Cir. 1984) (purpose of the CAA is to protect the public health by controlling air pollution). I note Complainant fails to state a cause of action under the CAA because he has not alleged that any of his alleged protected activities could potentially pollute the ambient air outside the cooldown area. Instead, Complainant's concerns about exposure to SO₂ in the workplace and potentially defective personal monitors related only to his and his coworkers' safety and did not involve any concerns about public health, the environment, or polluting the ambient air. I find that such a concern would have been unreasonable under the facts of this case due to Ms. Vance's convincing testimony that neither CAA nor SWDA/RCRA required that Respondent contain the SO₂ emissions. TR at 1312. ("We didn't have to [contain SO₂] per the environmental part, but for the personnel in the area whatever we could do to try to contain those [SO₂] readings we wanted to do.") Therefore, Respondent amended its CAA permit to add a ventilation hood to blow the SO₂ out the roof, TR at 1305, 1324, and the State of Utah's Department of Air Quality determined that there was no compliance or permit issues associated with the release of SO₂ but that Respondent would include the SO₂ readings in Respondent's annual air emissions inventory as insignificant emissions. TR at 1296, 1304.

Complainant asserts that "[Respondent] admitted in its response to Complainant's Interrogatory 21 that SO₂ issues raised by Complainant fell within the scope of the [Respondent's] Clean Air Act permit." ALJX 14 at 13. Respondent argues this is incorrect. ALJX 15 at 14. I agree with Respondent that the interrogatory response cannot be read as an admission that Complainant engaged in protected activity. As stated by Respondent, the interrogatory was not addressed to Complainant's concerns alone, but to those of others as well, as it specifically asked about "the potential release to the environment of air contaminant issues" which, by the terms of the interrogatory, might have been raised by anyone. *See CX 21* at 28. Respondent actually objected to the vagueness of the interrogatory on this basis. *See id.* (objecting that "the interrogatory is vague and ambiguous, incorporating unspecified issues raised by Complainant *or by unspecified 'OSHA complaints'* or that 'resulted in [Complainant] being interviewed by OSHA'") (emphasis added). Respondent's response to this interrogatory also does not identify what complaints Complainant raised either expressly or implicitly. Rather,

Complainant himself did so at trial, and his testimony shows that he was only concerned about occupational safety, not a release of SO₂ to the environment endangering public safety. Much of Complainant's discussion of the jurisdiction issue is premised on the assumption that he had raised the issue of emissions to the environment adequately so as to have the subjective belief that his SO₂ exposure or faulty monitors violated the Environmental Acts. *See* ALJX 14 at 12-17. But the record is devoid of any evidence that Complainant raised the issue of emissions to the environment. As a result, I further find that there is no coverage under the CAA because Complainant has not articulated any relationship between his concern for his personal safety when exposed to SO₂ in the workplace and the purpose of the CAA.

III. *The Facts of This Case Are Distinguishable from the Cases Cited by Complainant*

Complainant seeks to impose strict liability on Respondent under the Environmental Acts regardless of the workplace hazard that Complainant alleges. Complainant points to the ARB's holding in *Jones v. EG&G Def. Materials, Inc.*, No. 97-129 (ARB Sept. 29, 1998), as a parallel fact situation to his case. ALJX 14 at 15-16. However, there are multiple reasons to distinguish *Jones* from the facts giving rise to Complainant's complaint. First, there are no overlapping environmental concerns here for SO₂ as there were for live chemical agent releases or a potential hydrogen explosion endangering a live chemical agent release as in *Jones*. Also in *Jones*, the ARB found an overlap in safety and environmental concerns did not preclude whistleblower protection under the Environmental Acts. *Jones*, No. 92-129, slip op. at 10-11. The ARB affirmed the ALJ's finding the complainant engaged in protected activity by complaining about safety hazards. *Id.* at 11-13. The ARB noted incineration of chemical agents posed a significant threat to the public if not done correctly, and thus the complainant's grievances regarding unsafe practices were protected by the Environmental Acts. *Id.* at 11. The complainant, Jones, however, did not rely solely on this proposition. *Id.* at 12. The complainant was Respondent's *safety manager* at the time and had specific instances of protected activities, including a report about live chemical agent being vented directly into the outside air; calling a fire department regarding a hydrogen leak that could have led to a widespread explosion; and reporting a failure to develop an emergency preparedness plan under the SWDA. *Id.* at 12-13. Here, Complainant was not a safety manager and his work was confined to the cooldown area, where his only expressed concern involved SO₂ exposure, deficient-for-SO₂-protection industrial respirators, and faulty personal monitors.

Complainant's assertion of *Jones*'s applicability to this case is overstated. Complainant did not engage in protests about the safety features of the live chemical incineration process. Complainant's work in this case did not involve the live chemical agent incinerator where the risk of public harm is greatest and which comes with the added requirement that workers wear the M-40 SCBA gas masks rather than the North industrial respirator Complainant wore in the cooldown area. TR at 1315-16, 1322. More importantly, Complainant admits and calls attention to the distinction arguing that Respondent's strict discipline policy of terminating employees for failing to wear the more protective M-40 SCBA gas mask in the live chemical agent incinerator should not apply to Complainant here where he worked in the less dangerous cooldown area subject to the lax discipline policy for failing to wear the less protective North industrial respirator that Complainant wore. ALJX 16 at 7-9. The evidence shows that Complainant

complained of exposure to SO₂ and there is no evidence he complained about or was actually exposed to anything other than SO₂.

Here, unlike the facts in *Jones*, Complainant's activity involved he and his coworkers' limited concern of exposure to the workplace hazard SO₂ – which is distinguishable from a safety manager's concern of a variety of safety issues that directly affected the public's health, such as potential hydrogen explosions or exposure to a release of the live chemical agents like sarin, GB, or VX, contact with which in turn required the use of M-40 SCBA gas masks. *See* TR at 313, 696, 698-99, 1108, 1155-56, 1342-43, and 1400-04. Here, there is no evidence that Complainant complained of and actually believed he had been exposed to active chemical warfare agent releases that threaten the environment. The MPF is a different incinerator than the incinerator mentioned in *Jones* that was used to eliminate live chemical agent. Instead, the ton containers at the MPF in this case had been emptied of the mustard agent before reaching the MPF. What remained produced SO₂ with no evidence of anything else endangering the public or environment such as live chemical agent. TR at 1068-69, 1084, 1323, 1334, 1336, 1561-64, 1621, 2160-63, 2166-67; RX 84.

Complainant's objection to the "readings in the SO₂ all the time" is not indicative of a concern the MPF cooldown process posed a threat to the public, especially when coupled with his statements admitting the personal monitors were the focus of his complaints. TR at 313, 696, 1108, 1155-56, 1342-43, 1400-04. In fact, the logical conclusion to Complainant having proven that incidents, like Complainant's here, involving a number of Respondent employees failing to wear North industrial respirators (not M-40 SCBA gas masks) in the cooldown area during operations occurred frequently and did not result in any disciplinary action prior to his termination because the cooldown area was a much less dangerous work area than the live chemical agent incinerator. *See* ALJX 16 at 8; ALJX 14 at 19; TR at 76-78, 126-29, 698-99, 702-05, 1027, 1077-78, 1084-85, 1096-98, 1155-58, 1169-70, 1916-17, 1934-35. In fact, the State of Utah's Department of Environmental Quality viewed releasing SO₂ into the environment through the cooldown area's garage doors as not being a CAA compliance issue and not even a permitting issue. *See* CX 18 at 386. As explained above, Complainant did not demonstrate his internal grievances to management addressed the safety of the disposal process, as related to a potential violation of the Environmental Acts rather than a complaint of a workplace hazard.

Complainant's reliance on the Tenth Circuit Court of Appeals' decision in *Kansas Gas & Electric Co. v. Brock*, 780 F.2d 1505 (10th Cir. 1985), *cert denied*, 478 U.S. 1011 (1986), is also misplaced. This case involved safety complaints brought under the Energy Reorganization Act (the "ERA") alleging violations of nuclear regulatory laws. Complainant's work with Respondent in this case, however, did not involve nuclear weapons.

Complainant was rightfully concerned about his and his coworkers' exposure to SO₂ and the inadequacy of safeguards to protect them. The discussion above is not meant to undermine Complainant's protests against Respondent's protection of its workers. Moreover, the discussion is not a criticism of Complainant's motive – revenge, rather than altruism, can be motivation to report pollution. However, the substance of his complaints was not in regards to environmental pollution, and there lies the fatal flaw of Complainant's case. Complainant's concerns and his expressions of them are protected activities, but not under the Environmental Acts.

C. Complainant's Second Protected Activity: Complainant's Testimony in an OSHA Investigation

I. Applicable Law

Complainant contends his interview with an OSHA investigator was a protected activity. This interview, however, did not involve an investigation under the Environmental Acts. Instead, the OSHA investigation involved the alleged workplace hazard of worker exposure to SO₂. *See* RX 122 at 1551-52 (Workplace hazard where Respondent did not implement feasible engineering controls to eliminate the exposure of plasma cutters to IDLH atmospheres at the workplace involving high concentrations of SO₂ and the risk of an employee respiratory hazard). Involvement in an investigation under the Environmental Acts is a protected activity. 29 C.F.R. § 24.102(b)(1)-(3). Participation in an investigation unrelated to a violation of the Environmental Acts, however, does not garner protection under those Acts. *See Post v. Hensel Phelps Constr. Co.* (“*Post II*”), No. 94-CAA-13, slip op. at 2 (Sec’y Aug. 9, 1995). The OSH Act, rather than the Environmental Acts, shields employees who participate in investigations about working conditions. 29 U.S.C. § 660(c). Claims arising under the OSH Act cannot be adjudicated before me; they are the exclusive purview of the federal district courts. *Id.* § 660(c)(2). In order for his contention to succeed, Complainant must not only show participation or assistance in a proceeding, but also that the proceeding was sufficiently related to the Environmental Acts and potential violations thereunder. *See* 29 C.F.R. § 24.102(b)(1)-(3); *see also Post II*, No. 94-CAA-13, slip op. at 2.

Complainant must show the requisite connection between the investigation and a potential violation of the Environmental Acts. The acts do not provide shelter for every conversation with an OSHA investigator or federal employee.⁷ They protect only those activities done in furtherance of the acts’ goals – the prevention of pollution from various sources. Complainant does not show the OSHA investigation was sufficiently related to the Environmental Acts. His actions, therefore, are not afforded protected activity status under their whistleblower provisions.

⁷ The one possible exception to this bar may be under CERCLA, which provides protection from dismissal for employees “provid[ing] information to a State or to the Federal Government.” 42 U.S.C. § 9610(a). In *Post v. Hensel Phelps* (“*Post I*”), an ALJ dismissed the case on timeliness grounds but in his evaluation of possible protected activity stated the complainant’s participation in an OSHA investigation regarding working conditions was a form of protected activity. No. 94-CAA-13, slip op. at 14 (ALJ Jan. 31, 1995). In his order adopting the ALJ’s decision, the Secretary noted the Environmental Acts, with the exception of CERCLA, do not protect contact with OSHA regarding strictly occupational health and safety hazards. *Post II*, No. 94-CAA-13, slip op. at 2. Because CERCLA protected employees providing information to the federal government, however, the Secretary affirmed the contact with OSHA was protected activity, despite the lack of public safety concerns. *Id.*

This holding by the Secretary is not enough to classify as protected activity Complainant’s participation in the OSHA investigation. *Post II* was ultimately dismissed on other grounds. *See id.* at 1. In addition, the ARB has shown a preference for a bright line distinction between protected activity under the OSH Act and under the Environmental Acts. *See, e.g., Tucker*, No. 96-043, slip op. at 4; *Evans*, No. 08-059, slip op. at 8. Moreover, the Secretary’s holding is limited. Neither the Secretary nor the ALJ discussed how CERCLA applied to the OSHA investigation; the Secretary only indicated once CERCLA applies, providing information to an OSHA officer was protected under CERCLA’s provisions. *Post II*, No. 94-CAA-13, slip op. at 1.

II. Complainant's Participation in the OSHA Investigation

Based on testimony, the OSHA investigation centered on potential working condition violations at the site. Mr. Jensen agreed Respondent had received notice of a complaint from OSHA, which was followed by an inspection and OSHA's issuance of a citation "in reference to monitoring."⁸ TR at 1051; RX 122 at 1551-52. Mr. Jensen also agreed the subject of the citation was "the metal parts furnace cool down, at least in substantial part, and the workers' concerns about exposure to sulfur dioxide." TR at 1051. He further indicated the monitors being discussed were the ITX monitors, which Complainant agreed was a type of personal monitor. *Id.* at 1068, 1401.

Complainant testified he spoke with a representative from OSHA prior to his discharge. *Id.* at 1344. The substance of that discussion centered on the readings from his personal monitors and how those readings were problematic regarding the nature of his respirator. *Id.* at 1346. Prior to the telephone conference, Respondent provided Complainant with a copy of the results of readings from Complainant's monitor. *Id.* at 1345. The OSHA investigator attempted to explain those readings and their import to Complainant during the conversation. *Id.* at 1346. The OSHA investigator also inquired about Complainant's opinion of the adequacy of the personal monitors, to which Complainant responded he found them inadequate. *Id.* According to Complainant, the discussion lasted for only a few minutes. *Id.* at 1409.

Despite Complainant's contentions, *see* ALJX 14 at 8, nothing in his or Mr. Jensen's testimony indicates the OSHA investigation was about possible violations of the Environmental Acts. Neither Complainant nor Mr. Jensen indicated the investigation concerned the overall monitoring of the SO₂ at the worksite. In fact, the testimony of each corroborates that of the other in that the focus of the OSHA investigation was the personal monitors worn by Complainant and others at the site. The personal monitors and their possible inadequacy are issues regarding the working conditions at the site. Complainant has not shown how they could be violations of the Environmental Acts, or how the investigation relates in any broader way to a violation.⁹ Without this critical link, Complainant's participation in the OSHA investigation does not fall under the umbrella of the Environmental Acts as a protected activity. *See Post II*, No. 94-CAA-13, slip op. at 2.

There is no evidence that Complainant raised any issue of fugitive emissions or any other activity that might be a matter of concern under any of the Environmental Acts. Instead, he raised issues "about purely occupational hazards" which "are not protected under the employee protection provisions of the whistleblower acts." *Evans*, slip op. at 6; *see also Bucalo*, No. 08-087, slip op. at 7.

⁸ *See supra* note 3.

⁹ Complainant claims the discussion was about "air monitoring," potentially as a suggestion the OSHA investigation regarded Respondent's monitoring of SO₂ emissions. ALJX 14 at 8-9. This assertion, however, is inconsistent with the testimony from both Mr. Jensen and Complainant. They both indicated the subject of the investigation was the possible inadequacy of the *personal monitors* rather than the *monitoring of emissions*. *See* TR at 1068, 1345.

Because Complainant has not shown the OSHA investigation related to violations of any of the Environmental Acts, his participation in that investigation is not a protected activity under such. *Id.* His participation may be protected under the OSH Act. *See* 29 U.S.C. § 660(c). Adjudication of whistleblower complaints under the OSH Act, however, is not within the scope of this court. *Id.*; *see Evans*, ARB No. 08-059, slip op. at 8. Complainant has not shown his participation in the OSHA investigation was a protected activity over which this court has coverage.

D. Complainant's Third Protected Activity: Perception of Complainant as a Whistleblower

Complainant argues Respondent believed him to be the anonymous source of the OSHA investigation, and that misperception affords him protected activity status. As noted above, the OSHA investigation related to work conditions, rather than violations of the Environmental Acts. Because any misconception arises out of the same nexus of facts, any possible protected activity status is still barred from adjudication in this court. Nevertheless, Complainant's concept of vicarious protection warrants a brief discussion.¹⁰

The federal regulations state four requirements for establishing a prima facie case of retaliation. 29 C.F.R. § 24.104(d)(2)(i-iv). The first requirement is that "[t]he employee engaged in a protected activity." *Id.* § 24.104(d)(2)(i). Only in the second requirement does an employer's suspicion of the protected activity become relevant. *Id.* at § 24.104(d)(2)(ii). Based on the regulations, Complainant's theory of vicarious protection fails. The regulations enumerate four requirements to establish a case for retaliation, and Complainant concedes one of those requirements did not exist. Complainant, in this instance, did not engage in the protected activity of contacting an OSHA investigator.¹¹

Limited case law exists as to Complainant's theory. The Secretary denied the applicability of a derivative theory of protection in *Hollis v. Double DD Truck Lines, Inc.*, 84-STA-13, slip op. at 5 (Sec'y Mar. 18, 1985). In *Hollis*, an ALJ found a complainant engaged in a protected activity under a former version of the Surface Transportation Assistance Act ("STAA"). *Id.* at 1; *see also* 49 U.S.C § 2305 (replaced by 49 U.S.C. § 31105). Under the older version of the STAA, in order to have successfully engaged in protected activity a complainant had to have sought repair for a dangerous or malfunctioning vehicle. 49 U.S.C. § 2305(b). In *Hollis*, the complainant's stepson had informed the Respondent about a malfunctioning truck. *Hollis*, 84-STA-13, slip op. at 1. The complainant refused to drive the truck, and argued the Respondent retaliated against him. *Id.* The ALJ found the stepson's notice provided the complainant with protected activity status. *Id.* The Secretary, however, dismissed this line of reasoning, calling it "illogical." *Id.* at 5.

The Secretary noted a similar theory of vicarious protection in *Collins v. Fla. Power Corp.*, 91-ERA-47, slip op. at 7 (Sec'y May 15, 1995). In *Collins*, the Secretary observed a complainant's discharge could only be considered retaliatory if she had been fired to cover the retaliatory discharge of a co-worker. *Id.* Because the Secretary found the co-worker had not

¹⁰ Complainant cited no cases in support of his argument.

¹¹ I disregard, in this instance, the fact discussed above that the protected activity in question is not covered by the Environmental Acts.

been discharged as retaliation, he did not reach the issue of whether the complainant could rely on the theory of vicarious protection. *Id.*

As previously noted, the OSHA investigation and its commencement are not protected under the Environmental Acts, making inapplicable any misconception by Respondent regarding Complainant's involvement. However, assuming *arguendo*, the investigation was protected under the Environmental Acts, Complainant's theory of vicarious protection is unsupported by the regulations or by case law. Complainant cannot rely on the protected activity of others to shield him from adverse actions.

E. Complainant's Fourth Protected Activity/: Speculative Status as "About to Testify"

Complainant's last claim of protected activity parallels his third claim. Complainant argues Respondent perceived he was "about to testify" to OSHA and "environmental enforcement officials." ALJX 14 at 10. Complainant noted Respondent was seeking the VPP designation for outstanding safety. *Id.* He speculated Respondent became concerned Complainant would prevent the VPP designation with testimony to OSHA or another unnamed environmental regulatory agency. *Id.* at 10-11. Complainant has not alleged nor has he shown he was about to testify in any further proceedings against Respondent.

A complainant who is "about to testify" in a proceeding or investigation is protected from retaliatory adverse actions. *See* 29 C.F.R. § 24.102(b)(2). Complainant cites *Wirtz v. Home News Publishing Co.*, 341 F.2d 20, 23 (5th Cir. 1965), as showing an employee is protected even if "the employee did not seek to so testify." ALJX 14 at 11. The complainant in *Wirtz*, however, had been subpoenaed to testify in a criminal hearing against the Respondent and had been retaliated against for that testimony. *Wirtz*, 341 F.2d at 20. The issue before the Fifth Circuit in that case was whether the complainant engaged in a protected activity when he was involved in a proceeding he was unable to initiate. *Id.* at 21. The Fifth Circuit broadened the term "any proceeding" to include those which a complainant could not have commenced or caused to commence. *Id.* at 23. The Fifth Circuit did not broaden the term "about to testify" to include an intent not communicated nor an action not requested.

Because Complainant has not shown he intended to testify or was requested to do so, he encounters the same obstacles as those in his third claim. He has not engaged in a protected activity, which is a critical element to a claim of retaliation. *See* 29 C.F.R. § 24.104(d)(2)(i). Moreover, he cannot point to an alternative protected activity to argue surrogate protection, though as indicated above this scheme is unsupported. Instead, Complainant is relying on Respondent's suspicions about his behavior as a substitute for the protected activity he is missing. Beyond the highly speculative nature of this theory (for which Complainant provides no more than hypotheses about Respondent's managers' thoughts), the premise fails because he cannot erase the need for one element of his case by pointing to the existence of another.

F. Conclusion

In order to show he engaged in an activity protected by the Environmental Acts, Complainant had to show he had an actual, reasonable belief Respondent was violating an one of these Acts. *See Melendez*, No. 96-051, slip op. at 18-19. While an employee in Complainant's position may have reasonably believed the SO₂ emissions were violating an Environmental Act, Complainant has not expressed or shown he had a subjective belief the SO₂ emissions were endangering the environment or the general public and therefore were a potential violation. Complainant's objections centered on unsafe working conditions, which are covered by the OSH Act, not the Environmental Acts, and are not within the purview of this Office. *See* 29 U.S.C. § 660(c).

Complainant also failed to show his participation in the OSHA investigation was a protected activity under the Environmental Acts. The Acts protect assistance or participation in a proceeding in furtherance of the goals of the Acts. *See, e.g.*, 42 U.S.C. § 7622 (CAA). Complainant had to show the OSHA investigation was related to the Environmental Acts. *Post II*, ALJ No. 94-CAA-13, slip op. at 2. Testimony from both Complainant and Mr. Jensen indicate OSHA was investigating the adequacy of the personal monitors, not the emissions of SO₂. TR at 1051, 1346. Complainant has not shown inadequate personal monitors are a potential violation of the Environmental Acts such that the OSHA investigation was in furtherance of those acts. As such, Complainant's participation was not a protected activity as envisioned by the Environmental Acts.

Complainant's concept of vicarious protection for activities he was suspected of doing, but did not actually do, is also unsupported by case law or the regulations. *See* 29 C.F.R. § 24.104(d)(2)(i); *Hollis*, 84-STA-13, slip op. at 6; *Collins*, 91-ERA-47, slip op. at 7. As an initial point, the OSHA investigation was not related to violations of the Environmental Acts, and therefore is not protected by them, regardless of Complainant's role. In addition, Respondent's misconception of Complainant's role in the OSHA investigation is not a substitute for Complainant's missing protected activity. Similarly, any misperception regarding Complainant's intent to testify or participate in a further proceeding does not absolve Complainant of his obligation to show he engaged in a protective activity.

In sum, the Complainant's concerns involved only his own health and safety and that of his coworkers in relation to exposure to SO₂. He did not express complaints that brought them under the protection of the whistleblower protection provisions of the three Environmental Acts.

VI. Order

For the reasons stated above:

IT IS ORDERED that the complaint of Edward Tomlinson for relief under the whistleblower provisions of the TSCA, RCRA/SWDA, and CAA is **DISMISSED** with prejudice.

A

GERALD M. ETCHINGHAM
Administrative Law Judge

San Francisco, California

NOTICE OF APPEAL RIGHTS: This Decision and Order will become the final order of the Secretary of Labor unless a written petition for review is filed with the Administrative Review Board ("the Board") within 10 business days of the date of this decision. 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. 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 Board's address is: Administrative Review Board, U.S. Department of Labor, Suite S-5220, 200 Constitution Ave., NW, Washington, DC 20210. In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.

At the same time that you file your petition with the Board, you must serve a copy of the petition on (1) all parties, (2) the Chief Administrative Law Judge, U.S. Dept. of Labor, Office of Administrative Law Judges, 800 K Street, NW, Suite 400-North, Washington, DC 20001-8001, (3) the Assistant Secretary, Occupational Safety and Health Administration, and (4) the Associate Solicitor, Division of Fair Labor Standards. Addresses for the parties, the Assistant Secretary for OSHA, and the Associate Solicitor are found on the service sheet accompanying this Decision and Order.

You must file an original and four copies of the petition for review with the Board, together with one copy of this decision. In addition, within 30 calendar days of filing the petition for review you must file with the Board: (1) an original and four copies of a supporting legal brief of points and authorities, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which the appeal is taken, upon which you rely in support of your petition for review.

Any response in opposition to a petition for review must be filed with the Board within 30 calendar days from the date of filing of the petitioning party's supporting legal brief of points and authorities. The response in opposition to the petition for review must include: (1) an original and four copies of the responding party's legal brief of points and authorities in opposition to the petition, not to exceed thirty double-spaced typed pages, and (2) an appendix (one copy only) consisting of relevant excerpts of the record of the proceedings from which appeal has been taken, upon which the responding party relies, unless the responding party expressly stipulates in writing to the adequacy of the appendix submitted by the petitioning party.

Upon receipt of a legal brief filed in opposition to a petition for review, the petitioning party may file a reply brief (original and four copies), not to exceed ten double-spaced typed pages, within such time period as may be ordered by the Board.

If a timely petition for review is not filed, or the Board denies review, this Decision and Order will become the final order of the Secretary of Labor. *See* 29 C.F.R. §§ 24.109(e) and 24.110.

In addition to filing your Petition for Review with the Board at the foregoing address, an electronic copy of the Petition may be filed by e-mail with the Board, to the attention of the Clerk of the Board, at the following e-mail address: ARB-Correspondence@dol.gov.