



In the Matter of:

EDWARD J. TOMLINSON,

**ARB CASE NOS. 11-024
11-027**

COMPLAINANT,

ALJ CASE NO. 2009-CAA-008

v.

DATE: January 31, 2013

EG&G DEFENSE MATERIALS, INC.,

RESPONDENT.

BEFORE: THE ADMINISTRATIVE REVIEW BOARD

Appearances:

For the Complainant:

Mick G. Harrison, Esq., Bloomington, Indiana

For the Respondents:

H. Douglas Owens, Esq., Holland & Hart, L.L.P., Salt Lake City, Utah

Before: E. Cooper Brown, Deputy Chief Administrative Appeals Judge; Joanne Royce, Administrative Appeals Judge; and Lisa Wilson Edwards, Administrative Appeals Judge. Deputy Chief Judge Brown, concurring, in part, and dissenting, in part.

DECISION AND ORDER OF REMAND

This case arises under the employee protection provisions of the Clean Air Act (CAA) (42 U.S.C.A. § 7622), the Toxic Substances Control Act (TSCA) (15 U.S.C.A. § 2622), the Solid Waste Disposal Act (SWDA), as amended by the Resource Conservation and Recovery Act of 1976 (RCRA) (42 U.S.C.A. § 6871), and implementing regulations, 29 C.F.R. Part 24 (2012). Edward J. Tomlinson filed a complaint with the Department of Labor's Occupational Safety and Health Administration (OSHA) on October 28, 2008. OSHA investigated and dismissed the complaint on April 3, 2009. Tomlinson objected and requested a hearing before an Administrative Law Judge (ALJ). Following an eight-day evidentiary hearing, the ALJ issued a Decision and Order on December 30, 2010,

dismissing the complaint. Tomlinson petitioned the Administrative Review Board (ARB) for review. We reverse and remand for further proceedings.

BACKGROUND

A. Facts

Tomlinson was a five-year employee of EG&G's Tooele Chemical Demilitarization Facility (Tooele), a hazardous waste disposal plant that incinerates chemical weapons for the Army. CX 1.¹ The company operates the Tooele facility under a SWDA/RCRA permit "for all of its hazardous waste operations to include storage, treatment, and ultimate disposal." D. & O. at 5, citing TR at 1290. The Tooele facility also operates under a Clean Air Act permit "with the Utah Department of Air Quality that is rolled into a Title 5 operating permit for [the company's] air emission sources at it facility." *Id.* One of the incinerator systems at Tooele is the Metal Parts Furnace, which "heats metal objects – including storage tanks (ton containers), projectiles, and shell casings – that have been in contact with chemical warfare agents to decontaminate them." D. & O. at 3. Parts emerging from the furnace are kept in the cool-down area. *Id.*

Employees working in the cool-down area, known as Brine Reduction Area/Residue Handling Area (BRA/RHA) operators, use a plasma cutter (a type of blow torch) to disable or destroy the part or munitions by cutting holes in the metal so that it cannot be reused. Other BRA/RHA operators vacuum the parts and the cutting area to remove dust, paint flakes, and other residue. After cutting and cleaning operations are complete, BRA/RHA operators use a telephone inside or outside the cool-down area to call Tooele's internationally staffed Treaty Compliance Office (Treaty) and verify the disabling of the parts. D. & O. at 3, citing TR at 383, 1339-40.

1. Tomlinson's complaints to EG&G about sulfur dioxide (SO₂) emissions

Tomlinson was a BRA/RHA operator on the B-team, and normally operated the plasma cutter in the cool-down area. D. & O. at 3, citing TR at 149-150. In September 2006, the Tooele facility began incinerating and destroying ton containers. The company quickly learned that incinerating and destroying ton containers exposed workers to SO₂ from burning the remaining chemical agent after being drained of mustard gas. Mustard gas contains elemental sulfur; when the sulfur combines with heat and oxygen in the cool-down area, smoke or gas containing SO₂ generates. D. & O. at 4. Ton containers exiting the furnace at 700 degrees held sulfur "in a solid field or 'heel' at the bottom of the container." D. & O. at 5, citing TR at 1318-19, 1536, 1731.

¹ "CX" refers to Complainant's Exhibit; "RX" refers to Respondent's Exhibit; "TR" refers to the Hearing Transcript; and "D. & O." refers to the ALJ's Decision and Order Dismissing Complaint (dated Dec. 30, 2010).

Tomlinson and his co-workers began complaining about SO₂ levels soon after the 2006 operations began. Tomlinson complained to his supervisors about headaches and sore throats he suffered following shifts in the cool-down area, where he was exposed to excessive SO₂. D. & O. at 18, citing TR at 1342. Tomlinson and his co-workers had several meetings with safety managers and industrial hygienists and raised concerns that management was not doing its best to protect them, that personal monitors were giving inconsistent readings, that some monitors became desensitized, and that the ventilation system was not working properly. D. & O. at 8.

The company took various steps over the next 18 months to resolve the SO₂ exposure problem. Initially, to stem the SO₂ emission, the company covered the ton containers with a “heat-resistant K-wool blanket” to “shut off the oxygen . . . 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.” D. & O. at 5, citing TR at 1536-37. The “clinkers” are “occasional hot spots of unburned sulfur beneath a card 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.” D. & O. at 5, citing TR at 1323, 1537, 1566. This “[i]ncinerated heel material is considered to be a hazardous waste under [the company’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.*, citing TR at 1536.

Tooele required its workers to wear safety monitors and industrial respirators in the cool-down area during cutting, vacuuming, and sweeping operations, and to adhere to EG&G’s health and safety procedures. D. & O. at 6. The respirators were protective up to 250 parts per million (ppm) of SO₂, but OSHA does not permit their use if the ppm level exceeds 99, which is the “immediately dangerous to life and health” (IDLH) standard under the Occupational Safety and Health Act (OSH Act). See D. & O. at 6; see also 29 C.F.R. § 1910.1000(a), Table Z-1; RX 110. EG&G’s Standard Operating Procedure (SOP) No. 24 required respirators to be worn whenever the ppm exceeded five and evacuation of the area if the level reached 25. D. & O. at 6, citing RX 2.

2. *EG&G requests modifications to its Clean Air Act permit to install equipment for lowering SO₂ concentration in cool-down area*

When the K-wool cover did not solve the SO₂ emissions problem, the company sought to “install[] a canopy-type hood to ventilate and direct the SO₂ from the cooling tons, away from the workers, and out of the roof facility without filtration.” D. & O. at 5, citing TR at 1319-20, 1600-03, 1773-75, 1868-69; RX 14 at 1350. In March 2007, EG&G petitioned the State of Utah’s Department of Environmental Quality, Division of Air Quality, to modify its Clean Air Act Title V permit to install an additional ventilation system to help lower the SO₂ concentrations in the cool-down area. Any changes to the company’s CAA permit required the State’s approval. D. & O. at 6, citing TR at 1296.

The company thus “issued a notice of intent and ultimately a permit change to the [CAA] permit order and Title 5 permit” for the extra ventilation. D. & O. at 5, citing TR at 1292.

3. OSHA investigates SO₂ exposure complaints at EG&G

On July 18, 2008, OSHA informed EG&G managers that Brenda Mugleston, the wife of a cool-down area worker, had filed a complaint about SO₂ exposure. D. & O. at 9. She complained that company employees at the Tooele facility were exposed to releases of contaminated particulates caused by the failure of monitoring equipment and the use of improper monitoring devices. OSHA ordered EG&G to conduct an internal investigation into the health hazards referenced in the complaint. D. & O. at 9, citing RX 60. The company investigated and released a report ten days later.² OSHA conducted an on-site investigation in August 2008, which included interviews with Tomlinson and about 20 other employees. D. & O. at 9.

An OSHA investigator interviewed Tomlinson in September 2008, about the readings on the personal air monitor that the company supplied. CX 11. During the interview, Tomlinson complained that his monitoring equipment was inadequate. The OSHA investigator informed Tomlinson that some of the readings on the monitors reflected significant increases due to radio frequency interference, but that others represented IDLH levels of SO₂ at an alarming level.³

On October 9, 2008, Mike Jensen, who was in charge of the SO₂ project, and other EG&G managers met with an OSHA official to review the complaint and discuss EG&G’s investigation. At OSHA’s request, EG&G conducted a controlled study to verify that radio frequency interference from the plasma torches was affecting the employees’ personal monitors, and in many cases causing artificially high SO₂ readings. OSHA later determined that the only issue was the SO₂ emissions in the cool-down area and issued a revised notice of citation, replacing all “serious” violations and citing the company with only one “other than serious” violation. EG&G abated the violation and paid a \$1,875.00 fine.⁴

² RX 79. See TR at 505-15 (testimony of Paul Anderson, EG&G safety manager).

³ The monitors were set to go off if SO₂ emissions reached 25 parts per million, but the masks provided protection up to 99 ppm and a safety mechanism permitted the exposed employees to evacuate the area. D. & O. at 6, citing RX 110, TR at 15-69, 1719-20.

⁴ The September 26, 2008 Citation and Notification of Penalty stated that EG&G “did not identify and evaluate the respiratory hazard in the workplace.” It noted that radio frequency radiation and chemical interferents disrupted the monitors’ ability to evaluate employee exposure adequately. It added that employees were exposed to sulfur dioxide during the plasma torch-cutting and that this condition “could expose employees to a respiratory hazard.” RX 70, CX 21.

4. *Events leading to Tomlinson's October 2008 termination*

On October 10, 2008, Jensen visited the cool-down area to help the B-team's safety representative arrange monitors for Tomlinson and his co-workers. Jensen watched, on a closed circuit television, two employees cleaning and vacuuming a ton container, and testified that he saw Tomlinson remove his respirator to speak on a telephone. Jensen reported the incident, and the company suspended Tomlinson on October 14, 2008, for violating Standard Operating Procedure 24 which prohibits employees from removing respirators during ongoing operations in the cool-down area. D. & O. at 11-12; see also RX 2 at 14-19. After an internal investigation, EG&G fired Tomlinson on October 23, 2008. Tomlinson was the only employee EG&G fired for removing his respirator. D. & O. at 13.

B. Tomlinson's OSHA Complaint

Tomlinson filed a complaint with OSHA on October 28, 2008, alleging that his discharge by EG&G violated the SWDA, the CAA, the TSCA, the Federal Water Pollution Control Act (FWPCA) (33 U.S.C.A. § 1367), the Comprehensive Response Compensation and Liability Act (CERCLA) (42 U.S.C.A. § 9610), the Safe Drinking Water Act (SDWA) (42 U.S.C.A. § 300j-9(i)), and section 11(c) of the Occupational Safety and Health Act (OSH Act) (29 U.S.C.A. § 651). Complaint at 3. He alleged that EG&G unlawfully retaliated against him for disclosing "material facts about worker exposures and potential worker exposures to dangerous chemicals in the workplace . . . [and] releases and potential releases of hazardous waste and hazardous constituents into the environment" in violation of these environmental acts. *Id.* at 1-2. Tomlinson stated in his complaint that the incidents at EG&G involved conditions "immediately dangerous to life and health" and posed a risk of release of sulfur dioxide and other pollutants to the outside environment. *Id.* at 2. He alleged in his complaint that EG&G's decision to terminate him for failing to use protective safety equipment was "pretext for retaliation" because "other employees, supervisors, and EG&G management had entered into the [cool-down area] during previous operations without the proper [protective safety equipment] and those employees were not reprimanded or terminated." *Id.*

OSHA dismissed the complaint on April 3, 2009. OSHA determined that Tomlinson's complaints about SO₂ levels were protected activity under three Environmental Acts (CAA, TSCA and SWDA), but concluded that the activity did not contribute to his termination in violation of the Acts. OSHA did not address Tomlinson's OSH Act claim. Tomlinson objected, and requested a hearing before an ALJ.

C. ALJ's Decision

Following a lengthy hearing, the ALJ issued a decision on December 30, 2010, dismissing Tomlinson's complaint. The ALJ analyzed the four protected acts Tomlinson alleged: (1) complaints about SO₂ emissions in the facility's cool-down room; (2) Tomlinson's testimony in an OSHA investigation; (3) perceptions of Tomlinson as a whistleblower; and (4) Tomlinson's status as "about to testify" to OSHA and

environmental enforcement officials. The ALJ determined that Tomlinson failed to prove that the activities he alleged were protected by the whistleblower provisions of the SWDA, CAA, or TSCA.⁵

1. Tomlinson's reports of SO₂ emissions.

The ALJ first addressed Tomlinson's complaints about SO₂ emissions in the cool-down area, ultimately ruling that his complaints were not protected under the three Environmental Acts. D. & O. at 16-24.

The ALJ observed that the Toxic Substances Control Act 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." D. & O. at 20, quoting 15 U.S.C. § 2603(a). "Sulfur dioxide is a chemical substance that the TSCA has listed as highly hazardous . . . and that was found in [Tomlinson's cool-down] area." D. & O. at 20, citing 29 C.F.R. § 1910.119, App'x A. The ALJ stated that "[w]hile 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." D. & O. at 20, citing *Melendez v. Exxon Chems. Americas*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 3, 17 (ARB July 14, 2000).

Based on the evidence at the hearing, the ALJ determined that Tomlinson'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[;] [h]e alleged only that inhaling such odors was hazardous to his and his co-workers' health." D. & O. at 20. The ALJ stated that "[s]imple exposure to SO₂ fumes is not enough to invoke coverage under the TSCA because [Tomlinson's] health concerns did not touch on any hazards to the environment or public health and safety." The ALJ concluded that Tomlinson's activity "was not protected under the TSCA." *Id.* at 21.

The ALJ further determined that Tomlinson's complaints were not covered under the Solid Waste Disposal Act, which is "intended to promote the reduction of hazardous waste and minimize the present and future threats of solid waste to human health and the environment." 42 U.S.C.A. § 6902(b). The ALJ noted that 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." D. & O. at 21, quoting 42 U.S.C.A. § 6903(5). The ALJ determined that Tomlinson's complaints did not fall within the SWDA because he "expressed no concerns and raised no issues about solid waste." D. & O. at 21. The ALJ found that Tomlinson's complaints were "confined to the cool-down area and workplace hazards" and that he did not "complain about the ultimate disposal of the materials on which he worked." *Id.*

⁵ Prior to the hearing, the ALJ granted the parties' joint motion dismissing Tomlinson's complaints under SDWA, FWPCA, and CERCLA. D. & O. at 2.

Finally, the ALJ determined that Tomlinson's complaints were not covered under the Clean Air Act. The ALJ observed that the CAA's purpose "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.A. § 7401(b)(1). The ALJ determined that Tomlinson's complaints were not covered because he did not allege potential pollution to "the ambient air outside the cool down area." The ALJ further determined that Tomlinson's complaints were not protected because Vance "convincingly testified that neither CAA nor the SWDA/RCRA required that [EG&G] contain the SO₂ emissions." D. & O. at 22, citing TR at 1312. The ALJ observed that evidence at the hearing showed that the Utah Department of Air Quality found no compliance or permit issue regarding EG&G's insignificant emissions of SO₂. D. & O. at 22, citing TR at 1296, 1304.

2. Tomlinson's interview and participation in an OSHA investigation

The ALJ rejected Tomlinson's contention that his interview with the OSHA investigator was protected activity within the environmental statutes. D. & O. at 25-27. The ALJ found that the OSHA investigation was not conducted under the Environmental Acts but instead involved an alleged workplace hazard of worker exposure to SO₂, a "purely occupational" hazard. D. & O. at 25; 29 U.S.C.A. § 660(c). The ALJ stated that "[p]articipation in an investigation unrelated to a violation of the Environmental Acts, however, does not garner protection under those Acts." D. & O. at 25. The ALJ held that Tomlinson "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." *Id.*, citing 29 C.F.R. § 24.102(b)(1)-(3).

Relying on the testimony of Tomlinson and Jensen, the ALJ concluded that the OSHA investigation was about the alleged failures of personal monitors in the cool-down area. The ALJ found that, despite Tomlinson's assertion that his discussion with the investigator was about "air monitoring," there was no evidence that Tomlinson raised any issue of fugitive emissions or any other activity that might have fallen under the Environmental Acts. D. & O. at 17, 26.

3. Perception of Tomlinson as a whistleblower

Tomlinson argued that the Environmental Acts afforded him protected status based on his perception that EG&G officials believed that he initiated the July 2008 OSHA investigation. The ALJ rejected this contention. The ALJ observed that of the four requirements for establishing retaliation under 29 C.F.R. § 24.104(d)(2)(i-iv), only the second covers an employer's *suspicion* of protected activity. D. & O. at 27. The ALJ found that because Tomlinson's participation in the OSHA investigation was not protected under the Environmental Acts, he could not prove that EG&G perceived him to be a whistleblower. The ALJ held that the Environmental Acts precluded Tomlinson from "rely[ing] on the protected activity of others to shield him from adverse actions." D. & O. at 28.

4. Perception of Tomlinson as “about to testify”

Tomlinson argued that his activities are protected under the Environmental Acts because he was “about to testify” to OSHA and environment enforcement officials. The ALJ observed that under 29 C.F.R. § 24.102(b)(2), a complainant who is “about to testify” in a proceeding or investigation is protected from retaliatory adverse actions. The ALJ determined that Tomlinson failed to show that he intended to testify in any proceeding or was asked to do so, but instead was relying on EG&G’s suspicions that he, as a whistleblower, could affect its campaign to achieve an environmental award status as a substitute for the protected activity he is missing. The ALJ concluded that this allegation was too speculative and that Tomlinson could not erase the need for one element of his case by pointing to the existence of another. D. & O. at 28.

JURISDICTION AND STANDARD OF REVIEW

The Secretary of Labor has delegated to the Administrative Review Board her authority to issue final agency decisions under the statutes at issue here. Secretary’s Order No. 02-2012 (Delegation of Authority and Assignment of Responsibility to the Administrative Review Board), 77 Fed. Reg. 222 (Nov. 16, 2012). The ARB reviews the ALJ’s factual findings for substantial evidence, and his legal conclusions de novo. 29 C.F.R. § 24.110(a).

DISCUSSION

Tomlinson seeks protection for his whistleblower complaints under three Environmental Acts – the SWDA, CAA, and TSCA. Under the whistleblower provisions of these Acts, Tomlinson must establish that his protected activity was a motivating factor in an adverse action that he suffered. 29 C.F.R. § 24.109(b)(2); *Morriss v. LG&E Power Servs. LLC*, ARB No. 05-047, ALJ No. 2004-CAA-014, slip op. at 31 (ARB Feb. 28, 2007) (citation omitted). An employer may avoid liability by demonstrating by a preponderance of the evidence that it would have discharged the complainant even if he had not engaged in protected activity. 29 C.F.R. § 24.109(b)(2); see also *Morriss*, ARB No. 05-047, slip op. at 33 (citation omitted).

The ALJ determined that Tomlinson’s reports to his employer of SO₂ emissions did not fall within the scope of the three Environmental Acts, and instead held that Tomlinson’s complaints concerned workplace conditions actionable only “under the OSH Act.” D. & O. at 17. This was error.

Contrary to the ALJ’s holding, the fact that the concerns Tomlinson raised related to workplace conditions covered under the OSH Act does not preclude a determination that he reasonably believed that his concerns also related to the Environmental Acts. As explained in *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 10-11 (ARB Dec. 12, 2012), the regulations at 29 C.F.R. § 24.103(e)

make clear that “there can be an overlap of violations of the OSH Act and the environmental whistleblower statutes.” The regulation states:

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

29 C.F.R. §24.103(e) (emphasis added); *see Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 11 (rejecting the proposition that there is a “bright line . . . between occupational and the environmental” complaints). “The case law makes clear that while environmental statutes ‘generally do not protect complaints restricted solely to occupational safety and health [covered by Section 11(c)],’ they do if ‘the complaints also encompass public safety and health or the environment.’” *Id.*, quoting *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 10 (ARB Mar. 31, 2005), quoting *Post v. Hensel Phelps Constr. Co.*, ALJ No. 1994-CAA-013, slip op. at 1-2 (Sec’y Aug. 9, 1995). Accord *Williams v. Mason & Hanger Corp.*, ARB No. 98-030, ALJ No. 1997-ERA-014, slip op. at 18-22 (ARB Nov. 13, 2002). Accordingly, the fact that Tomlinson’s reporting would fall within the scope of the OSH Act does not preclude him from pursuing whistleblower protection under the Environmental Acts.

A. The Solid Waste Disposal Act Protects Tomlinson’s Complaints About SO₂ Emissions in the Cool-Down Area at EG&G’s Hazardous Waste Disposal Plant

1. Scope Of The Solid Waste Disposal Act

The SWDA was enacted to address problems associated with “the disposal of various solid waste and hazardous wastes.” Solid Waste Disposal Act Amendments of 1980, Senate Report No. 96-172, 1980 U.S.C.C.A.N. 5019. In enacting SWDA, Congress found that “disposal of solid waste and hazardous waste in or on the land without careful planning and management can present a danger to human health and the environment,” and that “inadequate and environmentally unsound practices for the disposal or use of solid waste have created greater amounts of air and water pollution and other problems for the environment and for health.” 42 U.S.C.A. § 6901(b)(2)-(3). Congress’s “objectives” for the SWDA are to “promote the protection of health and the environment and to conserve valuable material and energy resources by . . . assuring that

hazardous waste management practices are conducted in a manner which protects human health and the environment; . . . [and] requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date.” 42 U.S.C.A. § 6902(a)(4)-(5). Congress declared as national policy of the United States that

wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. Waste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment.

42 U.S.C.A. § 6902(b).

The ALJ determined that Tomlinson’s complaints did not fall within the scope of the SWDA because “his 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.” D. & O. at 21. This was error because the ALJ construed too narrowly the meaning of protected activity under SWDA.

“It is a matter of well settled case law that actions that serve the environmental protection purposes of . . . [the] environmental statutes may begin with an employee’s personal health concern.” *Melendez*, ARB No. 96-051, slip op. at 3. A whistleblower complaint about hazardous waste disposal practices that implicates or touches on the substantive statute can be protected. *Williams v. Dallas Indep. School Dist.*, ARB No. 12-024, slip op. at 9 (citing *Melendez*, ARB No. 96-051, slip op. at 18); *see also* 42 U.S.C.A. § 6902(b). In this case, Tomlinson’s repeated complaints relating to potential problems at the Army’s Tooele facility, a SWDA-permitted incineration facility (*supra* at 2-3), are exactly the kind of disclosures the SWDA whistleblower provision seeks to protect against retaliation, regardless of whether the employee pursues the interest solely for himself and his co-workers.

The record reflects that EG&G has a SWDA permit “for all of its hazardous waste operations to include storage, treatment, and ultimate disposal.” D. & O. at 5, citing TR 1290 (testimony of environmental manager Sheila Vance); *see* 49 C.F.R. § 6903(7) (defining “hazardous waste management” as the “systematic control of the collection . . . processing, treatment . . . and disposal of hazardous wastes.”). Tomlinson complained to company managers about activities within its waste treatment plant where workers were engaged in the incineration and decontamination process for the Army’s stockpile of chemical weapons, specifically “storage tanks (ton containers), projectiles, and shell casings.” D. & O. at 3. The site where Tomlinson worked had longstanding concerns over excessive emission of SO₂ in the cool-down area. Ton containers transferred from the furnace to the cool-down area contained toxic residue that, “when exposed to air . . .

generates smoke or gas consisting [] of SO₂.” D. & O. at 4, citing TR at 1532-36. Sulfur dioxide is a

highly reactive colorless gas smelling like rotten eggs . . .
[and] derives primarily from fossil fuel combustion. Best
known for causing “acid rain,” at elevated concentrations in
the ambient air, SO₂ also directly impairs human health.

American Lung Ass’n v. EPA, 134 F.3d 388, 389 (D.C. Cir. 1998). The EPA has listed sulfur dioxide as an “extremely hazardous substance.” 40 C.F.R. Part 355, App. A (List of Extremely Hazardous Substances). The incinerated heel residue that created the SO₂ fumes to which Tomlinson was exposed is considered to be a hazardous waste under EG&G’s SWDA permit. D. & O. at 5. The permit requires, in relevant part, reporting of: “Any information of a release or discharge of hazardous waste, or of a fire or explosion at the TOCDF or CAMDS, which could threaten the environment or human health.” CX 19, TOCDF SWDA Permit, Module 1, Section I.U.4.

Recognizing that the company may have violated the SWDA/RCRA permit, the ALJ nevertheless determined that Tomlinson did not sufficiently link his complaints to those violations, nor had he conveyed any belief that the company’s disposal process led to pollution of the air, soil, ground water, or surface water. D. & O. at 19. This was error. The ALJ too narrowly interpreted coverage under the SWDA whistleblower provisions. A detailed knowledge of the substantive law or a recitation of the specific law, regulation, or permit requirement allegedly violated is not necessary for a complaint to be protected under the SWDA. *Zinn v. Am. Commercial Lines, Inc.*, ARB No. 10-029, ALJ No. 2009-SOX-025, slip op at 61-62 (ARB Mar. 28, 2012) (holding that complainants “need not describe an actual violation of law, as an employee’s whistleblower communication is protected where based on a reasonable, but mistaken, belief that the employer’s conduct constitutes a violation.”).

Tomlinson’s activity falls within the scope of the SWDA because his complaints about SO₂ emissions emanating from smoking ton containers implicate, or touch on, issues that SWDA was enacted to address. See *Williams v. Dallas Indep. School Dist.*, ARB No. 12-024, slip op. at 9. The SWDA requires that the disposal of hazardous waste “be properly managed in the first instance.” 42 U.S.C.A. § 6902(a)(4)-(5). His complaints about SO₂ emissions certainly questioned whether the company was adhering to that obligation. He complained to facility managers about possible problems with the incineration process due to excessive SO₂ emissions and put the company on notice that it may be violating its SWDA/RCRA permit requirements to expeditiously destroy hazardous chemicals in a manner that does not “threaten the environment *or* human health.” See *supra* at 11, citing CX 19 (SWDA/RCRA permit). Further, Tomlinson had no obligation to tell company managers that his concern about the incineration process related specifically to environmental pollution. The SWDA’s principle purpose is to “assur[e] that hazardous waste management practices are conducted in a manner which protects *human health* and the environment;” 42 U.S.C.A § 6902 (a)(4)-

(5)(emphasis added). The plain language of the statute identifies “human health,” as well as the “environment,” as within the scope of the Act’s protection. Indeed, occupational health complaints related to SO₂ emissions surrounding the facility’s incineration process fall within the scope of SWDA whistleblower protection, as mandated by regulations implementing the Environmental Acts. *Supra* at 8-9, citing 29 C.F.R. § 24.103(e). Tomlinson’s complaints, which included complaints related to his occupational health concerns, about the SO₂ gas emitted in the cool-down area as part of the incineration and decontamination process in the furnace and aftermath, fall within the scope of the SWDA.

The ALJ also determined that Tomlinson’s complaints were not protected under SWDA based on the ALJ’s ruling that the Act covered “solid waste” and excluded gaseous fumes. D. & O. at 21-22. This ruling on the scope of the SWDA was error. The SWDA defines “hazardous waste” as a “solid waste or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may – cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible illness; or . . . pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed.” 49 U.S.C.A. § 6903(5). Hazardous waste management is the “systematic control of the collection, source separation, storage, transportation, processing, treatment, recovery, and disposal of hazardous wastes.” 49 U.S.C.A. § 6903(7).

Contrary to the ALJ’s holding, solid waste under the SWDA is not limited to solid material. The statute defines “solid waste” as “any garbage, refuse, sludge from a waste treatment plant, . . . and other discarded material, including solid, liquid, semi-solid, or *contained gaseous material* resulting from *industrial*, commercial, mining, and agricultural operations” 49 U.S.C.A. § 6903(27) (emphasis added). This definition of solid waste is set out in House Report No. 94-1491 (Part 1 at 2) of the Resource Conservation Recovery Act of 1976, which states that the “subjects of th[e] legislation” include “not only solid wastes, but also liquid and contained gaseous wastes, semi-solid wastes and sludge” within the scope of the act. *See* 1976 U.S.C.C.A.N. 6240. In enacting broad hazardous solid-waste disposal legislation, Congress sought to address its “concerns over the effect on the population and environment of the disposal of discarded hazardous wastes – those which by virtue of the composition of longevity are harmful, toxic or lethal [and] [u]nless neutralized or otherwise properly managed in their disposal, hazardous wastes present a clear danger to the health and safety of the population and to the quality of the environment. House Report No. 94-1491, Part 1 at 3, 78 U.S.C.C.A.N. at 6241.

For all these reasons, we hold that Tomlinson’s complaints alleging unsafe SO₂ emissions fall within the scope of the SWDA.

2. *Tomlinson's Complaints Were Based On A Reasonable Belief Of A Violation And Furthered the SWDA's Purposes*

In determining whether the SWDA protected Tomlinson's complaints, an assessment must be made of the reasonableness of Tomlinson's belief that he was reporting a violation of the Act. To be afforded protection under the SWDA, Tomlinson must show a reasonable belief, both subjectively and objectively, that his conduct furthered the SWDA's purposes. *Lee v. Parker-Hannifin*, ARB No. 10-021, ALJ No. 2009-SWD-003, slip op. at 9 (ARB Feb. 29, 2012). "Whistleblower protection for a complainant's activities that . . . 'touch on' the environmental acts" requires proof that complainants "actually believed" that the activities complained about implicate concerns addressed by the acts "or that the complainant's actions otherwise furthered the purposes of those acts." *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 10, citing *Melendez*, ARB No. 96-051, slip op. at 25. In this case, Tomlinson's complaints were reasonable in that his reporting touched on concerns, and furthered the purposes, of the SWDA.

a. *Tomlinson had a reasonable (subjective and objective) belief of a SWDA violation*

"A complainant does not need to express his reasonable belief when he engaged in protected activity so long as he reasonably believed, at the time he voiced his complaint or raised his concerns, that a threat to the environment or to the public existed." *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 10. The "reasonable belief standard requires an examination of the reasonableness of a complainant's beliefs, but *not* whether the complainant actually communicated the reasonableness of those beliefs to management or the authorities." *Id.*, quoting *Sylvester v. Paraxel Int'l*, ARB No. 07-123, ALJ Nos. 2007-SOX-039, -042; slip op. at 14 (ARB May 25, 2011); *see also Jones v. EG&G Def. Materials, Inc.*, ARB No. 97-129, ALJ No. 1995-CAA-003, slip op. at 13 (ARB Sept. 29, 1998), *aff'd on recon.* (Dec. 24, 1998) (concluding that an employee who worked as a safety manager and called the fire department on observing a "hydrogen leak [that he believed] could lead to an explosion that would destroy the . . . building in and around which numerous hazardous chemical agents were stored" engaged in "protected activity under the environmental statutes").

The "subjective" component of the reasonable belief test is demonstrated by showing that the employee actually believed that the conduct of which he complained constituted a violation of relevant law. *See, e.g., Melendez*, ARB No. 96-051, slip op. at 27-28; *Oliver v. Hydro-Vac Servs*, ALJ No. 1991-SWD-001, slip op. at 9-13 (Sec'y Nov. 1, 1995). *Compare Harp v. Charter Comm'n*, 588 F.3d 722, 723 (7th Cir. 2009); *Welch v. Chao*, 536 F.3d 269, 277 n.4 (4th Cir. 2008). The facts in this case show that Tomlinson had a reasonable subjective belief of a SWDA violation. The facility where he worked was involved in incinerating the Army's stockpile of chemical weapons, a process that risked exposing its employees to hazardous waste. D. & O. at 4. The

process of incinerating and destroying ton containers at the site exposed workers to SO₂ as a result of burning “chemical agent residue after being drained of mustard gas.” *Id.* The company’s deputy manager of technical support at the site, Joe Majestic, testified 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.” *Id.*

Tomlinson’s complaints since 2006 contributed to the company’s efforts to improve the ventilation system in the cool-down area. *Id.* at 3-4. Following those efforts, he was also involved in OSHA’s investigation of the SO₂ emissions that stemmed from a complaint another EG&G employee filed. Tomlinson testified at the administrative hearing that he felt adverse physical effects due to the SO₂ exposure at work. TR at 1340 (Tomlinson testified that he “kept getting headaches and sore throats, but they’d go away. It seems like there at the end of every night I’d go home, and I’d have a bad headache.”). He also testified that he “was concerned about his health and safety too like the rest of [his] team” and that he believed the company “was *not* doing its best job to protect him and the entire . . . team from the SO₂ in the cool-down area.” D. & O. at 18-19; TR at 180, 696. This evidence of Tomlinson’s expressed concern over his personal health and his belief that EG&G was not making sufficient efforts to protect his health and that of his co-workers at the plant establishes that he had a subjectively reasonable belief that the emission of SO₂ at the plant was a potential violation of SDWA, which is intended to “assure that hazardous waste management practices are conducted in a manner which protects human health.” 42 U.S.C.A. § 6902(a)(4).

An objective reasonable belief is evaluated based on the knowledge available to a reasonable person in the same factual circumstances with the same training and experience as complainant. *Sylvester*, ARB No. 07-123, slip op. at 14; *see Harp*, 558 F.3d at 723. The record here supports the ALJ’s finding that Tomlinson had an objectively reasonable belief of a violation for at least two reasons.

First, Tomlinson’s complaints concerning SO₂ emissions in the cool-down area where he worked involved a plant permitted under the SWDA. D. & O. at 5. When the company’s efforts in 2006 and 2007 to improve ventilation in the cool-down area did not work, Tomlinson continued to complain based on his belief that the company “was not doing its best job to protect him and the entire B-team from the SO₂.” *Id.* at 8. Moreover, the ALJ credited the testimony of risk manager Majestic about “clinkers,” hot spots of unburned sulfur, mostly metal and ash, that can remain in the ton containers after incineration and that emit SO₂ fumes when exposed to oxygen. This incinerated “heel” material is considered hazardous waste under EG&G’s permit and must be removed in the cool-down area before EG&G can dispose of the containers. D. & O. at 5, 15. By complaining about the SO₂ in 2006 and 2007 and participating in the OSHA investigation of the SO₂ fumes in 2008, Tomlinson was furthering the purposes of the SWDA to control the disposal of hazardous waste, like clinkers, that threaten human health.

Second, although the record does not show Tomlinson to be an expert on the harmful effects of SO₂ exposure, it is commonly known that SO₂ has significant adverse

health effects. *See, e.g.*, <http://www.epa.gov/air/sulfurdioxide/health.html> (EPA reports that “[c]urrent scientific evidence links short-term exposures to SO₂, ranging from 5 minutes to 24 hours, with an array of adverse respiratory effects including bronchoconstriction and increased asthma symptoms. These effects are particularly important for asthmatics at elevated ventilation rates, *e.g.*, while exercising or playing. Studies also show a connection between short-term exposure and increased visits to emergency departments and hospital admissions for respiratory illnesses, particularly in at-risk populations including children, the elderly, and asthmatics.”). “SO₂ can affect healthy non-asthmatic individuals at concentrations above 2.0 parts per million (“ppm”); below 2.0 ppm, it primarily affects people with asthma.” *American Lung Ass’n*, 134 F.3d at 389 (citing National Ambient Air Quality Standards for Sulfur Oxides (Sulfur Dioxide)-Final Decision, 61 Fed.Reg. 25,566-70 (1996)).

Based on the evidence in the administrative record, Tomlinson had a reasonable belief of a SWDA violation, and his complaints to his supervisors concerning SO₂ emissions were activities protected under the Act.

b. Tomlinson’s complaints furthered the purposes of the SWDA

While the inherent nature of Tomlinson’s complaints were based on a subjectively and objectively reasonable belief of a SWDA violation (and satisfied his proof that he engaged in activity protected by the Environmental Acts), it is additionally noteworthy that Tomlinson’s complaints clearly furthered the SWDA’s purposes as well. His complaints about SO₂ emissions occurred from 2006 to 2008. D. & O. at 7-8. During that time, he was involved in investigations of SO₂ emissions at the Tooele facility, and federal investigators responding to complaints about the emissions problem interviewed him. *Id.* at 9. As a SWDA/RCRA permitted facility, managers at Tooele must comply with federal requirements for operating a hazardous waste disposal facility. *Id.* at 5. These facts found by the ALJ establish that Tomlinson’s activity “furthered the purposes” of the SWDA to ensure safe disposal of hazardous waste. *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 10; 42 U.S.C.A. § 6902(a)(4)-(5).

B. Under the Circumstances Presented, Tomlinson’s Complaints of SO₂ Emissions in the Cool-Down Area Were Protected Under the CAA Because His Complaints Contributed to the Company’s Decision to Modify Its CAA Permit at the Tooele Facility

1. Scope Of The Clean Air Act

The CAA, 42 U.S.C.A. § 7401 *et seq.*, is a complex and comprehensive environmental statute enacted to preserve and protect the nation’s air and public health. In enacting the CAA, Congress found that the “growth in the amount and complexity of air pollution brought about by urbanization and industrial development . . . has resulted in mounting dangers to the public health and welfare.” 42 U.S.C.A. § 7401(a)(2). Congress declared the CAA necessary 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” and to facilitate the development and operation of pollution prevention and control programs. 42 U.S.C.A. § 7401(b)(1), (4).

The CAA’s whistleblower provision prohibits discrimination with respect to an employee’s compensation, terms, conditions or privileges of employment because the employee has caused or commenced a proceeding under the Act, or “assisted or participated” in “such a proceeding or in any other action to carry out the purposes of the act.” 42 U.S.C.A. § 7622(a)(1), (3). Like the SWDA, protected activity under the CAA is “grounded in conditions constituting reasonably perceived violations” of the specific acts under which a complaint is brought; such conditions can include, among others, the release of unsafe substances into the environment or the release of toxins into the ambient air. *Carpenter v. Bishop Well Servs. Corp.*, ARB 07-060, ALJ No. 2006-ERA-035, slip op. at 6 (ARB Sept. 16, 2009), citing *Culligan v. Am. Heavy Lifting Shipping Co.*, ARB No. 03-046, ALJ Nos. 2000-CAA-020, 2001-CAA-009, -011; slip op. at 9-11 (ARB June 30, 2004).

The ALJ held that Tomlinson’s activity was not protected under the CAA because he did not complain that SO₂ was seeping into the “ambient air outside the cool-down area.” D. & O. at 22. This was error. Tomlinson does not need to show that he conveyed to his employer a reasonable belief that SO₂ was seeping into the ambient (or outdoor) air for his whistleblower claim to survive under the CAA. Under the CAA and the other Environmental Acts, a complaint related to air quality that “touch[es] on” concerns for public health and the environment can be sufficient. *Melendez*, ARB No. 96-051, slip op. at 11.

In this case, there is evidence showing that Tomlinson’s complaints touch on the pollution concerns that the CAA addresses. He alleged in his complaint that he was terminated “shortly after [he] spoke with an OSHA representative per OSHA’s request in regard to an OSHA investigation of a safety hazard complaint filed with OSHA by other EG&G employees.” Complaint at 1. Tomlinson stated in his complaint that he conveyed to OSHA investigators “material facts about worker exposures and potential worker exposures to dangerous chemicals in the workplace . . . and about releases and potential releases of hazardous waste and hazardous constituents into the environment . . .” *Id.* at 1-2. There is evidence in the record that company supervisors were aware of the concern that at least some of the SO₂ fumes in the cool-down area may have been released to the ambient air through the roof vents that connected to the fan covering the area of the incinerator’s exits. Shift manager Scott Sorenson testified that to overcome the SO₂ problem, EG&G installed the fan above the furnace where the incinerated ton containers exited to draw the gases off the containers and “put them up on top of the building, and throw them.” TR at 204, 255. Another witness, Nathan Brown, stated that the purpose of the fan was to try to “suck up the SO₂ and direct it out of the building.” TR at 476. Co-worker Mugleston testified that the exhaust fan pulling the fumes to the roof was not very effective so workers opened the outside, pull-down doors in the area to vent the fumes to the environment. TR at 842-43.

Even if Tomlinson's complaints to his supervisors did not specifically convey concerns about the SO₂ fumes escaping into the ambient air from the roof vent and the doors, his 2006 complaints contributed to a modification of the company's CAA permit in its attempt to alleviate SO₂ exposure to its employees. *Supra* at 3-4. EG&G Environmental Manager Vance testified that the CAA permit was changed to permit extra ventilation in the cool-down area and the Utah Department of Environmental Quality added the cool-down area to the CAA permit as an emissions source. D. & O. at 6; see also CX 21, 18; TR at 1318-20. Tomlinson assisted in the process that resulted in modifying the permit to accommodate the SO₂ emissions from the cool-down area. D. & O. at 8.

These facts showing Tomlinson's contributions to the company's decision to seek a modification to the company's CAA permit fully demonstrate that he participated in an "action to carry out the purposes of the Act." 42 U.S.C.A. § 7622(a)(1) & (3); see also *United States v. Eme Homer City Generation*, 823 F. Supp. 2d 274, 279 (W.D. Pa. 2011) (CAA requires "EPA to promulgate national ambient air quality standards . . . for pollutants, including Ca, which may reasonably endanger public health or welfare."). Furthermore, his contributions towards the company's efforts at modifying its CAA permit at the Tooele facility falls well within the purposes of the Act because it was part of a "comprehensive state and federal scheme to control air pollution."⁶ See *Caldwell v. EG&G Def. Materials, Inc.*, ARB No. 05-101, ALJ No. 2003-SDW-001, slip op. at 12 (ARB Oct. 31, 2008) (under the CAA and other environmental statutes, the ALJ found protected activity when complainant participated in an internal investigation of the migration of a toxic substance into the atmosphere because his participation furthered the statutory purposes).

2. Tomlinson Had a Reasonable Belief Of A CAA Violation

The ALJ determined that Tomlinson failed to show a reasonable belief of a CAA violation. That determination stemmed from a lack of proof that Tomlinson believed that SO₂ escaped from the plant into the ambient air. D. & O. at 22-23. This was error.

In *Knox v. U.S. Dept. of Labor*, 434 F.3d 721, 724 n.3 (4th Cir. 2006), the court of appeals addressed whether a federal employee's actions constituted protected activity under the CAA, when he raised concerns about the presence of asbestos in the workplace. The ARB had dismissed the administrative complaint, holding that Knox failed to prove

⁶ The "participation" provisions of the Environmental Acts define protected activity as assisting or participating in any manner in a proceeding, or assisting or participating in any other action to carry out the purpose of these Acts. See 42 U.S.C.A. § 6971(a); 15 U.S.C.A. § 2622(a); 42 U.S.C.A. § 7622(a); 42 U.S.C.A. § 9610(a); 33 U.S.C.A. § 1367(a); 42 U.S.C.A. § 300j-9(i)(1)(A). The ARB has construed the term "proceeding" broadly to encompass all phases of a proceeding that relate to public health or the environment. *Lee*, ARB No. 10-021, slip op. at 7 (citations omitted).

that he had a reasonable belief that his employer “was emitting asbestos into the ambient air.” 443 F.3d at 724. The court of appeals reversed that holding, stating: “We are not convinced that a reasonable belief of a release into the ambient air is even the correct standard in all cases under the whistleblower provision of the CAA.” *Id.* at n.3. The court stated that there are “several ways to violate the CAA and its implementing regulations without releases into the ambient air.” *Id.*, citing 42 U.S.C.A. § 7412(h)(1) (allowing EPA to establish work practice standards for pollutants such as asbestos); 40 C.F.R. § 61.150 (setting forth standards for waste disposal for manufacturing, fabricating, demolition, renovation, and spring operations” involving asbestos, some of which can be violated without releases of asbestos into the ambient air); *United States v. Ho*, 311 F.3d 589, 594-95 (5th Cir. 2002) (discussing work practice standards involving asbestos). The court of appeals observed that in proving a whistleblower violation under the CAA, an employee can, “depending on the circumstances . . . reasonably believe his employer was violating the CAA, even if no release into the ambient air occurred.” *Knox*, 434 F.3d at 724 n.3. Under *Knox*, Tomlinson need not necessarily prove a reasonable belief that SO₂ escaped into the ambient air. Instead, his complaints about SO₂ emissions at the plant, coupled with the physical effects that the emissions had on him and his colleagues as part of an investigation of complaints that could affect the company’s CAA permit issued by State of Utah officials, can establish a reasonable (subjective and objective) belief of a CAA violation.

First, Tomlinson shows a subjectively reasonable belief of a violation based on his testimony and that of his co-workers as to the physical effects he and they felt from working in the cool-down area. D. & O. at 9-10. The subjective reasonableness of Tomlinson’s belief of a CAA violation is not diminished because he did not tell managers that the toxic air in the cool-down area was escaping into the ambient air outside the building. In *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 9, an ALJ determined that a complainant’s CERCLA whistleblower complaint failed to express any concern “that the environment or public health had been impacted” or that the respondent’s activities presented “a potential hazard for the environment external to [the workplace.]” On appeal, the ARB determined that the ALJ erred in focusing on whether the complainant “expressed concern at the time about the environment or public health, rather than on whether [the complainant’s] actions for which he seeks whistleblower protection ‘touched on the concerns for the environment or public health and safety that are the focus of the environmental acts.’” *Id.* The ARB held that the actions for which complainant sought protection – communications with OSHA and repeated requests to his employer for environmental assessments pertaining to his workplace – “clearly touch on the environmental and public health and safety concerns that are CERCLA’s focus.” *Id.* at 11. That principle applies here.

Tomlinson’s complaints were also objectively reasonable because the complaints relate not only to safety concerns involving air quality that the CAA addresses, but also the company’s CAA permitting process for the Tooele facility. From 2006 to 2008, Tomlinson and his co-workers complained to company managers about SO₂ emissions in the cool-down area. The company attempted to stem the SO₂ emissions problems in

2007 by installing “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 with filtration.” D. & O. at 5. These efforts required the company to “issue[] a notice of intent and ultimately a permit change to the CAA permit order and Title 5 permit to add extra ventilation in the cool-down area associated with SO₂.” D. & O. at 5-6; TR at 1292-93, 1601-02; CX 14, 18. Despite these efforts, Tomlinson and his B-team co-workers continued to complain about the excessive presence of SO₂ in the cool-down area, and these continuing concerns led to an OSHA investigation of workplace conditions in 2008. D. & O. at 7-8. Moreover, Tomlinson testified that he expressed concerns to company managers that he could smell SO₂ even while wearing his respirator and that different air monitors were giving inconsistent SO₂ readings. TR at 179-180. He met individually with company managers, told managers that air monitoring in the cool-down area was unreliable or inaccurate, that respirator protection was inadequate, and that the cool-down area exposed employees to unreasonably high levels of SO₂. *See* TR at 1002-03 (Hunt), TR at 253 (Sorenson), TR at 692-93 (Utley), TR at 293 (Youngberg), TR at 641-42 (Hunter), TR at 1107 (Palmer).

Even if Tomlinson did not expressly state concerns about the SO₂ fumes escaping from the roof vent and the doors, it is undisputed that his complaints contributed to the company’s decision to seek an amendment to its CAA permit with the State of Utah to construct “changes to add ventilation to the cooldown area [which required] a permit modification.” D. & O. at 6, citing TR at 1296 (Vance). Thus Tomlinson’s complaints set out an objectively reasonable belief of a CAA violation, and his continued efforts to stem SO₂ emissions at the Tooele facility was done in furtherance of the CAA for the purpose of ensuring that Tooele was operated in accordance with the CAA permitting requirements administered by the State of Utah’s Department of Environmental Quality.⁷

⁷ Because the ALJ erred, and Tomlinson’s complaints fall within the scope of activity the SWDA and the CAA protect, we need not determine coverage under the Toxic Control Substances Act, 15 U.S.C.A. § 2622. However, ARB precedent regarding the TSCA makes clear that “internal reporting of safety concerns and procedures” at the specific industries TSCA covers falls well within the scope of the activity protected by the whistleblower provisions of the Environmental Acts. *See Jones*, ARB No. 97-129, slip op. at 11 (agreeing with the ALJ’s finding that “reporting of safety concerns . . . at a chemical weapons incinerator, uniquely and solely controlled by and subject to [the] military, more than touches on compliance with the environmental statutes under which his whistleblower complaint is brought. Such actions are the essence of assuring that a military facility with [the Disposal Facility’s] purpose, handling the unique toxic chemicals and hazardous wastes it handles and solely controlled by the military and its contractor under a military contract, comply with RCRA, TSCA and CAA.”) (internal citation omitted). For this same reason, we also need not address Tomlinson’s remaining protected activity claims the ALJ rejected (see D. & O. at 25-28).

C. Record Evidence Suggests That Tomlinson’s Protected Activity Motivated EG&G To Terminate Him, But The ALJ Should Make that Determination In The First Instance

Where, as here, a complainant proves that his actions were protected by the Environmental Acts, he must then show “by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint.” 29 C.F.R. § 24.109(b)(2).

EG&G stated that it fired Tomlinson because he removed his mask in the cool-down area on October 10, 2008, in violation of the SOP 24, which requires that after cool-down operations have ended, a “BRA-RHA operator uses one of the telephones located inside or outside the cool-down area to call the [Tooele facility’s] internationally staffed Treaty Compliance Office [], which verifies the disabling of the parts.” D. & O. at 3, citing TR at 393, 1339-40. To the extent Tomlinson removed his mask before SO₂ levels were lower, he did so to call Treaty to verify disabling of a part, which the company requires. D. & O. at 11 (ALJ finding that Tomlinson “credibly testified visually confirming operations had ceased in the MPF cooldown area before he went to call Treaty and lifted his respirator.”); see also D. & O. at 3 (ALJ finds that BRA/RHA operators “use[] one of the telephones located *inside* or outside the cooldown area to call . . . Treaty Compliance Office . . . which verifies the disabling of the parts). Tomlinson contended that his firing was motivated by his protected activity, and that no other person had ever been fired for either removing his mask in violation of EG&G’s SOP 24, or for even more extreme conduct. The ALJ appeared to agree with Tomlinson’s contention, holding:

I adopt Complainant’s rationale and argument as to Mr. Jensen’s and Ms. Sweeting’s true motivations in terminating [Complainant]. 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.

D. & O. at 15. Although the ALJ did not explicitly analyze the element of causation, his observations as to the evidence of motivating factor very strongly suggest that Tomlinson’s protected activity caused his suspension and subsequent termination on October 28, 2008.

Indeed, the ALJ made clear that the company’s witnesses, who testified about the termination decision, “were not very credible witnesses as to the October 10, 2008, incident, its investigation, and the motivation leading to [Tomlinson’s] termination of employment on October 24, 2008.” D. & O. at 15. While EG&G stated that it discharged Tomlinson for removing his respirator in the cool-down area, there is overwhelming evidence that other employees engaged in the same conduct, or worse, but

were not fired. *See* D. & O. at 13, citing TR at 76-78, 84-87, 105, 117-118, 126-129, 137-139, 702-705, 943-950, 1025, 1027, 1031, 1077-1078, 1084-1085, 1087-1089, 1096-1098, 1155-1160, 1169-1170, 1179-1181, 1193-1200, 1234-1237, 1341, 1652-1654, 1815-1816, 1916-1917, 1934-1935; CX 20, 22-23. Moreover, the ALJ questioned the credibility of evidence that Jenson saw Tomlinson remove his respirator while he was in the cool-down area when SO₂ levels were elevated and that this warranted his discharge. D. & O. at 11, citing TR at 1686-1687. Tomlinson “denied intentionally or knowingly removing his respirator while operations were ongoing.” *Id.*, citing TR at 1335-1337, 1345-1346. Tomlinson testified that even if he had removed his respirator, he thought operations had concluded and was checking to see if SO₂ levels were safe. As the ALJ stated, Tomlinson “more credibly characterized the October 10th incident as an inadvertent mistake where he checked the SO₂ level to see if it was safe and thought operations had concluded before he lifted his North industrial respirator to call Treaty.” *Id.*, citing TR at 658-659; 1335-1337, 1345-1346.

Moreover, Tomlinson’s immediate supervisor, Cody Hunter, testified that Tomlinson should have received a one or two-day suspension, not be fired, because he was a valuable employee and had had no prior disciplinary problems. D. & O. at 11, citing TR at 621-624. Hunter tried to convince human resources representative Debbie Sweeting that Tomlinson’s conduct did not warrant termination, and that prior employee terminations involved different situations with employees wearing M-40 gas masks. The ALJ observed that the company’s decision to terminate Tomlinson “departed from its progressive discipline policy,” and that the company “for the first time suspended [Tomlinson] while its investigation interviews were incomplete, recorded inaccurate facts, and [was] still in progress.” D. & O. at 13. The ALJ observed that the company’s decision to take disciplinary action was “unusual without consulting [Tomlinson’s] two immediate supervisors who disagreed with the decision to terminate” him. *Id.*

Certainly, the temporal proximity of Tomlinson’s protected activity and the disciplinary measures taken against him raise an inference of causation. *Caldwell*, ARB No. 05-101, slip op. at 13 (“a temporal connection between protected activity and an adverse action may support an inference of retaliation”). His suspension followed closely his ongoing concerns expressed to managers over excessive SO₂ emissions in the cool-down area, and his discharge came within a month of his involvement in OSHA’s investigation. Supervisor Hunter testified about Tomlinson’s long-term and exemplary work performance, and his testimony is undisputed. TR at 153, 621-24. Thus, Tomlinson’s involvement in the SO₂ emissions issue appears to have motivated EG&G to take the extreme measure of suspending and discharging him under these circumstances. Although the record seems clear on causation, we remand to the ALJ to making a finding on this element of proof. If the ALJ finds that Tomlinson’s protected activity was a motivating factor for EG&G’s decision to fire him, the company must be afforded an opportunity to “demonstrate[] by a preponderance of evidence that it would have taken the same adverse action in the absence of the protected activity.” 29 C.F.R. § 24.109(b)(2).

CONCLUSION

For the foregoing reasons, the ALJ's decision is **REVERSED**, and this case is **REMANDED** for further proceedings.

SO ORDERED.

LISA WILSON EDWARDS
Administrative Appeals Judge

JOANNE ROYCE
Administrative Appeals Judge

E. Cooper Brown, Deputy Chief Administrative Appeals Judge, concurring in part and dissenting in part:

I concur in the majority's conclusion that Mr. Tomlinson engaged in whistleblower protected activity under the SDWA, as amended by RCRA, but dissent from my colleagues' conclusion that he engaged in protected activity under the CAA. I am also of the opinion that Mr. Tomlinson did not engage in protected activity under the TSCA.

As the Board has previously recognized, actions that serve the purposes of environmental whistleblower Acts such as the SWDA "may begin with an employee's personal health concerns." *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, ALJ No. 2008-TSC-001, slip op. at 9 (ARB Dec. 28, 2012) (citing *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006, slip op. at 17-18 (ARB July 14, 2000)). In order to be protected, however, the actions for which the complainant seeks whistleblower protection must touch on the concerns that are the focus of the environmental Act. Additionally, the complainant must have had at the time "a reasonable good faith belief that his conduct was in furtherance of the purposes of the act under which he seeks protection." *Williams v. Dallas Indep. Sch. Dist.*, ARB No. 12-024, slip op. at 9. Whistleblower protection for a complainant's activities that otherwise "touch on" the environmental Acts is contingent on proof that the complainant actually believed that the respondent's activities implicated concerns addressed by the environmental Acts under which protection is sought or that the complainant's actions otherwise furthered the purposes of those Acts, and that the complainant's belief was objectively reasonable. *Id.* at 10 (citing *Melendez*, ARB No. 96-051, slip op. at 25; *Minard v. Nerco Delamar Co.*, No. 1992-SWD-001, slip op. at 7-16 (Sec'y Jan. 25, 1994)).

In the instant case, as the majority notes, Tomlinson raised concerns about his exposure, and that of his co-workers, to SO₂ that was released into the workplace environment during the process of treating and disposing of mustard gas at the Tooele Chemical Demilitarization Facility. The ALJ concluded that the concerns Tomlinson

raised about workplace exposure to SO₂ were not protected under the SWDA, as amended by RCRA, because they did not involve environmental safety and health concerns that the act encompasses. In reaching this conclusion, the ALJ cited the fact that Tomlinson expressed no concerns and raised no issues about solid or hazardous waste *per se*, or conduct on the part of EG&G that violated the SWDA/RCRA, but confined his complaints to SO₂ workplace hazards. Because SO₂ is not listed as a hazardous waste and even if it were, Tomlinson's concerns "did not touch on the effects of SO₂ fumes on the water, soil, or air outside of Respondent's enclosed workspace," the ALJ found "no coverage under the SWDA." D. & O. at 21-22.

I agree with the majority that the ALJ erred in reaching this conclusion, for several reasons beginning with the limited interpretation by the ALJ of the scope of SWDA's coverage. The SWDA, as amended by RCRA, constitutes "a comprehensive environmental statute that governs the treatment, storage, and disposal of solid and hazardous waste." *Meghrig v. KFCC Western*, 516 U.S. 479, 483 (1996). "Congress's 'overriding concern' in enacting RCRA was to establish the framework for a national system to insure the safe management of hazardous waste." *Am. Mining Cong. v. E.P.A.*, 824 F.2d 1177, 1179 (D.C. Cir. 1987). "RCRA's primary purpose . . . is to reduce the generation of hazardous waste and to ensure the proper treatment, storage, and disposal of that waste . . . 'so as to minimize the present and future threat to human health and the environment.'" *Meghrig*, 516 U.S. at 483 (quoting 42 U.S.C. § 6902(b)).

"Hazardous waste," which is subject to EPA jurisdiction under the SWDA/RCRA, see 40 C.F.R. Parts 260 to 270, is defined under the act to include any "solid waste" that because of its characteristics may "(A) cause, or significantly contribute to an increase in mortality or an increase in serious irreversible, or incapacitating reversible, illness; or (B) pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, or disposed of, or otherwise managed." 42 U.S.C. § 6903(5). Hazardous waste is a subset of "solid waste" under RCRA,⁸ which is defined under the statute as "any garbage, refuse, sludge from a waste treatment plant . . . and other *discarded material*, including solid, liquid, semisolid, or contained gaseous material resulting from industrial, commercial, mining, and agricultural operations. . . ." 49 U.S.C. § 6903(27) (emphasis added).⁹

⁸ *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1045 n.7 (9th Cir. 2004); *U.S. v. ILCO, Inc.*, 996 F.2d 1126, 1131 (11th Cir. 1993).

⁹ RCRA's legislative history reinforces the act's expansive definition of the term "solid waste" beyond the term's traditional definition. House Report No. 94-1491 (Part 1), at 2-3 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6238, 6239-41, clarifies that RCRA is intended to cover not only solid wastes; that liquid and contained gaseous wastes, semi-solid wastes, and sludge are also the subjects of this legislation. See *Safe Air*, 373 F.3d at 1045.

In support of the conclusion that Tomlinson's expressed concerns regarding SO₂ are whistleblower protected activity, the majority relies upon RCRA's inclusion of "liquid" and "contained gaseous material" within the act's definition of solid waste. Since SO₂ is not listed as a hazardous material under the act,¹⁰ I assume the majority is referring to the liquid form of the mustard gas that was being disposed of, rather than the gaseous SO₂.¹¹ Regardless of the majority's focus, what is clear is that the regulatory definition of "discarded material"¹² brings the Tooele Facility's treatment and disposal of mustard gas within the foregoing statutory definition of material subject to EPA's hazardous waste regulatory authority under 40 C.F.R. Parts 260 – 270.¹³ See 40 C.F.R. § 266.206. However, for purposes of determining whistleblower protection under the SWDA it is irrelevant that Tomlinson did not come in contact with, nor complain of exposure to or release to the environment of solid or hazardous wastes, as the ALJ required. It is sufficient that the SO₂, of which Tomlinson complained, was generated as a result of the treatment and disposal of the mustard gas and its containers undertaken at the Tooele Facility pursuant to its RCRA permit.¹⁴ The pertinent question in the first

¹⁰ The majority notes that the EPA has listed sulfur dioxide as an "extremely hazardous gas," citing 40 C.F.R. Part 355, Appendix A. While true, the EPA's designation is not under the SWDA but pursuant to the Emergency Planning and Community Right-to-Know Act (EPCRA), Title III of the Superfund Amendments and Reauthorization Act (SARA) of 1986 (Pub. L. 99-499) (amending the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) of 1980). Title III of SARA (EPCRA) "establishes authorities for emergency planning and preparedness, emergency release notification reporting, community right-to-know reporting, and toxic chemical release reporting." 40 C.F.R. § 355.1(a). Part 355 "establishes requirements for a facility to provide information necessary for developing and implementing state and local chemical emergency response plans, and requirements for emergency notification of chemical releases." The chemicals listed as "Extremely Hazardous Substances" in Appendix A are used in determining whether a facility is subject to these requirements. *Id.*

¹¹ A vesicant chemical warfare agent, mustard gas can take the form of a solid, a liquid, or gas depending upon its temperature. See <http://www.bt.cdc.gov/agent/sulfurmustard/basics/facts.asp>, cited at D. & O. n1.

¹² Unused military munitions such as mustard gas that are removed from storage in a military magazine or other storage area for the purpose of being disposed of, burned, or incinerated, or treated prior to disposal are defined as "discarded material" constituting hazardous waste under 40 C.F.R. §§ 261.2(a)(1), (a)(2)(i)(D), and § 266.202(b).

¹³ As the ALJ noted, the RCRA permit for the Tooele Facility covered all of its hazardous waste operations including storage, treatment, and ultimate disposal. D. & O. at 5 (citing the testimony of the Respondent's environmental manager, TR at 1290).

¹⁴ The incinerated "heel" residue ("clinker"), from which the SO₂ fumes of concern originated, is considered hazardous waste under the Respondent's RCRA permit. See D. & O. at 5 (citing the testimony of Joe Majestic, Deputy General Manager, Technical Support & Risk Management for URS, EG&G, TR at 1536).

instance is not the distinction drawn by the ALJ, but whether Tomlinson's complaints about SO₂ exposure "touched on" the concerns that are the focus of the SWDA, as amended by RCRA.

Unlike the other environmental whistleblower Acts, the SWDA is not limited in its focus to environmental and public health concerns. The purposes of the other environmental whistleblower protection Acts focus on the protection and promotion of "public health" or, more generally, "environmental safety" and "public welfare."¹⁵ The focus of the SWDA, as amended by RCRA, is on assuring that hazardous waste management operations are conducted in a manner that instead protects "human health" (as well as the environment). See 42 U.S.C. § 6901(b) and § 6902(a) & (b). As Congress explained, the EPA operation standards mandated under the SWDA/RCRA for assuring the safe operation of hazardous waste treatment facilities are required to "reasonably protect" both the environment and "human health." House Rep. No. 94-1491(I), 1976 U.S.C.C.A.N. 6238, 6265-66. Congress could have utilized the same protection of the "public health" language that it did with the other environmental whistleblower protection statutes, but chose instead to define the SWDA and RCRA's purposes in terms of protection of "human health." Given the fact that individuals employed in the hazardous waste treatment and disposal process are inevitably exposed to dangerous and toxic substances, it stands to reason that Congress sought to protect the health of workers engaged in the treatment and disposal process in addition to assuring protection of the environment and public health. There is only one conclusion that can be drawn in the instant case from Congress's expressed intent to protect "human health." To the extent that Tomlinson complained about the risks to his health and that of his co-workers due to their exposure to a toxic by-product of the Tooele Facility's RCRA-permitted processes, Tomlinson's complaints touched on concerns that are the focus of the SWDA/RCRA regardless of the fact that his concerns were confined to the workplace.

The remaining question is whether, at the time Tomlinson raised his concerns about SO₂ exposure, he believed that the SO₂ problems he had identified implicated concerns addressed by SWDA/RCRA or that his actions otherwise furthered the act's purposes and, if so, whether his belief was objectively reasonable. The ALJ found that Tomlinson "failed to produce any evidence that he subjectively believed the SO₂ issue was resulting in a violation of one of the Environmental Acts" and thus that "his activity was not protected." D. & O. at 20. The ALJ's conclusion results, of course, from having misconstrued the breadth of SWDA's concerns. SWDA's concerns, as previously discussed, include "assuring that hazardous waste management practices are conducted in a manner which protects *human health*," 42 U.S.C. § 6902(a)(4) (emphasis added).

¹⁵ See e.g., the Clean Air Act (CAA) at 42 U.S.C. §§ 7401, 7470 ("public health and welfare"); CERCLA at 42 U.S.C. § 9602 (environmental and "public health" concerns); the Federal Water Pollution Control Act (FWPCA) at 33 U.S.C. §§ 1251, 1281, 1312 (environmental and "public health" concerns); and the Safe Drinking Water Act (SDWA) at 42 U.S.C. § 300j et seq. (environmental concerns).

Given this statutory focus, it is clear from the concerns that Tomlinson voiced to his supervisor and EG&G's management that he actually believed that the SO₂ issues he raised implicated health and safety concerns the SWDA/RCRA addresses. It is equally clear, for the reasons stated by the majority, that his belief was objectively reasonable.

Thus, I join with the majority in concluding that Tomlinson engaged in whistleblower protected activity under the SWDA, and in ordering remand to the ALJ based upon this conclusion for further consideration of Tomlinson's claim. I am not, however, of the opinion that Tomlinson engaged in protected activity under either the Clean Air Act or TSCA.

In rejecting the ALJ's determination that Tomlinson did not engage in CAA whistleblower protected activity, the majority is of the opinion that Tomlinson's complaints about occupational SO₂ exposure touch on the purposes and concerns of the Clean Air Act, and that he had a reasonable belief that the problems he identified implicated the concerns the CAA is intended to address. I agree with my colleagues that the occupational SO₂ exposure issues Tomlinson raised touch on the purposes and concerns of the CAA. However, the evidence of record does not support a finding that, at the time he voiced his concerns about SO₂, Tomlinson subjectively believed that the SO₂ problems in the workplace implicated any purposes or concerns the CAA addresses. Consequently, I cannot agree that Tomlinson engaged in protected whistleblower activity under the Clean Air Act.

As the majority notes, the Tooele Facility operated under a CAA Title V permit governing the release of pollutants, including SO₂, into the ambient air. See 42 U.S.C. §§ 7661a, 7661b, 7661c. As part of its effort to address the concerns that Tomlinson and his co-workers raised about SO₂ exposure in the workplace, the Respondent secured an amendment to the CAA permit in order to install a ventilation system that removed SO₂ from the workplace. D. & O. at 22; TR at 1304-1305, 1324. The fact that the resulting emissions were insignificant and did not involve any concerns about public health or the environment, *id.*, is immaterial. The fact that Tomlinson's voiced concerns about occupational health and safety ultimately resulted in amendment of the CAA permit in order to vent SO₂ into the ambient air is sufficient to establish that the actions for which Tomlinson seeks whistleblower protection touch on the purposes and concerns the CAA addresses.

Regarding the second aspect of establishing protected activity under the Clean Air Act, the majority does not dispute the ALJ's finding that Tomlinson's concerns were exclusively focused on occupational health and safety considerations. Nor does anyone dispute the ALJ's finding that the record is devoid of any evidence demonstrating that Tomlinson believed that the SO₂ problems of concern in the workplace might result in SO₂ ambient air releases or in some other way implicate environmental or public health concerns addressed by the CAA. Instead, the majority relies upon a footnote passage from *Knox v. U.S. Dept. of Interior*, 434 F.3d 721 (4th Cir. 2006), for the proposition that Tomlinson need not prove a reasonable belief that SO₂ escaped into the ambient air; that

his occupational health concerns coupled with the physical effects that SO₂ was having on those working in the cool-down area that, in turn, resulted in modification of the Tooele Facility's CAA permit, was sufficient to establish a reasonable belief of a CAA violation.

The defect in the majority's reliance upon *Knox* is that the cited language merely expresses doubts about the correctness of the ARB's requirement that the complainant in that case have a reasonable belief of a release to the ambient air given the hazardous substance of concern in that case. The complainant had raised concerns about occupational exposures to asbestos. The ARB had held that, in order to establish CAA protected activity, the complainant had to have reasonably believed that the asbestos was being emitted into the ambient air. The problem with invoking the "release to the ambient air" requirement in that case was the fact that the Clean Air Act regulated asbestos, the hazardous substance of concern, in workplace and occupational settings. *Knox*, 434 F.3d at 724 n.3. Other hazardous substances might similarly be regulated under the CAA without any release into the ambient air. Thus, the court noted, "depending on the circumstances, an employee could reasonably believe his employer was violating the CAA, even if no release into the ambient air occurred." *Id.*¹⁶ The problem for Tomlinson in the instant case is that there are no similar provisions under the CAA for sulfur dioxide that would alleviate the requirement of a reasonable belief in release into the ambient air where the complainant has raised occupational health and safety concerns. Consequently, the Fourth Circuit's decision in *Knox* does not support the majority's contention that Tomlinson need not prove a reasonable belief that SO₂ escaped into the environment.

Nor does the majority's reliance upon the ARB's decision in *Williams v. Dallas Independent School District* support such a contention. The language that the majority cites from *Williams* addresses the question of whether the activity for which protection is sought "touches on" the purposes and concerns addressed by the environmental law (or laws) under which whistleblower protection is sought. Satisfactorily resolving that test in a complainant's favor does not address the question of whether, at the time the complainant raised his concern, he had a subjective belief that the environmental laws under which protection is sought were implicated and whether that belief was objectively reasonable. That question is an evidentiary matter. In the instant case, there simply is no evidence that at the time he voiced his concerns Tomlinson believed SO₂ was being released into the ambient air or that he believed that the CAA or its implementing regulations were otherwise being violated.¹⁷ For this reason, I cannot join with my

¹⁶ Notwithstanding the appellate court's reservations, the Fourth Circuit applied the ARB's "ambient air" in holding that *Knox* had engaged in CAA-protected activity under that standard because the evidence established that *Knox* did, in fact, reasonably believe that asbestos was escaping into the ambient air. 434 F.3d at 725.

¹⁷ On remand from *Knox*, the ARB revised its standard for protected activity under the CAA to take into consideration the concerns the Fourth Circuit had expressed, as follows:

colleagues in holding that Tomlinson's voiced concerns regarding sulfur dioxide are protected under the whistleblower provisions of the Clean Air Act.

In light of their ruling that the concerns Tomlinson raised about SO₂ workplace exposure constituted whistleblower protected activity under the SWDA and the CAA, the majority does not reach the question of whether Tomlinson's SO₂ concerns are also protected under the whistleblower protection provisions of the Toxic Substance Control Act. My colleagues nevertheless cite *Jones v. EG&G Def. Materials*, ARB No. 97-129, ALJ No. 1995-CAA-003 (ARB Sept. 29, 1998), to suggest that ARB precedent would support a ruling in Tomlinson's favor under TSCA. *Supra* at n.7. A careful reading of *Jones* does not, however, support the majority's contention.

"[T]he overall purpose of the TSCA was to set up a comprehensive testing scheme to ameliorate the dangers of toxic substances to human and environmental health." *Devers v. Kaiser-Hill Co.*, ARB No. 03-113, ALJ No. 2001-SWD-003, slip op. at 12 (ARB Mar. 31, 2005) (citing *Rollins Env'tl. Servs. (FS), Inc. v. Parish of St. James*, 775 F.2d 627, 632-33 (5th Cir. 1985)). To this end, "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." *Devers*, ARB No. 03-113, slip op. at 11-12 (citing 15 U.S.C.A. § 2603(a)). Accordingly, the Board has held that an employee's complaints about his occupational exposure to airborne chemicals released in the manufacture of petroleum and petrochemicals in conjunction with his demand for personal exposure data collected by his employer pursuant to Section 8(c) of TSCA, 15 U.S.C. § 2607(c), constituted whistleblower protected activity under TSCA. *Melendez v. Exxon Chems.*, ARB No. 96-051, ALJ No. 1993-ERA-006 (ARB July 14, 2000). On the other hand, complaints about personal exposure to toxic or hazardous substances that do not involve violations of TSCA's testing or regulatory scheme do not qualify for whistleblower protection under the act. *Devers*, ARB No. 03-113, slip op. at 12-13.

Jones is consistent with *Melendez* and *Devers*. In *Jones* the ARB recognized that the reporting of public health and safety concerns involving specific industries covered by TSCA may constitute protected activity under the act's whistleblower protection

Under the CAA, an employee engages in protected activity when he or she expresses a concern, and reasonably believes, that the employer has either violated Environmental Protection Agency (EPA) regulations implementing the CAA or has emitted or might emit, at a risk to the general public, potentially hazardous materials into the ambient air.

Knox v. U.S. Dept. of Interior, ARB No. 06-089, ALJ No. 2001-CAA-003, slip op. at 3-4, 5 (ARB Apr. 28, 2006). See also, *Knox v. U.S. Dept. of Interior*, ARB No. 07-105, ALJ No. 2001-CAA-003, slip op. at 3 (ARB Aug. 30, 2007).

provision. Certain facts were nevertheless critical to the ARB's affirmation of the ALJ's finding of TSCA-protected activity. To begin with, the facility at which the complainant worked and its operations were subject to TSCA. As the ARB noted, "The staff was working on obtaining authorization to operate [the facility] under the TSCA." *Jones*, ARB No. 97-129, slip op. at 2. Second, several of the chemical agents handled at the facility were covered under TSCA. *Id.* at 12. Finally, the concerns the complainant raised were not limited to occupational exposure. "When Jones expressed concern about military chemical agent being vented directly into the atmosphere, he clearly expressed concerns that touched on the public's environmental safety." *Id.*

The facts of the instant case are distinguishable from *Jones*, and lead to the opposite conclusion. There is no evidence of record that the Tooele Facility's operations are subject to TSCA. Secondly, the chemical agent of concern, SO₂, is not covered under TSCA.¹⁸ Finally, the concerns that Tomlinson raised were not about any venting or release into the environment, but confined to the workplace. For these reasons, I agree with the ALJ that the concerns Tomlinson raised about occupational SO₂ exposure were not protected under the TSCA.

Tomlinson raised three other bases in support of his contention that he engaged in whistleblower protected activity under the SWDA, TSCA, and the CAA: (1) his participation in the OSHA investigation; (2) the "perception" by EG&G that Tomlinson was a whistleblower; and (3) Tomlinson's alleged status as "about to testify" to OSHA and environmental enforcement officials. With regard to all three contentions, I am of the opinion that none constitute whistleblower protected activity under the three environmental Acts for the reasons articulated by the ALJ. See D. & O. at 25-28.

In conclusion, the majority notes that upon remand the ALJ must address the issue of causation, beginning with whether Tomlinson meets his burden of showing "by a preponderance of the evidence that the protected activity caused or was a motivating factor in the adverse action alleged in the complaint." 29 C.F.R. § 24.109(b)(2). My colleagues discuss evidence of record that leads them to believe that "the record seems clear on causation." Out of concern for prejudging the question of causation in the absence of necessary findings of fact that are exclusively within the jurisdictional province of the ALJ to make, I decline to join the majority in making these observations.

¹⁸ The ALJ identified sulfur dioxide as a chemical substance listed under TSCA as "highly hazardous." D. & O. at 20. However, the regulation cited by the ALJ in support of this conclusion, 29 C.F.R. § 1910.119 at App'x A, not only fails to identify sulfur dioxide as hazardous in its gaseous form (it is listed as hazardous in liquid form only), more importantly the authority for the cited regulatory provision is not TSCA but the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 653, 655, and 657.

For the foregoing reasons, I concur with the majority in holding that Tomlinson engaged in whistleblower protected activity under the Solid Waste Disposal Act, as amended by RCRA. I dissent with respect to all other aspects of the majority's decision.

E. Cooper Brown
Deputy Chief Administrative Appeals Judge