

RACHEL'S ENVIRONMENT & HEALTH WEEKLY #484

March 7, 1996

News and resources for environmental justice.

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CITIZENS COULD IMPROVE FEEBLE ENFORCEMENT AT U.S. ENVIRONMENTAL PROTECTION AGENCY

by William Sanjour [1]

So-called "conservatives" in this Congress have targeted the U.S. Environmental Protection Agency (EPA) for the largest percentage cuts of any federal agency (other than those they want to eliminate entirely). And even though they have backed down a bit in response to polls showing public support for environmental legislation, they still are urging huge cuts --up to 50% --in the one area they seem to hate the most, which is enforcement. Ironically, grass-roots environmentalists also have a low opinion of EPA's enforcement record but for different reasons. [2] When Congress savages a program that is already viewed as dismal, communities can look forward to little or no environmental enforcement unless something is done to replace or augment the agency's feeble enforcement program.

The best source of information on corporate lawbreaking is often the company's own employees. When it comes to reporting violations of environmental laws these so-called "whistleblowers" offer many advantages over hired enforcement officials:

- ** They know what's really going on and where the skeletons are buried.
- ** They are not easily snowed by management the way government officials often are.
- ** Unlike hired enforcement agents, they and their families live and work exposed to the pollution produced when environmental laws are violated.
- ** Workers can witness violations at night and on weekends when hired enforcement officials are not normally on the job.
- ** Whistleblowers cost the taxpayers nothing.

For these reasons, Congress recognized the unique position of workers to monitor and report violations of environmental law, noting in its conference report on the 1977 Clean Air Act [P.L. 95-95]: "The best source of information about what a company is actually doing or not doing is often its own employees...." [3]

Of course workers do not usually come forward when they witness corporate violations because they fear losing their jobs or being harassed and persecuted by management and even by their co-workers.

To stimulate whistleblowing by employees, Congress has included nearly identical whistleblower protection

provisions in almost all major environmental laws, including the Clean Air Act; the Safe Drinking Water Act; the Solid Waste Disposal Act; the Water Pollution Control Act; the Toxic Substances Control Act; and the Comprehensive Environmental Response, Compensation, and Liability Act (Superfund).

The whistleblower provisions in these six acts were crafted to encourage and protect both government AND PRIVATE INDUSTRY employees, who report violations of environmental, health and safety regulations. Congress also mandated that employees who blow the whistle should be protected from retaliation, harassment, intimidation, and other forms of discrimination by their employers. Harassed whistleblowers can (and do) file suits with the Department of Labor to end harassment, restore their jobs, and be reimbursed for legal fees and even collect damages.

The main reason more whistleblowers have not come forward is because the vast majority of people are unaware of the protection available to them. EPA has made no attempt to implement the whistleblower protection provisions of the statutes. As a result, corporate employees and corporate management are ignorant of these provisions, and so are EPA and state officials. Likewise, awareness of state whistleblower protection laws, which often have longer statutes of limitations and other benefits unavailable under federal law, is all but nonexistent.

EPA's responsibilities under these acts mirror those of other agencies which rely upon the free flow of information between employee-whistleblowers and a regulatory agency to protect the public interest. For example, the U.S. Nuclear Regulatory Commission (NRC) has nearly identical responsibilities for protecting employee-whistleblowers under the Energy Reorganization Act as does EPA under the Solid Waste Disposal Act. In July, 1993 the NRC established a review team to "reassess the NRC's program for protecting alleged [i.e., whistleblowers] against retaliation." The review team issued its comprehensive report in January, 1994. [4] The NRC has undertaken a broad program to implement Congressional mandates and requirements concerning the protection of whistleblowers. Furthermore, the NRC has undertaken various administrative actions to regulate the processing of whistleblowers' allegations.

By contrast, in the environmental area, there is the almost universal ignorance within the federal and state EPAs, the workforce and even among environmental organizations, labor unions and the legal community itself, regarding the whistleblower protection provisions available under the six acts. Even investigators in the EPA's Office of the Inspector General (which is charged with protecting whistleblowers), are unaware of these provisions. Employee-whistleblowers who call the state or federal EPA are often shunted around to different offices because nobody has been trained in what to do with them. They are usually not informed of their right of anonymity or their right to be protected from harassment or firing by their employer BECAUSE THE EPA PERSON THEY ARE TALKING TO IS UNAWARE OF THESE RIGHTS. Unlike nuclear facilities regulated by the NRC, there is no notice on employee bulletin boards of facilities regulated by EPA outlining whistleblower rights under the law and how to obtain them.

A review of the NRC report reveals the kinds of actions an administrative agency should take to implement employee-whistleblower procedures and regulations:

** Allegations of safety concerns by employee-whistleblowers are reviewed by technical staff and an "Allegation Review Board" pursuant to a Management Directive. EPA has no such procedure. EPA has not established any guidelines for regional offices or headquarters to use in reviewing allegations by employee-whistleblowers. Furthermore, there is no oversight or monitoring of state actions taken in response to employee concerns.

The NRC has published formal regulations on employee-whistleblower protection. [5] EPA has failed to formulate any such regulations.

The NRC regulations require that employers provide notice to their employees of "their right to raise concerns about potential violations or safety concerns," how to raise such a concern with the U.S. government and "how to file a complaint" with the U.S. Department of Labor if the employee believes that he or she was discriminated against for raising a safety concern. [6] EPA has taken no action to ensure that employees know how to file a safety complaint with EPA. Likewise, the agency has taken no steps to ensure that employees are aware of the law forbidding discrimination against them for raising a concern with EPA.

The NRC takes enforcement action against employers who attempt to interfere with the free flow of information to the government from employee-whistleblowers. [7] EPA has no regulations providing for such enforcement action.

The NRC has taken action against employment contracts or settlement agreements which prohibit the free flow of information between employees and the government. [8] EPA has not taken any action regarding the problems related to restrictive contracts in the area of environmental enforcement.

What Can Be Done?

The NRC did not take action out of a sense of duty or public spirit. It took action only after Congress investigated NRC's egregious handling of health and safety complaints by nuclear power plant workers. My observation is that EPA is equally shabby in its treatment of whistleblowers. But since environmental pollution does not arouse the same fear in the public as nuclear radiation does, Congress has never shown the same interest in forcing EPA to implement its whistleblower protection provisions as it did with the NRC. And this Congress will be even less interested than previous ones.

Therefore it is up to the environmental movement, particularly the people who have the most to lose from the lack of environmental enforcement, i.e. community grass-roots groups, to pressure EPA to implement these laws. Fortunately citizens are aided by the fact that this is a presidential election year and, at least until Novem-ber 5th, President Clinton and EPA Administrator Carol Browner are courting the environmental movement in order to contrast themselves with the anti-environmental Congress.

The EPA Administrator has the authority to require notices to be posted in all EPA-regulated workplaces:

- ** encouraging workers to report violations of environmental laws;
- ** informing them whom to notify;
- ** advising them of their right of anonymity and their right to be protected from retaliation; and
- ** advising them of where and when they should seek redress if they are retaliated against.

This and many of the other provisions implemented by the NRC could be implemented by EPA without any act of Congress and without any additional funding. Just as the NRC has learned, EPA can, for zero cost, get better enforcement than it is losing by Congressional budget cuts. But EPA is not going to do this voluntarily. Like the NRC, EPA would need to feel pressure from citizens before it would make its enforcement more efficient and effective by encouraging whistleblowers.

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234-4663], he co-authored ENVIRONMENTAL WHISTLEBLOWERS: AN ENDANGERED SPECIES (Annapolis, Md.: Environmental Research Foundation, February, 1994), providing suggestions for strengthening the nation's whistle blower protections. His other published work includes the 3-part series, ANNALS OF THE EPA (PART 1. WHO POLICES THE POLICEMAN?, July, 1991; PART 2. WHY EPA IS LIKE IT IS AND WHAT CAN BE DONE ABOUT IT, February 1992; and PART 3. AN ODOR LIKE A SKUNK DIPPED IN CREOSOTE AND BURNED: EPA'S REGULATION OF COMMERCIAL HAZARDOUS WASTE INCINERATORS, January, 1993), all published by Environmental Research Foundation, Annapolis, Md. 21403; phone: (410) 263-1584.

[2] Citizens know from experience that EPA's record of enforcement is poor and getting worse. See, for example, William Sanjour's publication, AN ODOR LIKE A SKUNK DIPPED IN CREOSOTE AND BURNED: EPA'S REGULATION OF COMMERCIAL HAZARDOUS WASTE INCINERATORS cited above in note 1. The newsletter INSIDE EPA November 3, 1995, pg. 16, reported that the number of enforcement actions taken by EPA in 1995 was 208, compared to 428 actions taken in 1994.

[3] UNITED STATES CODE U.S. CONGRESSIONAL AND ADMINISTRATION NEWS (St. Paul, Minn.: West Publishing, 1977) pg. 1404.

[4] James Lieberman and others, REPORT OF THE REVIEW TEAM FOR REASSESSMENT OF THE NRC'S PROGRAM FOR PROTECTING ALLEGERS AGAINST RETALIATION (Washington, D.C.: U.S. Nuclear Regulatory Commission, January 7, 1994).

[5] See, for example, the following sections of the CODE OF FEDERAL REGULATIONS (CFR): 10 CFR 30.7, 40.7, 50.7, 60.9, 61.9, 70.7 and 72.10.

[6] Lieberman, cited above in note 4, pg. I.C-10.

[7] Lieberman, cited above in note 4, pgs. I.C-10, I.C-11.)

[8] Lieberman, cited above in note 4, pg. App. B-5-6.)

Descriptor terms: epa; william sanjour; whistleblowing; whistleblowers; enforcement; violations; clean air act; nrc; clean water act; safe drinking water act; sdwa; toxic substances control act; tsca; cercla; superfund; lawsuits; dol; solid waste disposal act; swda;

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