March 24, 2008

Honorable Congressional Representatives and United States Senators
Washington, DC 20510

RE: **H.R. 985:** *Whistleblower Protection Enhancement Act of 2007*
S. 274: *Federal Employee Protection of Disclosures Act of 2007*

Dear Honorable Members of Congress:

The term "whistleblower" derives from the practice of English Bobbies who would blow their whistle when they noticed the commission of a crime. The blowing of the whistle would alert both law enforcement officers and the general public of danger.

For Federal employees, the Whistleblower Protection Act (WPA) at Title 5 of the United States Code (U.S.C.) § 1221(e), was established to strengthen and improve the protection rights of Federal employees who "blow the whistle" on wrong doing in government. The Act mandates that Federal employees should not suffer adverse consequences as a result of prohibited personnel practices, including protecting whistleblowers from retaliation.

Six environmental statutes contain whistleblower protections, including the Federal Water Pollution Control Act or the Clean Water Act (CWA or FWPCA), the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act or Solid Waste Disposal Act (RCRA or SWDA), the Toxic Substances Control Act (TSCA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA or Superfund), and the Clean Air Act (CAA). ***However, even though whistleblower protection provisions are part of these environmental statutes, EPA employees – and in particular, scientists and engineers - who "blow the whistle" may <u>still</u> be retaliated against for their whistleblower activities – and even be fired.***

On December 3, 1992 Administrative Law Judge David Clarke, Jr. found in the case of EPA's firing of Senior Toxicologist William Marcus that the reasons the Agency cited for the firing *"were a pretext and that his employment was terminated because he publicly questioned and opposed EPA's fluoride policy."* In fact, it was not the Agency's *policy* that Dr. Marcus opposed, but its willingness to accede to a change in the cancer classification of the chemical from *"clear evidence of carcinogenicity"* to *"equivocal*

evidence," the unjustified change being required to preserve the U.S. Public Health Service's national program of fluoridation of all drinking water supplies in the U.S.

Citing a September 23, 2005, unpublished opinion of the U.S. Attorney General's Office of Legal Counsel, the U.S. Department of Labor's Administrative Review Board ruled Federal employees may no longer pursue whistleblower claims under the Clean Water Act. The Attorney General's opinion stated that *"In sum, it is our conclusion that the Government's sovereign immunity has been waived by the whistleblower provisions of the SWDA, 42 U.S.C. § 6971, and the CAA, 42 U.S.C. § 7622, but not with respect to the whistleblower provision of the CWA, 33 U.S.C. § 1367."* (*emphasis added*). This "invocation" of the ancient doctrine of *sovereign immunity ("The King can do no wrong.")*, affects ***approximately 170,000 federal employees working within environmental agencies with the loss of their whistleblower rights.***

EPA itself has joined in the "sovereign immunity" claims proffered by the U.S. Attorney General's Office. In the case of Sharyn Erickson v. EPA Region 4, EPA's Office of General Counsel, the Counsel for EPA's Office of Inspector General and EPA's Region 4 Regional Counsel opined that *"For all the foregoing reasons, there has been no clear, unequivocal **[sic (waiver?)]** of Federal sovereign immunity from whistleblower liability under CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA, and Complainant's claims should be dismissed for lack of subject matter jurisdiction."* It appears that EPA Counsel is of the opinion that there are no whistleblower protections under the six major environmental laws.

Therefore, on behalf of the EPA employees we represent, we urge improvements to the WPA, as well as the "*Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002,"* ("No FEAR Act"), since:

(1) The *No Fear Act* (Public Law 107-174) came to fruition after Dr. Marsha Coleman-Adebayo, an EPA employee serving on the Gore-Mbeki Commission, reported that toxic waste generated by an American company was poisoning workers and their families at the Brits, South Africa, vanadium mines. Instead of being commended for her discovery, she was forced out of the commission. On August 18, 2000, a Federal jury found EPA guilty of violating the civil rights of Dr. Marsha Coleman-Adebayo on the basis of race, sex, color and a hostile work environment, under the Civil Rights Act of 1964. The No Fear Act was signed into law on May 15, 2002.

(2) The U.S. Supreme Court ruled that government employees do not have protection from retaliation by their employers under the First Amendment of the Constitution (Garcetti v. Ceballos, Case 04-473). The free speech protections of the First Amendment have long been used to shield whistleblowers from retaliation by whistleblower attorneys.

(3) The current Administration is of the opinion that it is immune from prosecution over whistleblower activities under the CWA due to *"sovereign immunity."*

(4) EPA's Office of General Counsel, the General Counsel for EPA's Office of Inspector General and EPA's Region 4 (Atlanta, GA) Counsel are apparently of

the opinion that there is no whistleblower protection under the six major environmental statutes (CAA, CERCLA, FWPCA, SDWA, SWDA, and TSCA).

In passing the 2002 Sarbanes-Oxley Act, the Senate Judiciary Committee found that whistleblower protections were dependent on the *"patchwork and vagaries*" of varying state statutes. *(Congressional Record p. S7412; S. Rep. No. 107-146, 107th Cong., 2d Session 19 (2002).)* It seems that EPA employees are now dependent upon the *"patchwork and vagaries"* of EPA legal opinions over whistleblower protections. At a time when the United States and indeed the global community are facing unique environmental, scientific and technical challenges, it is crucial that EPA staff – especially its engineers, scientists and researchers -- have protections for whistleblowing activities related to their unique and critical work.

In the next few weeks, House and Senate negotiators are working to reconcile the above-referenced bills to enhance whistleblower protections for Federal employees. Your leadership on this issue will help to ensure that the final version of the Whistleblower Protection Enhancement Act contains specific protections for Federal employees who blow the whistle on the suppression or distortion of Federal research, technical information or other such wrong-doing in government.

Therefore, we urge you to advocate for a final WPA bill that would provide protection from retaliation for exposing attempts to censor, distort, or suppress any scientific or technical research or wrong-doing by EPA. EPA employees must be able to protect human health and the environment without interference, and should be able to speak out freely about distorted or suppressed scientific findings or decisions.

Sincerely,

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