UNITED STATES DEPARTMENT OF LABOR
ADMINISTRATIVE REVIEW BOARD

In the Matter of:		
	ARB Case No.s:	03-002
SHARYN ERICKSON,		03-003
		03-004
Complainant,		
	ALJ Case No.s:	1999-CAA-2
v.		2001-CAA-8
		2001-CAA-13
U.S. ENVIRONMENTAL PROTECTION		2002-CAA-3
AGENCY, REGION 4,		2002-CAA-18
Respondent.		

Brief of *Amici Curiae* Public Employees for Environmental Responsibility (PEER) and the Government Accountability Project (GAP) in Support of Complainant Sharyn Erickson

Introduction

PEER and GAP are private, non-profit organizations that advise, support, and represent conscientious public employees in their efforts to protect the environment and insure that the important mandates of the federal environmental statutes are carried out. PEER and GAP have submitted a motion seeking leave to appear as "friends of the court" (*amici curiae*) in an effort to fully inform the Administrative Review Board (ARB or Board) regarding the application of sovereign immunity to federal agencies confronted with complaints that they have violated the employee protection provisions of the

environmental statutes.[1] PEER and GAP respectfully request that the Board grant their Motion to participate as *amici curiae* and that the Board reject the notion that sovereign immunity shields federal agencies from compliance with the employee protection provisions of the federal environmental statutes.

Prior Proceedings

PEER and GAP will not endeavor to recite the complete history of the complaints referenced in the caption of this matter. However, for continuity, it is important to understand an overview of the prior proceedings.

Sharyn Erickson was a contract officer for the U.S. Environmental Protection Agency (EPA). She is based in EPA's Region IV office located in Atlanta, Georgia. Ms. Erickson engaged in a variety of protected activities, which were summarized by the Administrative Law Judge (ALJ) as follows:

> 1) In June 1993, as a contracting officer, Complainant voiced concerns about Superfund environmental regulations, analytical procedures, policies, and practices that wasted funds, created impossibility of performance issues on a Superfund cleanup site;
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> 2) A June 18, 1993 letter to her supervisor, copied to the union president, defending Complainant's actions in reforming a Superfund contract and alleging violations of federal law;
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> 3) Her interference in February and March of 1995, in the bidding process for the North Cavalcade Superfund project that contained faulty contract

[1] See, *e.g.*, Water Pollution Control Act (WPCA also referred to as the Clean Water Act (CWA)), 33 U.S.C. § 1367; Safe Drinking Water Act (SDWA), 42 U.S.C. § 42 U.S.C. § 300j-9(i); Solid Waste Disposal Act (SWDA also referred to as the Resource, Conservation & Recovery Act (RCRA)), 42 U.S.C. § 6971; Clean Air Act (CAA), 42 U.S.C. § 7622; Comprehensive Response Compensation & Liability Act (CERCLA or Superfund), 42 U.S.C. § 9610.

performance provisions which would result in impossibility of performance issues;

4) Complaining to various members of Congress in May 1995 concerning an EPA OIG investigation of her because of the affirmative action she took in interfering in the North Cavalcade project to avoid impossibility of performance issues before the contract was open for bidding;

5) Filing whistleblowing complaints concerning alleged retaliation and hostile work environment for engaging in what Complainant reasonably believed were protected activities beginning on April 8, 1998;

6) Sharing information with the press about retaliation within the EPA for whistleblowing activities including: a June 10, 1998 letter to the Washington Times alleging EPA retaliation against whistleblowers; participating in a January 29, 1999 General Accounting Office report on the whistleblower on the allegations raised in the Washington times; contributing to a press information packet put out by the National Whistleblower Center detailing her abuse; detailing EPA waste and abuse in the publications other publications such as the Investors Business Daily and the Environmental Insider; and

7) Sending information to Congress regarding possible FOIA violations by Respondent EPA concerning the destruction of e-mail back-up tapes in February 2000.

See, *Erickson v. EPA*, 1999-CAA-2, 2001-CAA-8, 13, 2002-CAA-3, 18 (ALJ, *Recommended Decision & Order*, Sept. 24, 2002) at 59 – 60.[2] It is this decision in *Erickson I* that is presently before the Board for review.

As a result of engaging in the described protected activities, Ms. Erickson was subjected to various forms of retaliation and abuse. The ALJ described the retaliation faced by Ms. Erickson as follows:

1) reassignment of the Southeastern and Bechtel contracts, demoting Complainant to a contract specialist, detailing her out of the Procurement Section and into the Grants Section, and denying her a promotion through

[2] Hereafter this decision will be referred to as *Erickson I*.

> a desk audit; 2) canceling Complainant's contract warrant, transferring Complainant out of her career field and into the Information Management Branch, opening an OIG investigation, issuing a "gag order," and stealing her property; 3) Respondents' refusal to disclose the results of the OIG investigation to Complainant so that a final determination of her actions hung over her head like the "sword of Damocles;" 4) putting Complainant on "display" in the library, shunning, and placing Complainant in a dead-end job that she is not qualified to perform; 5) issuing a written warning; 6) denial of promotion through nonselection; 7) subjecting Complainant to a hostile work environment; and 8) blacklisting and stigmatization of Complainant during discovery in this case and making a "bad faith" settlement offer.

Erickson I at 61 – 62. As a result of the retaliation she experienced, Ms. Erickson brought claims under the employee protection provisions of the "Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9(i); Water Pollution Control Act (WPCA) 33 U.S.C. § 1367; Solid Waste Disposal Act (SWDA) 42 U.S.C. § 6971; Clean Air Act (CAA) 42 U.S.C. § 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9610." *Erickson I* at 3.

After a lengthy trial and post-trial proceedings, the ALJ concluded that Ms. Erickson was entitled to relief. The ALJ awarded: (1) reinstatement to a position as GS-13 contract officer or front pay; (2) back pay with interest; (3) $50,000 in compensatory damages; (4) posting of notices regarding the decision; (5) $225,000 in punitive damages; and (6) attorneys' fees and costs. *Erickson I* at 91 – 98.

Despite the outrageous conduct documented in *Erickson I* and the relief awarded Ms. Erickson, EPA continued to retaliate. EPA's abusive conduct

triggered a second waive of complaints from Ms. Erickson.[3] The ALJ described *Erickson II* as follows:

> This proceeding (*Erickson II*) involves seven (7) complaints filed on October 9, 2002; March 11 and 24, 2003; April 28, 2003; June 2, 2003; September 3, 2003; and October 1, 2003 by Complainant against Respondent pursuant to employee protection provisions of the Safe Drinking Water Act (SDWA) 42 U.S.C. § 300j-9(i);Water Pollution Control Act (WPCA) 33 U.S.C. § 1367; Solid Waste Disposal Act (SWDA) 42 U.S.C. § 6971; Clean Air Act (CAA) 42 U.S.C. § 7622; and the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 U.S.C. § 9610.

Erickson v. EPA, 2003-CAA-11, 19, 2004-CAA-1 (ALJ, *Recommended Decision & Order*, Nov. 13, 2003) (*Erickson II*).

In *Erickson II*, the ALJ again found that Ms. Erickson had been subjected to unlawful retaliation and awarded additional relief. Responding to the EPA's recalcitrance and continuing unlawful behavior, the ALJ awarded the following relief: (1) reinstatement with step increases and back pay with interest from March 10, 1995 through the present; (2) $50,000 in compensatory damages; (3) $225,000 in punitive damages; (4) posting the decision; (5) training for EPA managers on compliance with the employee protection provisions of the federal environmental statutes; and (6) attorneys' fees and costs.

EPA's unlawful conduct is now well documented through two trials with relief being awarded to Ms. Erickson in both cases. Such outrageous conduct must not be sanctioned by failures to provide timely relief.

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[3] Although the second *Erickson* litigation is not addressed in the above-captioned matter, it is clear that a decision on the issue of sovereign immunity would impact that litigation as well.

The *Powers* Decision

On August 16, 2005, the Board reissued its decision in *Powers v. Tennessee Dep't Env't*, ARB No.s 03-061, 125, ALJ No.s 2003-CAA-8, 16 (ARB June 30, 2005, amended and reissued Aug. 16, 2005). On August 17, 2005, the Board issued an order, *sua sponte*, in the above-captioned matter stating in relevant part:

> In light of our decision in the *Powers* case we afford the parties the opportunity to brief the issue whether sovereign immunity bars any or all of Erickson's environmental whistleblower complaints against EPA and the EPA Inspector General.

Erickson v. EPA, ARB Case No.s 03-002, 003,004 (ARB *Supplemental Briefing Order and Notice of Opportunity to File Amicus Curiae Brief* Aug. 17, 2005) at 2.

The short answer to the question raised by the Board is that the *Powers* case offers no insight into the application of the sovereign immunity doctrine to federal agencies. The focus of the Board's analysis in *Powers* concerned application of the Eleventh Amendment's restriction on lawsuits brought by individuals against states. As the *Erickson* case concerns the question of an individual's statutory right to bring a lawsuit against a federal agency, there is little Powers teaches that applies to the instant case.

Powers was an environmental compliance inspector employed by the Tennessee Department of Environment and Conservation (TDEC). Powers alleged that TDEC retaliated against her because she engaged in activities protected by several of the federal environmental statutes. Powers also filed a second complaint alleging that she was being blacklisted.

OSHA's investigation of Powers' complaints resulted in determinations that the complaints lacked merit. Powers requested a hearing, and the respondents moved to dismiss based upon the Eleventh Amendment's restrictions on the rights of individuals to bring lawsuits against states and their agencies.

Upon review, the Board determined that Congress had not unequivocally abrogated the state's sovereign immunity in the employee protection provisions. Additionally, the Board found that legislative history could not cure a failure to explicitly abrogate Eleventh Amendment immunity and that the state had not waived its immunity. *Powers* at 4 – 9.

As noted previously, *Powers* does not apply to the *Erickson* litigation. *Powers* deals solely with state sovereign immunity questions, while *Erickson* deals with the federal government's sovereign immunity. These sovereign immunity concepts have similar analytical threads, but they are quite distinct. Therefore, the Board should disregard any application of *Powers* to Ms. Erickson's case.

Congress has Explicitly Waived the Sovereign Immunity of the Federal Government in the Applicable Federal Environmental Statutes

Of course, the Board/Secretary has specifically addressed the issue of the federal government's sovereign immunity defense under the employee protection provisions on a number of occasions. The decisions have uniformly found that the federal government has waived sovereign immunity. See, *e.g.*,

Marcus v. EPA, 92-TSC-5 (Sec'y Feb. 7, 1994), slip op. at 2-3; *Pogue v. U.S. Dep't of Navy*, 87-ERA-21 (Sec'y May 10, 1990), rev'd on other grounds, *Pogue v. Dep't of Labor*, 940 F.2d 1287 (9th Cir. 1990); *Jenkins v. U.S. EPA*, 92-CAA-6 (Sec'y May 18, 1994) (finding waiver in CERCLA, SDWA, FWPCA, CAA, and SWDA); *Berkman v. U.S. Coast Guard Academy*, ARB No. 98-056, ALJ No. 1997-CAA-2 and 9 (ARB Feb. 29, 2000) at 11 – 14.

In *Berkman*, the Board reviewed many of the statutes at issue in the above-captioned case. The Board determined that the federal government had waived sovereign immunity with respect to the employee protection provisions of CERCLA, FWPCA, SWDA, and CAA. Consistent with other decisions, the Board also found that the federal government had not waived its sovereign immunity under the Toxic Substances Control Act (TSCA).[4]

There is no reason for the Board to now depart from these well established precedents. Moreover, no recent change in statutory or case law would suggest a different result.

To the contrary, Congressional review of the environmental statutes over the last twenty years indicates that Congress has seen fit to leave the interpretations of the Board / Secretary in place, or has sought to clarify that the federal government has waived sovereign immunity. For example, the 1992 amendment of SWDA/RCRA by adding the Federal Facilities Compliance Act makes clear that Congress expects federal agencies to fully comply with all

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[4] See, 15 U.S.C. § 2622.

aspects of state and federal environmental laws. See, 42 U.S.C. § 6961. Congress made no effort to exclude compliance with the employee protection provisions in the language of this important amendment.

More recently, Congress passed the Notification and Federal Employee Antidiscrimination and Retaliation Act of 2002 (No FEAR Act).[5] The purpose of the No FEAR Act, in relevant part, is "[t]o require that Federal agencies be accountable for violations of antidiscrimination and whistleblower protection laws."

Congressional findings supporting the No FEAR Act included:

> . . . (3) in August 2000, a jury found that the Environmental Protection Agency had discriminated against a senior social scientist, and awarded that scientist $ 600,000;
>
> (4) in October 2000, an Occupational Safety and Health Administration investigation found that the Environmental Protection Agency had retaliated against a senior scientist for disagreeing with that agency on a matter of science and for helping Congress to carry out its oversight responsibilities . . .
>
> .
>
> (6) notifying Federal employees of their rights under discrimination and whistleblower laws should increase Federal agency compliance with the law;
>
> (7) requiring annual reports to Congress on the number and severity of discrimination and whistleblower cases brought against each Federal agency should enable Congress to improve its oversight over compliance by agencies with the law; and
>
> (8) requiring Federal agencies to pay for any discrimination or whistleblower judgment, award, or settlement should improve agency accountability with respect to discrimination and whistleblower laws.[6]

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[5] P.L. 107-174.

[6] P.L. 107-174, Section 101.

Similarly, the Sense of Congress regarding the implementation of the requirements of the No FEAR Act was reflected, in part, as follows:

> (1) Federal agencies should not retaliate for court judgments or settlements relating to discrimination and whistleblower laws by targeting the claimant or other employees with reductions in compensation, benefits, or workforce to pay for such judgments or settlements;
>
> (2) the mission of the Federal agency and the employment security of employees who are blameless in a whistleblower incident should not be compromised . . . .[7]

Obviously, in passing the No FEAR Act Congress reviewed whistleblower and other protections afforded federal employees and expected that those protections would remain in place. Further, Congress sought to establish reporting and financial accountability requirements that would insure that such protections would have an appropriate deterrent effect.

Congress expressed no concern that the federal government's sovereign immunity had been waived in the environmental statutes or other laws with antidiscrimination provisions. Congressional review for the No FEAR Act combined with the general reviews that the environmental statutes have undergone over the last two decades establishes that there is no desire to change the current statutory structure or interpretations concerning employee protection. The Board should not seek to change what the Congress has seen fit endorse and leave in place.

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[7] P.L. 107-174, Section 102.

Conclusion

Ms. Erickson has been plagued for over a decade with abuse and retaliation from EPA officials. She is entitled to the relief awarded by the ALJ and that relief should not be unduly delayed by any action of the Board.

Moreover, the notion that EPA is immune from its repeated acts of retaliation is unsupported by statute, case law, or policy considerations. The Board should reject any argument in support of a sovereign immunity defense and rule that the federal government has waived immunity for each of the environmental statutes at issue.

Respectfully submitted,

Richard E. Condit
General Counsel
Public Employee for Environmental Responsibility
2001 S Street, NW, Suite 570
Washington, D.C. 20009
Tel. 202-265-7337

Counsel for PEER and GAP

CERTIFICATE OF SERVICE

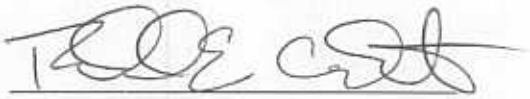
I certify that the foregoing brief and motion for leave to participate as *amici curiae* were served on the parties identified below via First Class Mail, Postage Prepaid on this 23rd day of September 2005.

Sharyn Erickson
1330 Wheatfield Drive
Lawrenceville, Georgia 30043

Karol Smith, Esq.
U.S. EPA
EAD Office of Support, 13th Floor
61 Forsyth Street
Atlanta, Georgia 30303

Erie W. Hanger, Esq.
U.S. EPA
Office of Counsel (MC 2411T)
1200 Pennsylvania Ave., NW
Washington, D.C. 20460

Steven J. Mandel, Esq.
Associate Solicitor
Division of Fair Labor Standards
U.S. Department of Labor
200 Constitution Ave., NW
Room N-2716, FPB
Washington, D.C. 20210



Richard E. Condit