

MEMO

TO: Andrew Hon, Petition Manager, U.S. Nuclear Regulatory Commission

FROM: Dave Lochbaum, Advisor to 2.206 Petitioners

DATE: June 3, 2020



SUBJECT: Review of TVA Employee Concerns Program 2.206 Petition

At the request of Billie Garde, I readily performed a pro bono review of the subject 2.206 petition dated June 4, 2019, and applicable records with regard to the petition's three requested actions. As detailed in the enclosure, I found ample evidence strongly suggesting the underlying concerns associated with these three requested actions have not yet been resolved. I also identified reasons that strongly suggest the requested actions, if completed, could satisfactorily contribute to the resolution of the concerns.

I also identified two flaws in the process employed by the NRC en route to its plan not to accept the petition into the agency's recently revised Management Directive 8.11 (MD 8.11). First, MD 8.11 does indeed enable the NRC staff to find a petition unacceptable when it addresses matters previously reviewed and resolved by the agency. In invoking this criterion, the NRC staff cited NRC reports issued long after the 3-week deadline explicitly specified in MD 8.11 for accepting or rejecting incoming petitions. In addition, MD 8.11 permits the NRC staff to find a petition unacceptable when prior NRC review has already resolved issues. In other words, a 2.206 petition cannot be used to appeal or re-litigate an issue. But as detailed in the enclosure, the NRC reviews to date have not resolved the issues raised in the petition, as unequivocally stated in NRC records.

Figures 1 and 2 provide histograms of the number of allegations and the number of allegations involving discrimination received by the NRC over the past 30 years from all U.S. nuclear plants and from the TVA plants. Over each year in the past decade-plus and nearly two-thirds of this three-decade period, the NRC received more allegations involving discrimination from TVA's plants than from non-TVA plants. TVA has commanding leads in categories where, like golf, low score wins.

I recommend that the 2.206 petition be accepted by the NRC into its MD 8.11 process. The subsequent Director's Decision could communicate how the petition's requested actions were taken and how they resolved the issues. Alternatively, that Director's Decision could communicate how different steps were taken that resolved the issues.

cc: Billie Garde

Petition Request #1¹

IMMEDIATELY ISSUE AN ANNOUNCEMENT TO ALL TVA EMPLOYEES, REITERATING THEIR RIGHTS AND RESPONSIBILITIES TO RAISE ANY SAFETY-RELATED CONCERNS, THAT DOING SO IS A LEGALLY-PROTECTED ACTIVITY, AND PROMINENTLY PROVIDE THE NRC'S TELEPHONE NUMBER AND EMAIL ADDRESS TO ALL EMPLOYEES. IF THERE IS A SIGNIFICANT SAFETY-RELATED CONCERN OR COMPLAINT OF RETALIATION, EMPLOYEES MUST KNOW THAT THERE IS A VIABLE ALTERNATIVE AVENUE TO RAISE IT, INSTEAD OF REMAINING SILENT IN THE FACE OF THIS DEBACLE.

On March 2, 2020, the NRC issued a report by its Office of Investigations identifying multiple acts of discrimination by TVA management against workers engaged in protected activities:²

Contrary to the above, on **March 9, 2018**, Tennessee Valley Authority (TVA) **corporate management discriminated against a former Sequoyah employee** for engaging in a protected activity. Specifically, the former Sequoyah employee engaged in a protected activity by raising concerns regarding a chilled work environment, filing complaints with the Employee Concerns Program, and by raising concerns regarding the response to two non-cited violations. After becoming aware of this protected activity, a corporate manager filed a formal complaint against the former employee. The formal complaint initiated **an investigation by the TVA Office of the General Counsel that resulted in the former employee being placed on paid administrative leave for nearly three months until, at which point, the former employee was constructively discharged**. This action was based, at least in part, on the former employee engaging in a protected activity. [boldfacing added]

Contrary to the above, on **March 9, 2018**, TVA **corporate management discriminated against a former corporate employee** for engaging in a protected activity. Specifically, the former corporate employee engaged in a protected activity by raising concerns of a chilled work environment. After becoming aware of this protected activity, a corporate manager filed a formal complaint against the former employee. The formal complaint initiated **an investigation by the TVA Office of the General Counsel that resulted in the former employee being placed on paid administrative leave followed by termination**. This action was based, at least in part, on the former employee engaging in a protected activity. [boldfacing added]

Contrary to the above, on **May 25, 2018**, TVA **corporate management discriminated against a former Sequoyah employee** for engaging in a protected activity. Specifically, the former Sequoyah employee engaged in a protected activity by filing complaints with the Employee Concerns Program. After becoming aware of this protected activity, a **senior manager recommended that the former employee be placed on paid administrative leave for nearly three months until, at which point, the former employee was constructively discharged**. This action was based, at least in part, on the former employee engaging in a protected activity. [boldfacing added]

Contrary to the above, between **October 15, 2018, and January 14, 2019**, TVA **corporate management discriminated against a former corporate employee** for engaging in protected

¹ Garde, Billie Pirner, Clifford & Garde, LLP, to Doane, Margaret, Executive Director for Operations, U.S. Nuclear Regulatory Commission, “10 C.F.R. 2.206 Petition Regarding Tennessee Valley Authority Changes to Employee Concerns Program Structure.” June 4, 2019. (ML19164A191)

² Wilson, George A., Director, Office of Enforcement, U.S. Nuclear Regulatory Commission, to Barstow, Jim, Vice President, Nuclear Regulatory Affairs & Support Services, Tennessee Valley Authority, “Apparent Violations of Employee Protection Requirements (Office of Investigations Report Nos. 2-2018-033 and 2-2019-015),” March 2, 2020. (ML20058G833)

activities. Specifically, the former corporate employee engaged in a protected activity by **raising concerns of a chilled work environment to a senior manager and a TVA attorney during a TVA Office of the General Counsel investigation. After becoming aware of this protected activity, the senior manager placed the former employee on paid administrative leave and played a significant role in terminating the former employee.** These actions were based, at least in part, on the former employee engaging in a protected activity. [boldfacing added]

POINTS:

1. All the apparent violations documented in this NRC report occurred after the March 2016 Chilled Work Environment Letter to Watts Bar and after the July 27, 2017, Confirmatory Order (ML17208A647) issued to TVA for its Browns Ferry, Sequoyah and Watts Bar nuclear plants and before TVA restructured the ECPs in May 2019. Thus, with TVA clearly aware that its Safety Conscious Work Environments were being closely watched by the NRC and presumably on its best behavior, multiple workers were terminated after raising concerns while engaged in protected activities. While at least some of these workers raised concerns to the “old” ECP, the NRC report identified TVA management and TVA General Counsel as key players in the apparent violations with no blame or fault assigned to the ECP. Why was TVA senior management and TVA General Counsel restructured rather than making the ECPs the scapegoats?
2. The NRC report with its apparent violations is publicly available and therefore presumably well known to the TVA corporate, Browns Ferry, Sequoyah, and Watts Bar work forces. TVA nuclear workers are “told” they are free to raise safety concerns without fear of retaliation and discrimination, yet they “see” colleagues —now former colleagues — terminated after raising safety concerns. Are TVA nuclear workers to believe their ears, or their eyes?
3. In light of recurring SCWE problems at TVA, its nuclear workers need to see their freedom to raise safety concerns is really and truly protected and not just an empty promise. Petition Request #1 will not by itself convince workers of their regulatory rights, but it is a much needed step in rebuilding trust.
4. The NRC OI report chronicling improper actions by TVA management after the CWEL and Confirmatory Order were issued was released after the petition was submitted but more than a month before the NRC notified the petitioners’ attorney of its decision to reject the petition. Curiously, that notification did not cite this OI report or attempt to reconcile its factual findings with the notion that sufficient improvements had been achieved in SCWEs at TVA’s nuclear facilities so as to preclude the need for Petition Request #1.

Petition Request #2³

IMMEDIATELY REQUIRE TVA TO STOP ITS ECP PROGRAM CONVERSION; UNTIL IT CAN DEMONSTRATE TO THE NRC A MANAGEMENT OF CHANGE PROCESS THAT ENSURES ANY PROGRAM CHANGE MAINTAINS THE NECESSARY INDEPENDENCE OF ANY PROCESS TO HONESTLY, WITHOUT INTERFERENCE BY TVA MANAGEMENT, REPORT THE TRUTH OF ANY FINDINGS.

TVA informed the NRC in writing on October 3, 2019, that it was ready for the NRC to evaluate its SCWE fixes, including:

TVA has recently restructured its Employee Concerns Program in order to improve the effectiveness of alternative processes for raising concerns. **Our initial assessment is that there has been no impact from this change on employee's willingness to raise concerns or to use the Employee Concerns Program as an alternate process for raising concerns.** [boldfacing added]⁴

An NRC inspection report issued on July 23, 2019, mentioned that a sizeable fraction of the TVA work forces felt the new ECP would not provide independence from management:

Prior to the inspection, the licensee made fleet-wide communications regarding proposed changes to the ECP. When queried about the proposed ECP changes during the interviews, **31% of those interviewees were concerned that the proposed structure of the ECP would not provide independence from management**, however, most would still be willing to use the ECP. [boldfacing added]⁵

At the request of TVA, the Oak Ridge Associated Universities (ORAU) assessed the SCWE at TVA's corporate and plant sites. ORAU's report was issued in November 2019 and covered ECP issues:⁶

Participants also indicated they were more hesitant to raise concerns because of the recent changes to ECP. At the TVA Corporate Offices, some employees believed that those on the ECP team were treated unfairly during the reorganization, resulting in feeling they might be treated similarly if they raise a concern. A few **participants also felt that the changes to ECP removed their avenue to report safety concerns without repercussions.** [boldfacing added]

The ECP changes exemplified the poor communication around Corporate decisions for some participants, with some saying that **the changes are an attempt by TVA Corporate to strong-arm would-be whistleblowers at the sites, some saying that the changes were themselves a form of retaliation for former members of the ECP raising employees' concerns which Corporate managers did not want to accept.** [boldfacing added]

³ Garde, Billie Pirner, Clifford & Garde, LLP, to Doane, Margaret, Executive Director for Operations, U.S. Nuclear Regulatory Commission, "10 C.F.R. 2.206 Petition Regarding Tennessee Valley Authority Changes to Employee Concerns Program Structure." June 4, 2019. (ML19164A191)

⁴ Williams IV, Anthony L., Site Vice President, Watts Bar Nuclear Plant, Tennessee Valley Authority, to U.S. Nuclear Regulatory Commission, "Notification of Readiness for NRC Independent Review to Confirm Chilling Effect Letter and Cross-Cutting Issue Closure Criteria Have Been Met," October 3, 2019. (ML19276C380)

⁵ López-Santiago, Omar R., Chief, Reactor Projects Branch 5, Division of Reactor Projects, U.S. Nuclear Regulatory Commission Region II, to Shea, Joseph W., Vice President, Nuclear Regulatory Affairs and Support Services, Tennessee Valley Authority, "Sequoyah Nuclear Plant – Biennial Problem Identification and Resolution Inspection Report 05000327/2019011 and 05000328/2019011," July 23, 2019. (ML19204A190)

⁶ Oak Ridge Associated Universities, "TVA Nuclear Fleet Nuclear Safety Culture Evaluation," November 2019.

TVA made no effort to mask the fact that issues raised by workers to ECP would be routed back to management. In their presentation to the NRC during an August 27, 2019, public meeting, TVA's eighth slide explained how the restructured ECP would report concerns back to management:⁷

Employee Concerns Program Restructuring

- RP Root Cause Analysis (RCA), as well as several other sources, identified issues with ECP effectiveness
- Restructured program is more proactive, with ECP representatives spending a majority of their time out in the field interacting with employees
- For concerns other than HIRD or potential CWE, ECP will engage management to facilitate resolutions of concerns
- Concerns involving HIRD or potential CWE will be investigated by an independent investigator
- Restructured program requires higher level of nuclear supervisory experience and skillsets of ECP personnel
- New Watts Bar ECP representative is in place

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The NRC's Office of Investigations (OI) completed its investigation into a November 2015 reactor startup of Watts Bar Unit 1. The OI investigation was completed on May 17, 2019, but was not made publicly available until March 9, 2020.⁸ The OI report made numerous references to three internal TVA investigations of this November 2015 event: one by the Employee Concerns Program (ECP), another by the TVA Office of the Inspector General (OIG), and the third by a Senior Leadership Team (SRT). The OI report stated these conclusions about the three internal TVA investigations:

On February 24, 2016, the TVA OIG briefed the NRC on its investigation and its conclusion of a widespread chilled work environment at WBN.

In early March, the VP of Nuclear Licensing emailed preliminary conclusions of the SRT to the WBN Senior Site VP. On March 9, 2016, the WBN Senior Site VP emailed an SRT team member, stating "**I have read the ECP report. I have read the [VP of Nuclear Licensing] conclusions. They are miles apart.** A logical person will have trouble getting to our proposed end." [boldfacing added]

Revision 21 of the SRT acknowledged that the SRT Report and the ECP Report had not reached the same conclusions regarding a hostile work environment. Subsequent versions of the SRT

⁷ López-Santiago, Omar R., Chief, Reactor Projects Branch 5, Division of Reactor Projects, U.S. Nuclear Regulatory Commission Region II, to Polickoski, James T., Director, Nuclear Regulatory Affairs, Tennessee Valley Authority, "Public Meeting Summary – Tennessee Valley Authority Safety Conscious Work Environment Update at Watts Bar, Docket Nos. 50-390 and 50-391." September 12, 2019. (ML19255H552)

⁸ O'Brien, Kenneth G., Director, Special Project Team, Office of Enforcement, U.S. Nuclear Regulatory Commission, Barstow, Jim, Vice President, Nuclear Regulatory Affairs & Support Services, Tennessee Valley Authority, "Watts Bar Nuclear Plant – Office of Investigations Report No. 2-2016-042 and Apparent Violations." March 9, 2020. (ML20065M374)

Report, including the final version submitted to the NRC, were significantly revised to align the report more closely with the ECP Report and the NRC's conclusions.

The SRT Report was incomplete and inaccurate, however, in that it failed to acknowledge that the team was formed to influence the NRC not to take additional regulatory action after TVA management learned, in late February 2016, that the NRC had been briefed about the conclusions of a TVA Office of the Inspector General (OIG) investigation into a chilled work environment at WBN and had entered the concerns identified by the TVA OIG into the NRC Allegations Program.

Since the OI investigation of this significant event was not released until after the inspection reports cited by the NRC as the basis for rejecting the 2.206 petition and this NRC OI report was not mentioned by the NRC staff in its petition rejection, it is not clear that these pertinent factors were considered the decision-making.

The NRC's Allegation Program Annual Trends Report for Calendar Year 2019 addressed SCWE issues at TVA's Browns Ferry and Watts Bar sites:⁹

As Figure 5 shows, the number of allegations the NRC received from onsite sources about Watts Bar Units 1 and 2 in 2019 decreased after significantly increasing in 2018. There were, however, a similar number of concerns raised. **The rate of receipt was high in the first two quarters of the year, corresponding to the licensee's decision to restructure its Employee Concerns Program (ECP), including replacing the ECP personnel at each site in the fleet and the program manager at TVA headquarters.** Allegations were received equally from licensee employees and contractors, with many of the concerns in the chilling effect and discrimination areas, and a number of those involving the nuclear oversight organization. [boldfacing added]

As previously noted, TVA reorganized its ECP in 2019, resulting in the replacement of the ECP personnel. For a few months, an interim staff was put in place, until the last quarter when the new organization launched with new ECP personnel. Watts Bar's ECP received 17 concerns for evaluation in 2019. The total number of contacts to the ECP was much greater; however, it was still fewer than contacts made in 2018. These continue to be low compared to other sites and to the number of allegations received by the NRC. **It is too early to determine whether the new ECP program will benefit TVA's SCWE.** [boldfacing added]

A review of the July 2019 nuclear safety culture (NSC) assessments completed for Watts Bar and TVA corporate headquarters shows that worker perceptions of TVA corporate's NSC have declined, while those of Watts Bar have improved. **The assessment notes that written comments received reflect not that workers hesitate to raise concerns because they fear retaliation, but, rather, they hesitate because they do not see what, if any, actions are taken to address their concerns once raised.** [boldfacing added]

As Figure 6 shows, the number of allegations the NRC received about the Browns Ferry site from onsite sources in 2019 increased significantly after a 2-year decline. **The rate of receipt spiked in the second quarter of the year, corresponding to the licensee's decision to restructure its ECP, including replacing the ECP personnel at each site in the fleet and the program manager at TVA headquarters.** Allegations were received primarily from licensee employees, but approximately 30 percent were received anonymously, most of those in the third quarter. As

⁹ Office of Enforcement, U.S. Nuclear Regulatory Commission, "Allegation Program Annual Trends Report Calendar Year 2019," April 29, 2020. (ML20115E241)

at Watts Bar, **many of the concerns were related to a chilling effect and discrimination, but, at Browns Ferry, they involved multiple departments.** [boldfacing added]

As previously noted, TVA reorganized its ECP in 2019. TVA removed ECP personnel from their positions, and for a few months put interim staff in place. In the last quarter of 2019, the new organization launched, with new ECP personnel. Browns Ferry's ECP received only one concern for evaluation in all of 2019—an extremely low number compared to other sites and the number of allegations the NRC received. **It is too early to determine whether the new ECP program will benefit TVA's SCWE.** [boldfacing added]

POINTS:

1. TVA stated that the ECP provides "*an alternate process for raising concerns.*" This implicit alternative is to raising concerns to in-line management. In one survey, 31% of the respondents expressed doubt that the restructured ECP would provide independence from management. In its presentation to the NRC, TVA explained that the restructured ECP process entails engagement with management on non-HIRD and non-CWE issues. Thus, is the restructured ECP process truly an alternative with independence from management, or simply a longer pathway to management?
2. ECP provides "*an alternate process for raising concerns*" simply because workers might not feel comfortable raising issues to in-line management. Having ECP forward non-HIRD and non-CWE issues to management could easily be a barrier to workers raising nuclear safety concerns. If so, the restructured ECP merely becomes an alternative means of silencing workers.
3. In a docketed submittal to the NRC, TVA stated that its "*initial assessment* [of the restructured ECP] is that there has been no impact from this change on employee's willingness to raise concerns or to use the Employee Concerns Program as an alternate process for raising concerns." But the NRC's Office of Enforcement reported spikes in allegations received by the agency from Browns Ferry and Watts Bar it attributed to "*the licensee's decision to restructure its ECP, including replacing the ECP personnel at each site.*" Whose assessment is correct — TVA's or NRC's?
4. To resolve a potential 1-1 tie between TVA being correct and NRC being correct, the Oak Ridge Associated Universities (ORAU) issued their report in November 2019. ORAU's report showed that the new ECP certainly had an impact on the work forces, with some respondents feeling "*the changes were themselves a form of retaliation for former members of the ECP raising employees' concerns*" while others thought the "*changes are an attempt by TVA Corporate to strong-arm would-be whistleblowers at the sites.*"
5. The NRC's OI examined three internal TVA investigations of a reactor startup of Watts Bar Unit 1 in November 2015. OI identified no faults in the investigation by the TVA OIG. OI identified no faults in the investigation by the TVA ECP. OI identified an apparent violation of 10 CFR 50.9(a) in the investigation by the TVA SRT. Thus, TVA's problem is not that its OIG and ECPs fail to flag SCWE issues — TVA's problem is that management responds when SCWE issues are flagged by improperly and unlawfully suppressing and distorting true conditions.
6. The NRC's Office of Enforcement reported on April 29, 2020, that "*It is too early to determine whether the new ECP program will benefit TVA's SCWE.*" How then is it not too early for the NRC to determine that Petition Request #2 is unnecessary or rendered moot by prior NRC review?

Petition Request #3¹⁰

DEMAND THAT TVA PRESENT ITS ALLEGED “NEW” PROGRAM TO THE NRC AND THE PUBLIC FOR REVIEW, HOLD A PUBLIC MEETING, AND THEN PROVIDE FEEDBACK TO TVA ON WHETHER ITS PROPOSAL IS CONSISTENT WITH THE EXPECTATIONS THAT HAVE BEEN ESTABLISHED BY THE CONFIRMATORY ORDERS AND ECP BEST PRACTICES.

On October 3, 2019, TVA informed the NRC in writing that it was ready for an inspection to determine whether steps taken at Watts Bar in response to the March 2016 Chilled Work Environment Letter had been adequately completed. Specifically, TVA informed the NRC:

TVA has recently restructured its Employee Concerns Program in order to improve the effectiveness of alternative processes for raising concerns. **Our initial assessment is that there has been no impact from this change on employee's willingness to raise concerns or to use the Employee Concerns Program as an alternate process for raising concerns.** [boldfacing added]¹¹

Conflicting with this TVA assertion are statements in the NRC’s Allegation and Annual Trends Report for 2019:¹²

... the number of allegations the NRC received from onsite sources about Watts Bar Units 1 and 2 in 2019 decreased after significantly increasing in 2018. There were, however, a similar number of concerns raised. **The rate of receipt was high in the first two quarters of the year, corresponding to the licensee’s decision to restructure its Employee Concerns Program (ECP), including replacing the ECP personnel at each site in the fleet and the program manager at TVA headquarters. ... It is too early to determine whether the new ECP program will benefit TVA’s SCWE.** [boldfacing added]

... the number of allegations the NRC received about the Browns Ferry site from onsite sources in 2019 increased significantly after a 2-year decline. **The rate of receipt spiked in the second quarter of the year, corresponding to the licensee’s decision to restructure its ECP, including replacing the ECP personnel at each site in the fleet and the program manager at TVA headquarters.** Allegations were received primarily from licensee employees, but approximately 30 percent were received anonymously, most of those in the third quarter. As at Watts Bar, **many of the concerns were related to a chilling effect and discrimination, but, at Browns Ferry, they involved multiple departments.** [boldfacing added]

A review of the October 2019 NSC assessments completed for Browns Ferry shows that worker perceptions of the NSC declined when compared to the last assessment conducted in 2018. The operations department, in particular, rated almost all the safety culture traits lower than other departments participating. [boldfacing added]

¹⁰ Garde, Billie Pirner, Clifford & Garde, LLP, to Doane, Margaret, Executive Director for Operations, U.S. Nuclear Regulatory Commission, “10 C.F.R. 2.206 Petition Regarding Tennessee Valley Authority Changes to Employee Concerns Program Structure.” June 4, 2019. (ML19164A191)

¹¹ Williams IV, Anthony L., Site Vice President, Watts Bar Nuclear Plant, Tennessee Valley Authority, to U.S. Nuclear Regulatory Commission, “Notification of Readiness for NRC Independent Review to Confirm Chilling Effect Letter and Cross-Cutting Issue Closure Criteria Have Been Met,” October 3, 2019. (ML19276C380)

¹² Office of Enforcement, U.S. Nuclear Regulatory Commission, “Allegation Program Annual Trends Report Calendar Year 2019,” April 29, 2020. (ML20115E241)

At the request of TVA, the Oak Ridge Associated Universities (ORAU) assessed SCWE at TVA's corporate and plant sites. ORAU's report was issued in November 2019 and covered ECP issues:¹³

Across the fleet, however, participants expressed general confusion about the new ECP and were either skeptical or uncertain of whether individual contributors would use it. There were a few concerns regarding how independent ECP is from management, and a few focus group participants implied that they worried someone would try to personally identify them if they used the new ECP. [boldfacing added]

An area where concerns about Decision Making were clear was in participants' reactions to the changes to the ECP. **No survey participants from any of the data sources who mentioned communication of these changes thought it was handled appropriately.** [boldfacing and underlining added]

POINTS:

1. The NRC linked the increased numbers of allegations received from Browns Ferry and Watts Bar to "*the licensee's decision to restructure its Employee Concerns Program.*" Contrary to TVA's initial assessment, the spikes in allegations received by the NRC strongly suggests both an impact from the change and a lessening in the willingness of workers to raise concerns to the restructured ECP.
2. ORAU reported that "*No participants from any of the data sources who mentioned communication of these changes thought it was handled appropriately.*" Petition Request #3, if granted and performed, would remedy the bungled communications and help the work forces increase their awareness of the new ECP.
3. Publicly available documents do not describe the flaws or shortcomings of the "old" ECP that the restructured ECP purportedly fix. That lack of transparency explains why the ORAU survey found skepticism, at best, among the work force regarding the reason for and efficacy of the ECP changes. The lack of transparency also explains why the NRC is unable to yet determine whether the new ECP benefits the SCWE. Petition Request #3 seeks to flesh out the real and/or perceived weaknesses in the former ECP along with the features and elements of the revamped ECP that attempt to remedy those flaws. That essential step towards any effective solution has not apparently been taken – yet.
4. The NRC's Office of Enforcement report dated April 29, 2020, referenced a nuclear safety culture assessment in fall 2019 (with the "new" ECP in place) at Browns Ferry showing a decline in worker perceptions compared to results from 2018 (when the "old" ECP was in place).
5. Petition Request #3, if granted and performed, would also greatly facilitate moving beyond the NRC's stated position that "*It is too early to determine whether the new ECP program will benefit TVA's SCWE*" towards a common understanding of whether the new ECP is good, bad, or indifferent with respect to TVA's SCWE.

¹³ Oak Ridge Associated Universities, "TVA Nuclear Fleet Nuclear Safety Culture Evaluation," November 2019.

Petition Process Issue #1

The NRC Petition Manager informed the attorney for the Petitioners on April 9, 2020, that the agency was not accepting the petition:¹⁴

The Petition Review Board (PRB) has evaluated the petition you submitted June 4 and 10, 2019, pursuant to 10 CFR 2.206 regarding changes to TVA's employee concerns program (ECP). The PRB assessed whether the petition meets the acceptance criteria in NRC's Management Directive 8.11, "Review Process for 10 CFR 2.206 Petitions." From the description in the petition, the PRB's understanding is that your concerns with TVA's proposed changes to its ECP involve the potential impact to TVA's safety conscious work environment (SCWE) and employees' willingness to raise concerns at TVA facilities. **The PRB's initial assessment is that the petition does not meet the criteria in MD 8.11 Section III.C.1(b) to be accepted for review, because the issues raised in the petition have been "the subject of a facility-specific or generic NRC staff review" and none of the circumstances in Section III.C.1(b)(ii) apply.** [boldfacing added]

NRC Management Directive Handbook 8.11 Section III.B.2 explicitly addresses timeliness for NRC's initial assessments of petitions:

After addressing any requests for immediate action (see Section III.B.1 above), the assigned office will convene a PRB meeting to evaluate the petition for acceptance. **The PRB meeting should be held as quickly as possible, but no later than 3 weeks after EDO assignment of the petition.** [boldfacing added]

NRC Management Directive Handbook 8.11 Section III.C.1(b)(ii) is explicitly clear that a petition cannot be accepted if prior NRC review(s) adequately covered and resolved the matter:¹⁵

(ii) The issues raised have **previously been the subject of a facility-specific** or generic NRC staff review, and at least one of the following circumstances applies:

- The **prior review** did not resolve the issues raised by the petitioner, or
- The resolution of the issues in the **prior review** does not apply to the facts provided by the petitioner to support the requested action, or
- The petition provides significant new information that the staff did not consider in the **prior review.** [boldfacing added]

The NRC Petition Manager informed the attorney for the petitioners about the "prior" NRC reviews:

The NRC Staff has and continues to evaluate SCWE at NRC-regulated facilities. More specifically, **since the changes to TVA's ECP described in your petition, the NRC Staff has completed SCWE inspections at the Sequoyah Nuclear Plant (SQN), the Watts Bar Nuclear Plant (WBN), and the Browns Ferry Nuclear Plant. Specifically, on June 27, 2019, October**

¹⁴ Hon, Andrew, Petition Manager, U.S. Nuclear Regulatory Commission, to Garde, Billie, Clifford & Garde, LLC, "Initial Assessment Result of the 2.206 Petition Regarding TVA Employee Concern Program Changes," April 9, 2020. (ML20101P060)

¹⁵ U.S. Nuclear Regulatory Commission, Management Directive Handbook 8.11, "Review Process for 10 CFR 2.206 Petitions," March 1, 2019. (ML18296A043)

24, 2019, and December 12, 2019, the NRC, Region II, completed SCWE follow-up inspections at SQN (ML19204A190), WBN (ML19357A240), and BFN (ML20017A088). [boldfacing added]

These “prior” NRC reviews conducted and reported as follows:

Plant	Inspection Period	Report Date	ADAMS Accession
Sequoyah	06/03/2019-06/27/2019	07/23/2019	ML19204A190
Watts Bar	10/21/2019-10/24/2019	12/23/2019	ML19357A240
Browns Ferry	12/09/2019-12/12/2019	01/17/2020	ML20017A088

Furthermore, the very first bullet under MD 8.11 Handbook Section III.C.1(b)(ii) specifies:

- The prior review did not resolve the issues raised by the petitioner

The NRC’s Allegation and Annual Trends Report for 2019 issued on April 29, 2020 stated:¹⁶

It is too early to determine whether the new ECP program will benefit TVA’s SCWE. [boldfacing added]

NRC Management Directive 8.11 Handbook Section III.C.3 permits a petition to be held in abeyance under specific conditions. Section III.C.III(d) specifies actions to be taken if and when a petition is held in abeyance:

- (i) **The PRB chairperson will ensure that the office director, or designee, is informed of the PRB’s decision and concurs with the decision.**
- (ii) **The petition manager will then inform the petitioner of the PRB decision and its basis.** [boldfacing added]

The petitioners were not informed that the petition was being held in abeyance. Neither were individuals on the NRC staff and management tasked with monitoring petition processing. The NRC provides the Deputy Director of the Office of Nuclear Reactor Regulation with a quarterly status report on open 2.206 petitions. The status report for the first quarter of 2020 includes the TVA ECP petition but contains no mention or hint of any abeyance hold:¹⁷

Background:

- On June 4, 2019, the petitioner filed a petition under 10 CFR 2.206.
- On June 11, 2019, the petitioner informed the petition manager that she wanted to offer the NRC other serious considerations that need to be addressed.
- On June 13, 2019, the petitioner provided clarifying information to the NRC staff.
- On June 27, 2019, the petition manager screened in the revised petition in accordance with MD 8.11 and began scheduling the initial PRB meeting.

¹⁶ Office of Enforcement, U.S. Nuclear Regulatory Commission, “Allegation Program Annual Trends Report Calendar Year 2019,” April 29, 2020. (ML20115E241)

¹⁷ Erlanger, Craig G., Director, Division of Operating Reactor Licensing, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, to Gavrilas, Mirela, Deputy Director, Reactor Safety Programs and Corporate Support, Office of Nuclear Reactor Regulation, U.S. Nuclear Regulatory Commission, “Quarterly January-March 2020 Report on the Status of Public Petitions Under Title 10 of the *Code of Federal Regulations* Section 2.206.” (ML20097D146)

- On July 2, 2019, the petitioner provided additional information for the PRB to consider.
- On July 8, 2019, the petition manager informed the petitioner that the July 2, 2019, submittal was received and that the PRB will discuss this information in its next PRB meeting.
- **On July 8, 2019, the PRB met to discuss the contents of the petition and to consider its initial assessment.**
- **On July 31, 2019, and August 6, 2019, the PRB met to discuss the contents of the petition and to consider its initial assessment.**
- **On November 12, 2019, the PRB met to discuss the contents of the petition and to consider its initial assessment.**
- On December 17, 2019, the petition manager provided a status update to the petitioner.

Actions Completed This Quarter/Next Steps:

- On January 9, 2020, the petition manager provided the petitioner with an NRC inspection report related to the concerns raised in the petition and a status update.
- **On February 5, 2020, the PRB met to discuss its initial assessment in light of the inspection results.**
- On February 18, 2020, the petition manager provided a status update to the petitioner.
- The PRB will meet to determine if its initial assessment remains valid and the petition manager will inform the petitioner of the PRB's initial assessment. [boldfacing added]

The “new and improved” NRC Management Directive 8.11 was approved on March 1, 2019, after a multiple-year revision effort. MD 8.11 was revised for the following stated reasons:

U.S. NUCLEAR REGULATORY COMMISSION MANAGEMENT DIRECTIVE (MD)

MD 8.11	REVIEW PROCESS FOR 10 CFR 2.206 PETITIONS	DT-19-01
<i>Volume 8:</i>	Licensee Oversight Programs	
<i>Approved By:</i>	Margaret M. Doane, Executive Director for Operations	
<i>Date Approved:</i>	March 1, 2019	
<i>Cert. Date:</i>	N/A, for the latest version of any NRC directive or handbook, see the online MD Catalog	
<i>Issuing Office:</i>	Office of Nuclear Reactor Regulation Division of Operating Reactor Licensing	
<i>Contact Name:</i>	Perry Buckberg	
EXECUTIVE SUMMARY		
Management Directive (MD) 8.11, "Review Process for 10 CFR 2.206 Petitions," is being revised to—		
<ul style="list-style-type: none"> • Clarify the initial screening and acceptance criteria for evaluating petitions, • Clarify guidance regarding coordination and referral of allegations, • Clarify and update roles and organizational responsibilities, • Clarify and add guidance regarding referrals from adjudicatory boards and the Commission, • Clarify guidance on public meeting and teleconference interactions, • Clarify guidance for a streamlined director's decision in certain cases, • Correct the addressee of the periodic 2.206 status report from the Commission to the Director of the Office of Nuclear Reactor Regulation, • Revise the process to accelerate the PRB initial assessment prior to meeting with the petitioner, 		

POINTS:

1. Had the NRC conformed to the timeliness objectives in Management Directive 8.11 (i.e., “no later than 3 weeks”) for its initial assessment(s) about accepted the petition, that decision would pre-date ALL of the NRC inspection reports identified on April 9, 2020, as the basis for not accepting the petition.
2. Setting aside the whole “prior review” standard, Management Directive 8.11 handbook Section III.C.1(b)(ii) enables a petition to be accepted if it raises issues not resolved by NRC review(s). The petition in whole and Requests #2 and #3 in particular address the impact of the restructured ECP on SCWE. If it is “*too early to determine whether the new ECP program will benefit TVA’s SCWE*” as NRC reported on April 29, 2020, it is also too early for the NRC to not accept the petition on April 9, 2020, on grounds that NRC review(s) resolved the petitioners’ issues.
3. While NRC Management Directive 8.11 contains a provision for holding a petition in abeyance, the quarterly status reports lack any indication that the TVA ECP petition was being held and the attorney for the petitioners was not informed about any hold.
4. Rather than reaching an initial assessment for accepting the petition within 3 weeks based on existing information from prior NRC reviews, the NRC placed it in limbo for nearly 10 months.

5. The NRC revised MD 8.11 to clarify its “*initial screening and acceptance criteria for evaluating petitions.*” The record shows that the NRC conducted at least four (4) initial assessments of this petition over a seven (7) month period. Just how many initial assessments does it take for the NRC to reach a decision? Did the revision to MD 8.11 adequately clarify the acceptance criteria? If so, why did it take so many initial assessments in this case? If not, would the NRC mind trying again to revise MD 8.11 to clarify its initial screening and acceptance criteria?
6. The NRC revised MD 8.11 to “*accelerate the PRB initial assessment prior to meeting with the petitioner.*” Assuming that this stated reason was serious, did the multiple initial assessments and ten-month period between the petition’s submission and the offer to meet with the petitioners reflect the new “accelerated pace” or was it a hold-over of the former “slow as molasses” tactic? It’s a rhetorical question since the NRC’s pace handling this petition is quite simply unacceptable by any reasonable, and most unreasonable, standards.¹⁸
7. Belatedly relying on subsequent NRC reviews, the NRC proposes not to accept the petition even though its reviews are explicitly stated to be too early to judge the affect of the restructured ECP on TVA’s SCWE — a key, core component of the petition.

¹⁸ Among many examples of reasonable timeliness standards, 10 CFR Part 21 requires the NRC to be notified no later than 60 days after discovery of a potentially defective product or services, no matter how many “initial assessments” are performed. If the vendor cannot conclude no problem exists within 60 days, the clock tolls and the NRC must be notified of the potential problem. But the NRC’s petition acceptance clock apparently has no hands, ticking off petitioners waiting patiently, or not, for the NRC’s decision.

Petition Process Issue #2

NRC Management Directive Handbook 8.11 is clear that petitions must contain requests that could reasonably result in enforcement action or be screened out otherwise:¹⁹

II.A.2.d(v) Requests That Would Not Reasonably Lead to an Enforcement Action

A petition should be screened out if it does not request a specific enforcement-related action (e.g., issuing an order modifying, suspending, or revoking a license pursuant to 10 CFR 2.202, issuing a notice of violation pursuant to 10 CFR 2.201, etc.) and does not identify a specific safety or security concern (e.g., a technical deficiency or potential violation). A petition must provide information that could reasonably lead the NRC to take an enforcement action (not necessarily the action requested).

This petition contains elements that could reasonably result in enforcement action.

Petition Request #2 addressed the ECP being able to reach truthful findings independent from management and without undue influence. It is not unreasonable to believe that TVA might not be able to create and sustain such a ECP. The discussion above of Petition Request #2 details a marked difference between the TVA and NRC assessment of the impact of the ECP restructuring. TVA reported “no impact” on the willingness of workers to raise concerns while the NRC reported a surge in allegations received by the agency from TVA workers, strongly suggestive of an unwillingness to raise concerns via TVA normal and alternative processes.

If TVA misrepresented the actual conditions, a potential violation of 10 CFR 50.9 is involved.

If TVA misunderstood or wrongly assessed actual conditions, a revision to the July 2017 Confirmatory Order may be necessary to “recalibrate” TVA’s erroneous perception.

¹⁹ U.S. Nuclear Regulatory Commission, Management Directive Handbook 8.11, “Review Process for 10 CFR 2.206 Petitions,” March 1, 2019. (ML18296A043)

Petition Handling Recommendation #1

The concerns raised in the petition are clearly real and relevant, evidenced by the Chilled Work Environment Letter for Watts Bar and the Confirmatory Order for TVA more broadly.

The requests in the petition are essentially a “straw man” proposed by the petitioners to resolve some of the underlying issues.

TVA has taken different steps towards the same destination – a SCWE at all its plants and nuclear offices.

The NRC is monitoring TVA’s steps closely.

It is recommended that the NRC accept the petition into its Management Directive 8.11 process. As it evaluates TVA’s steps, the NRC could consider whether those steps fully and adequately resolve the concerns at the heart of the petition’s requests.

If so, the Director’s Decision for this petition could explain how and why TVA Steps A, B, and C adequately resolved Petition Request #1, TVA Steps X and Y adequately resolved Petition Request #2 and so on.

If not, the NRC could guide TVA to the additional steps and/or re-steps needed to fully and adequately resolve the concerns. Then, the NRC would be in a position to issue a Director’s Decision detailing how each of the petition’s concerns were resolved.

If the NRC were not to accept this petition at this time, especially based on just shallow and suspect grounds, it might serve as a “chilling effect” for individuals in the future who have a safety concern but are unwilling to pursue its resolution via the 2.206 petition process. Their unwillingness would not be fear of retaliation, but worry that their concerns would not receive a fair hearing, as NRC noted at TVA:²⁰

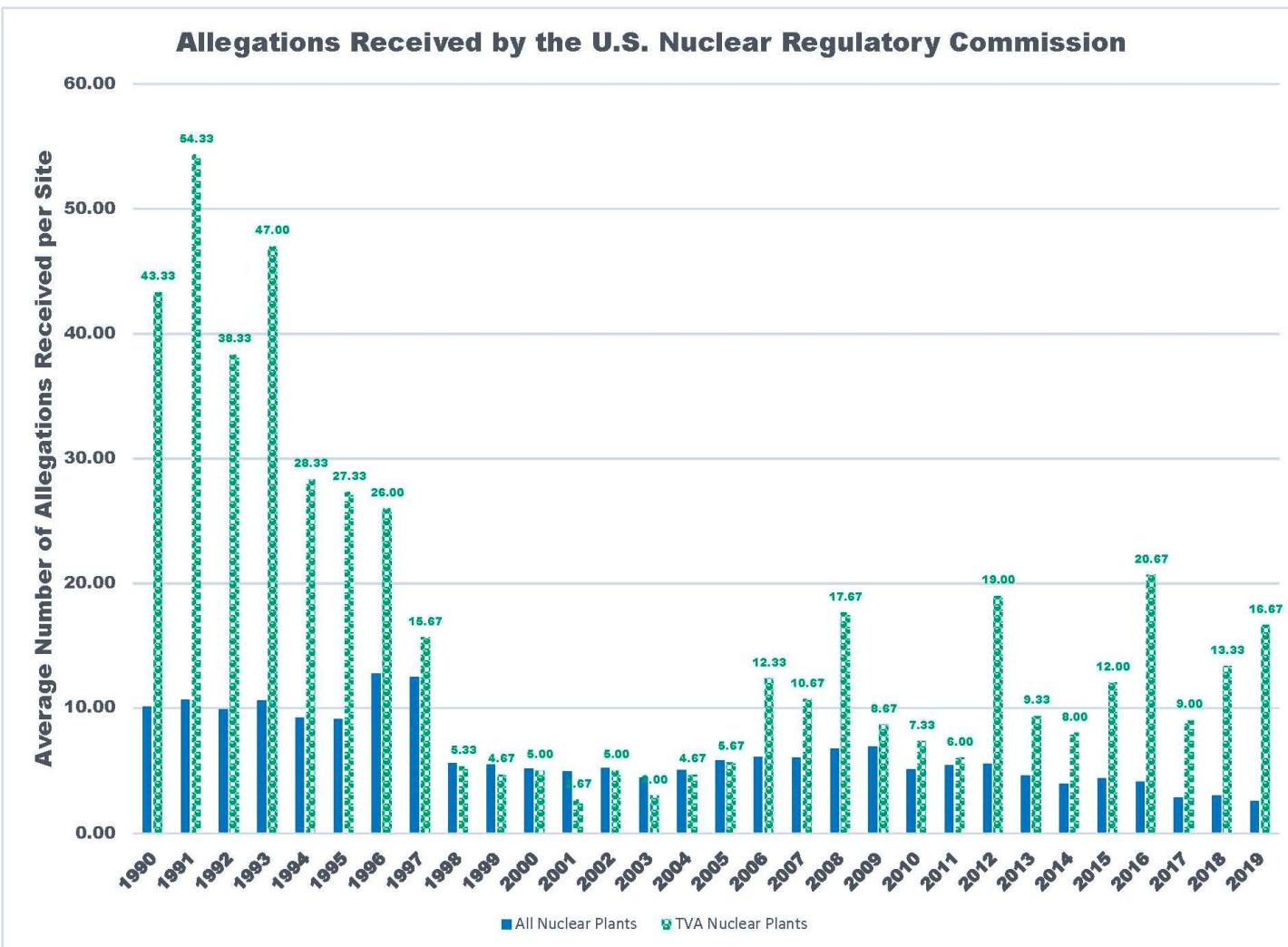
A review of the July 2019 nuclear safety culture (NSC) assessments completed for Watts Bar and TVA corporate headquarters shows that worker perceptions of TVA corporate’s NSC have declined, while those of Watts Bar have improved. The assessment notes that written comments received reflect not that **workers hesitate to raise concerns because they fear retaliation, but, rather, they hesitate because they do not see what, if any, actions are taken to address their concerns once raised.** [boldfacing added]

Accepting the petition into the 8.11 process and using the Director’s Decision to fully explain how the steps taken by TVA as verified by NRC’s inspections fully and adequately resolved the concerns raised in the petition is the proper way to handle this matter.

Contemplate a nuclear worker raising a safety concern to management and/or an ECP and being told the concern is being rejected because it has already been asked and answered without connecting the concern to its purported answer. That’s a sure ticket to SCWE problems. The NRC cannot administer a process that it would (hopefully) find unacceptable if conducted by a licensee.

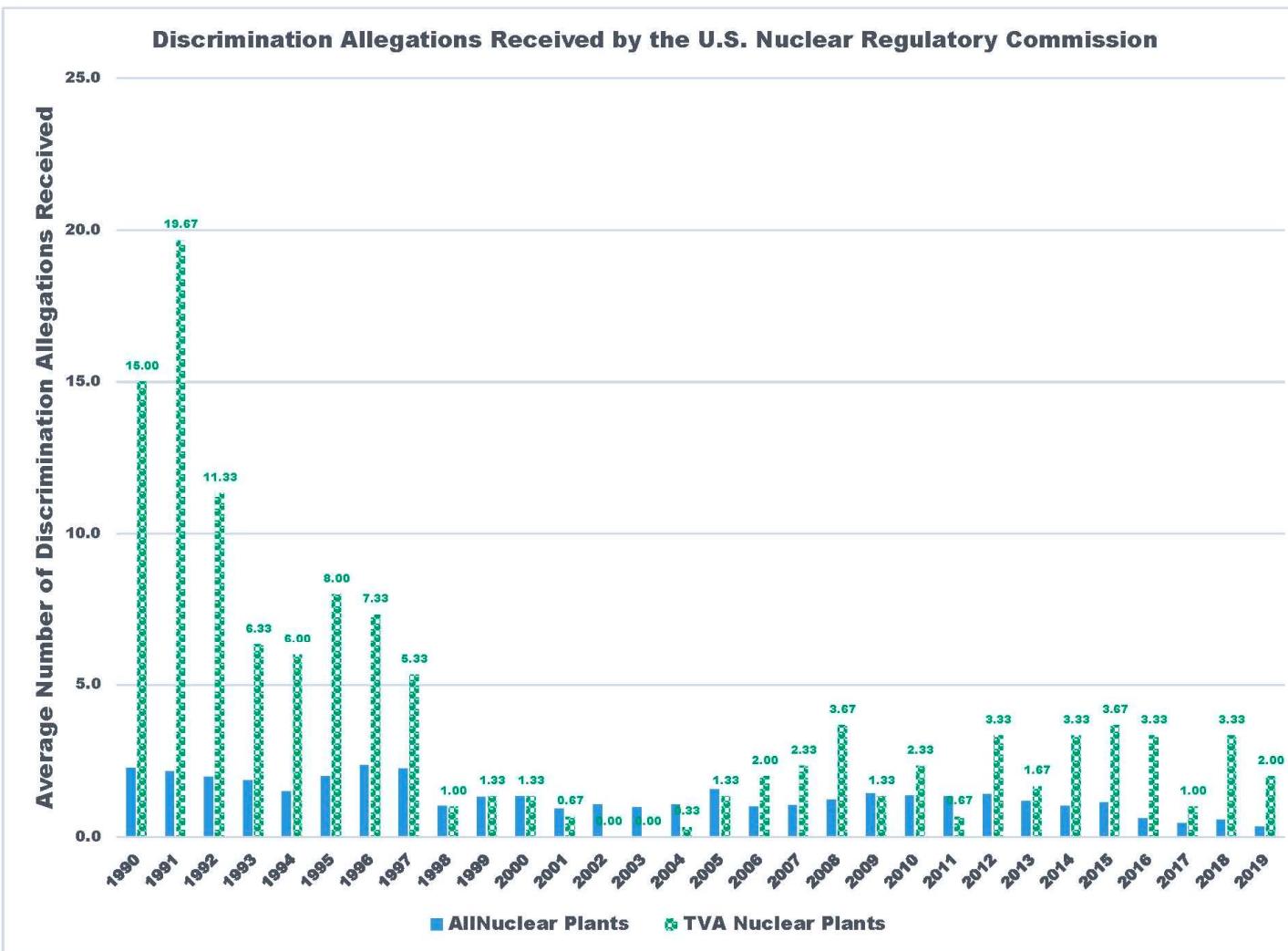
²⁰ Office of Enforcement, U.S. Nuclear Regulatory Commission, “Allegation Program Annual Trends Report Calendar Year 2019,” April 29, 2020. (ML20115E241)

Figure 1



In only eight (8) of the past thirty (30) years, the NRC received more allegations from the average U.S. nuclear plant than from the average TVA nuclear plant. That eight year period (1998-2005) ended more than a decade ago.

Figure 2



In only ten (10) of the past thirty (30) years, the NRC received more allegations from the average U.S. nuclear plant than from the average TVA nuclear plant. The most recent time (2011) was nearly a decade ago. The data is quite clear – TVA has a chronically troubled Safety Conscious Work Environment (SCWE) and not an Employee Concerns Program (ECP) problem.