

From: JSheaIA-Hearing Resource
Sent: Thursday, February 11, 2021 11:07 PM
To: JSheaIA-HearingNPEm Resource
Subject: FW: McBrearty / TVA
Attachments: 2018 09 26 exhibit template.pdf; 2018 09 26 OSHA complaint (final)_Redacted.pdf

From: Luina, Scott <Scott.Luina@nrc.gov>
Sent: Wednesday, October 24, 2018 1:28 PM
To: Baer, Lorraine <Lorraine.Baer@nrc.gov>
Subject: FW: McBrearty / TVA

From: Alan Kabat <kabat@bernabeipllc.com>
Sent: Wednesday, September 26, 2018 11:53 AM
To: Luina, Scott <Scott.Luina@nrc.gov>
Cc: Michael McBrearty <mmcbrearty@sbcglobal.net>
Subject: [External_Sender] McBrearty / TVA

Dear Mr. Luina,

Greetings. On behalf of Michael McBrearty, attached is the whistleblower retaliation complaint that we filed today with OSHA.

Thank you for your interest,

Alan

Alan R. Kabat
Bernabei & Kabat, PLLC
1400 - 16th Street, N.W., Suite 500
Washington, D.C. 20036-2223
tel. (202) 745-1942 (ext. 242)
fax (202) 745-2627
email: Kabat@BernabeiPLLC.com

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Hearing Identifier: JShea_IA_NonPublic
Email Number: 858

Mail Envelope Properties (828611bbc0ac4cadbcfc4a970b8a0902)

Subject: FW: McBrearty / TVA
Sent Date: 2/11/2021 11:07:28 PM
Received Date: 2/11/2021 11:07:30 PM
From: JShealA-Hearing Resource

Created By: JShealA-Hearing.Resource@nrc.gov

Recipients:
"JShealA-HearingNPEm Resource" <JShealA-HearingNPEm.Resource@nrc.gov>
Tracking Status: None

Post Office: HQPWMSMRS02.nrc.gov

Files	Size	Date & Time
MESSAGE	2162	2/11/2021 11:07:30 PM
2018 09 26 exhibit template.pdf	518555	
2018 09 26 OSHA complaint (final)_Redacted.pdf		222000

Options
Priority: Normal
Return Notification: No
Reply Requested: No
Sensitivity: Normal
Expiration Date:

Exhibits to OSHA Complaint

1. NRC letter to J. Grimes, TVA (Mar. 23, 2016).
2. NRC letter to J. Shea, TVA (Oct. 26, 2016).
3. Agenda, Licensing (May 7, 2018) (original version by Mr. McBrearty).
4. Agenda, Licensing (May 7, 2018) (revised version by Ms. Henderson).

Exhibit 1

NRC letter to J. Grimes, TVA (Mar. 23, 2016)



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**
REGION II
245 PEACHTREE CENTER AVENUE NE, SUITE 1200
ATLANTA, GEORGIA 30303-1257

March 23, 2016

EA-16-061

Mr. Joseph P. Grimes
Chief Nuclear Officer and
Executive Vice President
1101 Market Street
3R Lookout Place
Chattanooga, TN 37402-2801

**SUBJECT: CHILLED WORK ENVIRONMENT FOR RAISING AND ADDRESSING SAFETY
CONCERNS AT THE WATTS BAR NUCLEAR PLANT**

Dear Mr. Grimes:

As discussed during the public meeting held on March 22, 2016 in the RII office (ML16083A403), we initiated a review in late 2015 at the Watts Bar Nuclear Plant into the environment for raising and addressing safety issues. We began this review in light of information received through our inspection and allegations process associated with the Safety Conscious Work Environment (SCWE) within the Operations Department and its influence on the safe operation of the plant. Our review includes information received through allegations, inspections, and interviews of your staff over the past few months. The Nuclear Regulatory Commission has concluded that a Chilled Work Environment exists in the Operations Department because of a perception that operators are not free to raise safety concerns using all available avenues without fear of retaliation. We have not identified any serious safety violations or instances involving significant plant safety issues, but the information gathered has led to concerns about the impact the work environment is having on plant operations and raises questions about your commitment to emphasize safety over competing goals to ensure protection of people and the environment. We want to ensure that TVA has a clear understanding of the scope of our concerns and to communicate specific requests and expectations for your response.

The Safety Culture Policy Statement (76 FR 34773; June 14, 2011) sets forth the Commission's expectation that licensees establish and maintain a positive safety culture commensurate with the safety and security significance of their activities and the nature and complexity of their organizations and functions. The NRC defines nuclear safety culture as the core values and behaviors resulting from a collective commitment by leaders and individuals to emphasize safety over competing goals to ensure protection of people and the environment. A safety conscious work environment is defined by the NRC as an environment in which "employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation" and is one trait of a strong safety culture. NRC Regulatory Issue Summary 05-018, "Guidance for Establishing and Maintaining a Safety Conscious Work Environment," dated August 25, 2005, further describes the NRC's expectations in this area.

We have gathered information in a number of areas which, to varying degrees, calls into question whether management is open to safety concerns raised by operators, whether there is a proper “safety-first” focus during plant operations, and whether your corrective action program and Employee Concerns Program (ECP) have been effective at identifying and resolving these issues. The NRC has determined there is sufficient evidence to support the existence of an environment within the Operations Department where your employees do not feel free to raise safety concerns to your management because they fear retaliation and do not feel that their concerns are being addressed. Our concern is heightened by information that indicates undue influence and direction of licensed operators from sources external to the control room affected operational performance. We are concerned an environment exists where control room operations may be influenced by management in a manner that undermines licensed senior operator responsibility for directing licensed activities.

More broadly, we are concerned that a fear of retaliation exists to the extent that it is impeding open communication within the Operations Department. We have concerns that the current environment is impacting the normal processes designed to identify such issues and effect changes in affected aspects of the site safety culture. Our reviews found that information from the corrective action program, the ECP, and other sources, have provided opportunities for management to identify changes in certain aspects of the safety culture and SCWE, but the information has not been fully acknowledged and acted upon.

The NRC considers it vital for TVA to assess the climate at the Watts Bar station, address the root causes that allowed the chilled work environment to exist, and take steps to ensure the staff at Watts Bar are willing to openly participate in the process. We note that a Confirmatory Order (EA-09-009, EA-09-203) remains in effect to confirm commitments made by TVA for all three nuclear stations to address past SCWE issues. In summary, we request that you conduct your own in-depth assessment, and we acknowledge that surveys and evaluations recently conducted or directed by TVA might form part of such an assessment. We ask that you provide your plan of action for addressing this matter to the NRC within 30 days of the date of this letter. Included in your plan we request you: 1) describe any immediate/short term actions which provide reassurance of acceptable performance during completion of your in-depth assessment; 2) describe how the in-depth assessment will be/was conducted by persons independent of the organization affected; 3) evaluate effectiveness of the implementation of Confirmatory Order (EA-09-009, EA-09-203) requirements relative to the current conditions; 4) detail how you will address the potential extent of condition in organizations outside of Operations; 5) describe any associated corrective actions and how you will measure the effectiveness of any corrective actions; and 6) describe how you will address past effectiveness of your corrective action program and ECP. Additionally, we request you promptly notify the members of the workforce of the issuance of this letter.

Approximately two weeks after we receive your action plan, we would like to meet with you again to discuss this matter in more detail, so that we may plan for appropriate NRC monitoring and follow-up.

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the Public without redaction. If personal privacy information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the personal privacy-related information and a redacted copy of your response that deletes the personal privacy-related information. Identify the particular portions of the response in question which, if disclosed, would create an unwarranted invasion of personal privacy, identify the individual whose privacy would be invaded in each instance, describe the nature of the privacy invasion, and indicate why, considering the public interest in the matter, the invasion of privacy is unwarranted. If you request withholding on any other grounds, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., provide the information required by 10 CFR 2.790(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

Sincerely,

/RA/

Catherine Haney
Regional Administrator

Docket Nos.: 50-390, 391
License Nos.: NPF-90, 96

In accordance with 10 CFR 2.790 of the NRC's "Rules of Practice," a copy of this letter and your response will be made available electronically for public inspection in the NRC Public Document Room or from the NRC's document system (ADAMS), accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html>. To the extent possible, your response should not include any personal privacy, proprietary, or safeguards information so that it can be made available to the Public without redaction. If personal privacy information is necessary to provide an acceptable response, then please provide a bracketed copy of your response that identifies the personal privacy-related information and a redacted copy of your response that deletes the personal privacy-related information. Identify the particular portions of the response in question which, if disclosed, would create an unwarranted invasion of personal privacy, identify the individual whose privacy would be invaded in each instance, describe the nature of the privacy invasion, and indicate why, considering the public interest in the matter, the invasion of privacy is unwarranted. If you request withholding on any other grounds, you must specifically identify the portions of your response that you seek to have withheld and provide in detail the bases for your claim of withholding (e.g., provide the information required by 10 CFR 2.790(b) to support a request for withholding confidential commercial or financial information). If safeguards information is necessary to provide an acceptable response, please provide the level of protection described in 10 CFR 73.21.

Sincerely,

/RA/

Catherine Haney
Regional Administrator

Docket Nos.: 50-390, 391
License Nos.: NPF-90, 96

PUBLICLY AVAILABLE NON-PUBLICLY AVAILABLE SENSITIVE NON-SENSITIVE
ADAMS: Yes ACCESSION NUMBER: ML16083A479 SUNSI REVIEW COMPLETE FORM 665 ATTACHED

OFFICE	RII:DRP	RII:EICS	RII:EICS	RII:DRP	RII:DRP	RII:DRP	RII:ORA
SIGNATURE	CRK1	MXM3	DLG2	SAP1	AJB3	MEF1	LXW1
NAME	C. Kontz	M. Checkle	D. Gamberoni	S. Price	A. Blamey	M. Franke	L. Wert
DATE	3/23/2016	3/23/2016	3/23/2016	3/23/2016	3/23/2016	3/23/2016	3/23/2016
E-MAIL COPY?	YES NO	YES NO	YES NO	YES NO	YES NO	YES NO	YES NO
OFFICE	OE	OE	RII:ORA				
SIGNATURE	LLJ via email	PKH via email	LXW1 /RA for/				
NAME	L. Jarriel	P. Holahan	C. Haney				
DATE	3/23/2016	3/23/2016	3/23/2016				
E-MAIL COPY?	YES NO	YES NO	YES NO	YES NO	YES NO	YES NO	YES NO

OFFICIAL RECORD COPY DOCUMENT NAME: G:\DRP\INRPB6\WATTS BAR\CHILLING EFFECT 2016\WATTS BAR CEL FINAL.DOCX

Exhibit 2

NRC letter to J. Shea, TVA (Oct. 26, 2016)



**UNITED STATES
NUCLEAR REGULATORY COMMISSION**
REGION II
245 PEACHTREE CENTER AVENUE NE, SUITE 1200
ATLANTA, GEORGIA 30303-1257

October 26, 2016

EA-16-061

Mr. Joseph W. Shea
Vice President, Nuclear Licensing
Tennessee Valley Authority
1101 Market Street, LP 3D-C
Chattanooga, TN 37402-2801

SUBJECT: WATTS BAR NUCLEAR PLANT - NRC PROBLEM IDENTIFICATION AND RESOLUTION INSPECTION (PART 1); AND SAFETY CONSCIOUS WORK ENVIRONMENT ISSUE OF CONCERN FOLLOW-UP; NRC INSPECTION REPORT 05000390/2016007 AND 05000391/2016007

Dear Mr. Shea:

On September 15, 2016, the U.S. Nuclear Regulatory Commission (NRC) completed the first part of a Problem Identification and Resolution biennial inspection, which included a Safety Conscious Work Environment Issue of Concern Follow-Up inspection at your Watts Bar Nuclear Plant, Units 1 and 2. The enclosed inspection report documents the inspection results, which were discussed on September 15, 2016, with Mr. Paul Simmons and other members of your staff.

In a letter dated March 23, 2016, the NRC issued a Chilling Effect Letter (CEL) entitled, "Chilled Work Environment for Raising and Addressing Safety Concerns at the Watts Bar Nuclear Plant," (ML16083A479). The NRC determined there was sufficient evidence to support the existence of an environment within the Operations department where your employees did not feel free to raise safety concerns to management because they feared retaliation and did not feel that their concerns were being addressed. As a follow-up to the issuance of the CEL, this inspection included a focused assessment of the safety conscious work environment (SCWE). The staff evaluated the attributes of a SCWE as described in inspection procedure (IP) 93100, "Safety Conscious Work Environment Issue of Concern Follow-up." IP 93100 identifies a SCWE as an environment in which employees are encouraged to raise safety concerns, are free to raise concerns both to their own management and to the NRC without fear of retaliation, where concerns are promptly reviewed, given the proper priority, appropriately resolved, and timely feedback is provided to those raising concerns.

The inspection team conducted 17 focus groups and 22 interviews with members of the Watts Bar staff and key management. A total of 136 employees participated in the focus groups and interviews. The information from the focus groups, interviews, and document reviews were organized into the themes that are discussed in the attached report. The team made the following key observations associated with the current work environment, which are explained in more detail in the report. Interviews and focus groups with Operations department staff indicated an improvement in the primary work environment conditions that prompted the

issuance of the CEL, but focus groups within and outside of the Operations department indicated the existence of broader, previously unrecognized challenges to the maintenance of a positive safety culture, which continued to challenge the SCWE. The team identified substantial weaknesses in various attributes of a SCWE, which were found to be pervasive across various work units. Most prominent was that although most employees in the assessment indicated that they were personally willing to raise nuclear safety concerns, nearly half believed retaliation was a potential outcome for raising concerns. In addition, most employees did not believe that concerns were promptly reviewed or appropriately resolved, either by their management or via the Corrective Action Program.

The NRC has determined that, given the current state of the site's safety culture, you are not meeting the Commission's expectation that licensees establish and maintain a positive safety culture and safety conscious work environment as described in the Safety Culture and SCWE Policy Statements (76 FR 34773, June 14, 2011; 61 FR 24336, May 14, 1996). The inspectors did not identify any findings or violations of regulatory requirements of more than minor significance. The NRC will continue to inspect and monitor the site's safety culture and the progress of the actions identified in your response to the CEL to address the work environment issues. The observations made during this inspection will be reviewed in conjunction with the results of the second part of the inspection and included in the overall assessment and conclusions regarding the effectiveness of the PI&R program.

In accordance with Title 10 of the *Code of Federal Regulations* 2.390, "Public Inspections, Exemptions, Requests for Withholding," of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response (if any) will be available electronically for public inspection in the NRC's Public Document Room or from the Publicly Available Records (PARS) component of the NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html> (the Public Electronic Reading Room).

Sincerely,

/RA/

Alan Blamey, Branch Chief
Reactor Projects Branch 6
Division of Reactor Projects

Docket Nos.: 50-390, 391
License Nos.: NPF-90, NPF-96

Enclosure: Inspection Report 05000390/2016007 and 05000391/2016007
w/Attachment: Supplemental Information

cc: Distribution via ListServ

issuance of the CEL, but focus groups within and outside of the Operations department indicated the existence of broader, previously unrecognized challenges to the maintenance of a positive safety culture, which continued to challenge the SCWE. The team identified substantial weaknesses in various attributes of a SCWE, which were found to be pervasive across various work units. Most prominent was that although most employees in the assessment indicated that they were personally willing to raise nuclear safety concerns, nearly half believed retaliation was a potential outcome for raising concerns. In addition, most employees did not believe that concerns were promptly reviewed or appropriately resolved, either by their management or via the Corrective Action Program.

The NRC has determined that, given the current state of the site's safety culture, you are not meeting the Commission's expectation that licensees establish and maintain a positive safety culture and safety conscious work environment as described in the Safety Culture and SCWE Policy Statements (76 FR 34773, June 14, 2011; 61 FR 24336, May 14, 1996). The inspectors did not identify any findings or violations of regulatory requirements of more than minor significance. The NRC will continue to inspect and monitor the site's safety culture and the progress of the actions identified in your response to the CEL to address the work environment issues. The observations made during this inspection will be reviewed in conjunction with the results of the second part of the inspection and included in the overall assessment and conclusions regarding the effectiveness of the PI&R program.

In accordance with Title 10 of the *Code of Federal Regulations* 2.390, "Public Inspections, Exemptions, Requests for Withholding," of the NRC's "Rules of Practice," a copy of this letter, its enclosure, and your response (if any) will be available electronically for public inspection in the NRC's Public Document Room or from the Publicly Available Records (PARS) component of the NRC's Agencywide Documents Access and Management System (ADAMS). ADAMS is accessible from the NRC Web site at <http://www.nrc.gov/reading-rm/adams.html> (the Public Electronic Reading Room).

Sincerely,
/RA/

Alan Blamey, Branch Chief
Reactor Projects Branch 6
Division of Reactor Projects

Docket Nos.: 50-390, 391

License Nos.: NPF-90, NPF-96

Enclosure: Inspection Report 05000390/2016007 and 05000391/2016007
w/Attachment: Supplemental Information

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ADAMS: Yes ACCESSION NUMBER: ML16300A409 SUNSI REVIEW COMPLETE FORM 665 ATTACHED

OFFICE	OE:AT	RII:DCP	RII:DRP	RII:ORA	RES:DRA	HQ:OE	RII:DRP	RII:DRP
SIGNATURE	Via Email	/RA via Email/	/RA/	/RA/				
NAME	D.Willis	N. Coover	G.Smith	M.Checkle	SMorrow	LJarriel	CKontz	ABlamey
DATE	10/13/2016	10/12/2016	10/18/2016	10/21/2016	10/13/2016	10/20/2016	10/21/2016	10/26/2016
E-MAIL COPY?	YES NO	YES NO	YES NO					

U.S. NUCLEAR REGULATORY COMMISSION

REGION II

Docket No.: 50-390, 50-391

License No.: NPF-90, NPF-96

Report No.: 05000390/2016007, 05000391/2016007

Licensee: Tennessee Valley Authority (TVA)

Facility: Watts Bar, Units 1 and 2

Location: Spring City, TN 37381

Dates: September 12 - 15

Inspectors: C. Kontz, Senior Project Engineer (Team Lead)
S. Morrow, Human Factors Engineer (Lead Safety Culture Assessor)
D. Willis, Allegations Team Leader
M. Checkle, Senior Allegation Coordinator
N. Covert, Senior Construction Inspector
G. Smith, Senior Resident Inspector Sequoyah

Approved by: Alan Blamey, Branch Chief,
Reactor Projects Branch 6
Division of Reactor Projects

Enclosure

SUMMARY OF FINDINGS

IR 05000390/2016007; 05000391/2016007; September 12 – 15, 2016; Watts Bar, Units 1 and 2; Biennial Inspection of the Problem Identification and Resolution Program.

This inspection constituted the first part of the biennial inspection of the Problem Identification and Resolution Program and was conducted by a senior project engineer, senior resident inspector, human factors engineer, an allegations team leader, senior allegations coordinator, and a senior construction inspector. The NRC's program for overseeing the safe operation of commercial nuclear power reactors is described in NUREG-1649, "Reactor Oversight Process."

REPORT DETAILS

4. OTHER ACTIVITIES

4OA2 Problem Identification and Resolution

.1 Safety-Conscious Work Environment

a. Background

In a letter dated March 23, 2016, the NRC issued a Chilling Effect Letter (CEL) to the Watts Bar Nuclear Plant entitled, "Chilled Work Environment for Raising and Addressing Safety Concerns at the Watts Bar Nuclear Plant," (ML16083A479). The NRC concluded that a chilled work environment existed in the Operations department because of a perception that operators were not free to raise safety concerns using all available avenues without fear of retaliation. Additionally, Region II identified and documented a safety conscious work environment (SCWE) cross-cutting theme during the 2016 mid-cycle assessment, due to the issuance of the CEL and a violation with a cross-cutting aspect in the SCWE cross-cutting area (Inspection Report 05000390/2016001; ML 16098A323).

As part of the follow-up to the work environment issues, the NRC elected to include an assessment of the SCWE attribute of a licensee's safety culture using inspection procedure (IP) 93100, "Safety Conscious Work Environment Issue of Concern Follow-up."

As described in IP 93100, "A safety conscious work environment (SCWE) is defined as an environment in which employees are encouraged to raise safety concerns, are free to raise concerns both to their own management and to the NRC without fear of retaliation, where concerns are promptly reviewed, given the proper priority, and appropriately resolved, and timely feedback is provided to those raising concerns. In contrast, a "chilled work environment" is one in which employees perceive that raising safety concerns to their employer or to the NRC is being suppressed or is discouraged and can occur because of an event, interaction, decision, or policy change."

b. Inspection Scope

The inspection was performed in accordance with IP 93100, "Safety Conscious Work Environment Issue of Concern Follow-up," and other IPs as referenced by IP 93100. The objectives of the inspection were to determine whether interim actions have improved the work environment in the Operations department since the CEL; if indications of a chilled work environment exist in other departments; if employees are reluctant to raise nuclear safety or regulatory issues; and if employees are being discouraged from raising nuclear safety or regulatory issues.

Specifically, the inspection team performed semi-structured interviews and focus groups using questions designed to address four primary elements of a SCWE:

- 1) employees' willingness to raise concerns and whether management's behaviors encourage them to do so;
- 2) employees' perception of the effectiveness of the corrective action program as the primary avenue to raise concerns;
- 3) employees' perception of the effectiveness of an alternative program if one exists, such as an employee concerns program (ECP); and
- 4) employees' perception of the effectiveness of management actions to detect and prevent retaliation and chilling effects.

The inspection team conducted 17 focus groups and 22 interviews with the licensee's staff and key management. For the focus groups, the inspection team randomly selected 10 to 20 percent of employees from the following departments: Operations, Engineering, Maintenance, Work Management, Security, Chemistry, Radiation Protection, and Training. Each focus group consisted of employees at the same organizational level and from the same department. A total of 136 employees participated in the focus groups and interviews. The information from the focus groups, interviews, and document reviews were organized into the themes that are discussed in this report.

c. Observations

1) General

Based on the results of the interviews and focus groups, the inspection team identified deficiencies in the safety conscious work environment across multiple departments. Although nearly all employees indicated that they were personally willing to raise nuclear safety concerns, many stated they did not feel free to raise concerns without fear of retaliation. In addition, most employees did not believe that concerns were promptly reviewed or appropriately resolved, either by their management or via the Corrective Action Program.

The inspection team observed that, in some work units, employees expressed a clear distinction between their willingness to raise nuclear safety concerns versus non-nuclear safety concerns. While nearly all employees stated that they were willing to raise nuclear safety concerns, many indicated that they would be unwilling to raise concerns that they believed to be unrelated to nuclear safety. Further, most employees did not believe that management would respond to or take action to resolve non-nuclear safety concerns. When questioned about what a non-nuclear safety concern was, employees gave examples of concerns that had potential ties to nuclear safety, such as deficient procedures, work orders that were inappropriately closed before all work was completed, personal safety concerns about working on live systems (e.g., safety systems that remain electrified or pressurized), and long-standing equipment issues. As a result, the inspection team determined that employees used a very narrow definition of "nuclear safety" when identifying the types of concerns that they were encouraged to raise. The potential negative consequences of making a distinction between nuclear and non-nuclear safety concerns is that employees may self-censor and decide not to raise a

concern because they fear retaliation and do not believe it is tied to nuclear safety. The inspection team observed that employees' perceptions about how management would respond to a concern, and whether the concern would be resolved in a timely manner, strongly influenced their overall willingness to raise any concerns.

2) Response to Chilling Effect Letter

When asked about the chilling effect letter, all employees indicated that they had received communications from management explaining the letter. Many employees expressed disappointment in the initial communications from management, which seemed to downplay the issue by focusing on the "perception" of a SCWE problem. However, employees noticed a shift in the tone of more recent communications, which suggested management ownership for the chilled work environment in Operations and commitment to address work environment issues across the entire site. Most employees also indicated that they are cautiously optimistic about the recent management changes. However, employees were not generally aware of specific actions to address the root causes of the chilled work environment beyond recent management changes and increased communications.

Multiple focus groups expressed skepticism about the sustainability of positive changes in the work environment, particularly given their experiences with frequent management changes. While staff had noted increased communications, the information provided was not always seen as open and honest. For instance, communications were seen as incomplete, often over-emphasizing positives, and down-playing challenges. Employees noted that the incomplete communications gave the impression that management was controlling the story, which contributed to a **lack of trust in management**. Some groups felt they had no basis to judge whether positive changes would last, and noted that the next planned outage in Spring 2017 would be an effective indicator of whether there have been true changes in the work environment. Multiple groups observed that the safety conscious work environment is particularly challenged during outages because of the added schedule pressure.

3) Environment for Raising Concerns

Most licensed operators in both interviews and focus groups reported slight improvements in the work environment since the CEL, and expressed that they felt free to execute their duties without undue external pressure. However, many employees, including licensed operators, believed that **retaliation for raising safety concerns has occurred in the past**, and therefore remained cautious when deciding when and how they would raise concerns. Many based this belief on management actions they considered to be retaliatory in nature. **Employees provided examples of dismissive, disrespectful, or blaming behaviors that did not encourage the raising of concerns. In spite of this, most employees stated they would raise nuclear safety concerns.**

The inspection team observed a **lack of trust between employees and management regarding their environment for raising concerns, particularly beyond the level of first line supervision. While most employees felt free to raise issues to their first line supervisor, they would be hesitant to raise concerns to middle or upper management.** In addition,

employees did not feel that first line supervision was supported by upper management. For example, some employees believed that first line supervisors who regularly raised concerns up their management chain were subject to ridicule from higher levels of management and received more negative performance appraisals.

Many employees noted that the continuous turnover and rotation of managers had created instability in their departments. Employees from different departments provided examples of having from six to sixteen different managers in the past six years. Most employees expressed frustration with the frequent management changes because they felt it led to changing priorities and a lack of long-term accountability. For example, employees indicated that because managers would not remain in a position for a long period of time they could make decisions that prioritized short-term gains over long-term improvements. Other examples included beliefs that managers were more concerned with meeting metrics and production goals than fully addressing issues with degraded equipment, ensuring procedures were updated, or improving work processes. The lack of management visibility or development of relationships with employees had also contributed to a lack of trust between management and staff.

4) Other Safety Culture Observations

In addition to questions regarding the environment for raising concerns, the inspection team asked questions related to other traits of a positive safety culture, such as decision making, questioning attitude, problem identification and resolution, and work processes. The team sought to determine the extent to which weaknesses in other safety culture traits may be driving the identified deficiencies in the safety conscious work environment.

Most employees indicated that they have the authority to stop work and expressed a willingness to stop when they believed the work to be unsafe or work instructions were unclear. However, most employees also noted that there was a strong sense of production over safety throughout the organization. Many employees expressed the opinion that if they raised issues that would disrupt “critical path” activities then they would be viewed negatively by management. Focus group participants provided examples of disrespectful behavior, intimidation and shopping around work to other employees or contractors who would be less likely to raise issues.

When asked about the Corrective Action Program (CAP), all focus groups stated that they could enter issues into the CAP; however, most believed the CAP was ineffective at resolving issues. The CAP was characterized as a problem identification, but not a problem resolution tool. Employees expressed frustration with the lack of feedback, and issues that were closed to trend or repeatedly deferred.

5) Employee Concerns Program

Most employees stated that they were aware of the Employee Concerns Program. However, many employees were not aware or did not perceive ECP as independent from management. Some employees did not believe that management would take action to resolve issues identified through ECP.

Most employees stated that they can be open and honest when participating in ECP surveys and other safety culture assessments. However, the inspection team noted that many employees were not able to differentiate between the different safety culture assessments that they take. For example, ECP pulsing surveys were often confused with other surveys that ask similar questions about safety culture and SCWE, but also required employees to report identifying information such as their work unit, tenure, age range, and gender. As a result, the ECP pulsing surveys were not viewed as anonymous, which also affected employees' overall perception of the ECP. In addition, most employees did not recall communications regarding the results of the assessments, or saw changes made to the work environment prior to the next assessment. This created a continuous cycle of employees providing feedback but not seeing any action as a result of that feedback. Such action can discourage continued employee engagement and is interpreted by employees to mean management is not supportive of employees raising any concerns, including nuclear safety concerns.

6) Nuclear Safety Culture Monitoring Panel

The team interviewed multiple members of the Nuclear Safety Culture Monitoring Panel (NSCMP), and all members reported improvements in recent meetings of the NSCMP. For example, after the CEL the panel met monthly rather than quarterly to provide more timely reviews of safety culture trends. Panel members also reported more engagement during meetings, and the addition of craft level employees rather than just management at the meetings to provide additional insights regarding the work environment in different departments.

However, from the inspection team's review of the NSCMP procedures and meeting minutes from 2014 through August 2016, the NSCMP did not appear to be self-critical of key safety culture traits that were precursors for the issues that led to the chilled work environment in Operations. Specifically, the team noted that the safety culture trait, "leadership safety values and actions," was only identified as an improvement opportunity on two occasions since 2014. On both occasions, the trait was rated as an improvement opportunity due to issues identified by external organizations (e.g., Quality Assurance and Institute of Nuclear Power Operations). Further, the "leadership safety values and actions" trait has remained acceptable since fourth quarter of 2015, yet leadership deficiencies were identified as a root cause of the chilled work environment in Operations in early 2016. This suggested that the NSCMP may have difficulty self-identifying safety culture issues, particularly when the source relates to leadership behaviors.

The inspection team also observed considerable fluctuations in the NSCMP ratings of safety culture from meeting to meeting, primarily based on recent examples of positive or negative performance. For example, the NSCMP rated the safety culture trait, "environment for raising concerns" as a strength in November 2015, during the same time period that the chilled work environment developed in the Operations department. Since that time period, the "environment for raising concerns" trait has been rated as acceptable during multiple meetings, including the NSCMP meeting immediately before the chilling effect letter was issued (March 2016) and the meeting two months after the chilling effect letter (May 2016). This gives the impression that the NSCMP believed the

site had resolved the issues associated with the environment for raising concerns in May 2016. The rating of acceptable was based in part on pulsing survey results, which showed that high percentages of employees were willing to raise concerns. However, the data did not indicate whether employees feel encouraged to raise concerns, whether they believe they may be retaliated against for raising concerns, or whether employees believed concerns will be appropriately addressed and resolved.

The inspection team observed that NSCMP members have not received specialized training regarding how to draw conclusions about safety culture. Given the fluctuations in the safety culture ratings, it was not clear that the NSCMP members shared a common understanding of the nuclear safety culture standards they were trying to achieve when assessing whether a safety culture trait was a strength, acceptable, or an improvement opportunity. As a result, the inspection team did not have confidence that the NSCMP provided an accurate snapshot of the safety culture at the site, or that the NSCMP would be able to detect and correct a gradually declining safety culture prior to the development of a chilled work environment.

7) Summary

Based on the inspection team's limited assessment, the licensee's safety culture and safety conscious work environment were not consistent with the Commission's expectations as described in the Safety Culture and SCWE Policy Statements (76 FR 34773, June 14, 2011; 61 FR 24336, May 14, 1996). There were strong indications that similar stressors and precursors that allowed the chilled work environment to develop in the Operations department also existed in other departments. These underlying issues included perceptions that decision making favored production over safety, lack of effective problem resolution, lack of trust between management and staff, and beliefs that employees who raised concerns, including nuclear safety concerns, were at risk of being retaliated against for doing so. At the time of the inspection, most employees noted slight improvements in the work environment since the issuance of the CEL, and licensed operators reported that they felt free to execute their duties. However, the interviews and focus groups indicated deficiencies in the SCWE, specifically ensuring management behaviors encouraged the raising of concerns, the effectiveness of the CAP and ECP for resolving concerns, and the effectiveness of management actions to detect and prevent retaliation and chilling effects.

4OA6 Meetings, Including Exit

On September 15, 2016, the inspectors presented the inspection results to Mr. Simmons and other members of the site staff.

ATTACHMENT: SUPPLEMENTAL INFORMATION

KEY POINTS OF CONTACT

Licensee personnel:

Gordon Arent, Licensing Manager

NRC personnel:

Jared Nadal, Senior Resident Inspector

LIST OF REPORT ITEMS

None

LIST OF DOCUMENTS REVIEWED

Condition Reports Reviewed (CRs)

1125714
1127691
1151960
1155393
1182538
1209515
1210654

Corrective Action Documents (Completed)

1162755-013
1162755-028
1162755-033

Procedures

NPG-SPP-01.7, "Nuclear Safety Culture," Rev. 3
NPG-SPP-01.7.2, "Nuclear Safety Culture Monitoring," Rev. 6
NPG-SPP-01.7.3, "Conduct of Nuclear Safety Culture Assessments and Organizational Effectiveness Surveys," Rev. 2

Miscellaneous Documents

CR 1127691, "Inadequate Management of an Outage Emergent Issue Results in Challenge to Plant Operation Root Cause Analysis (RCA) CR Report," Rev. 1
 CR 1155393, "Watts Bar Nuclear Plant Chilled Work Environment RCA CR Report," Rev. 0
 EA-16-061, Letter from U.S. NRC to Mr. Joseph Grimes, "Chilled Work Environment for Raising and Addressing Safety Concerns at the Watts Bar Nuclear Plant," 03/23/2016
 Gelfond Employee Engagement Survey, dated Summer 2015
 Gelfond Nuclear Supplement to Employee Engagement Survey, dated Summer 2015
 Letter from Watts Bar Nuclear Plants Units 1 and 2 to U.S. NRC, "Response to NRC Letter Concerning a Chilled Work Environment for Raising and Addressing Safety Concerns at the Watts Bar Nuclear Plant," 04/22/2016
 Nuclear Safety Culture Monitoring Panel Agenda and Report, 06/05/2014
 Nuclear Safety Culture Monitoring Panel Agenda and Report, 008/14/2014
 Nuclear Safety Culture Monitoring Panel Minutes, 11/06/2014 and 11/20/2014
 Nuclear Safety Culture Monitoring Panel Minutes, 02/05/2015
 Nuclear Safety Culture Monitoring Panel Minutes, 05/07/2015
 Nuclear Safety Culture Monitoring Panel Minutes, 08/13/2015
 Nuclear Safety Culture Monitoring Panel Minutes, 11/05/2015
 Nuclear Safety Culture Monitoring Panel Agenda and Report, 01/14/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 03/03/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 04/14/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 05/19/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 06/23/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 07/14/2016
 Nuclear Safety Culture Monitoring Panel Minutes, 08/11/2016
 OE.01.WBN.01, "Improve WBN Work Environment," Business Planning Initiatives and Actions," FY17-21 BP Rev 0
 Organizational Survey Analysis Report by Midwest Organizational Services, 11/26/2014
 Watts Bar Nuclear Plant CWEL Oversight Meeting Minutes, 08/23/2016
 Watts Bar Nuclear Plant Nuclear Chilled Work Environment Assessment of Progress, presentation, 09/12/2016

Condition Reports generated as a result of the inspection

CR 1212504, "Consider Revising NSCMP Procedure NPG-SPP-01.7.2 to Add Craft," 09/12/2016
 CR 1212515, "Consider Adding the NSCMP Index Developed at Watts Bar to NSCMP Procedure," 09/12/2016

Exhibit 3

Agenda, Licensing (May 7, 2018)
(original version by Mr. McBrearty)

Agenda

CFAM Area:

Licensing

Attendees/Sponsor:

423-751-7777

423-751-3928#

Hulvey, McBrearty, Paul, Pate, Johnson, Oliver, Justice, Thompson
Bradshaw, Rescheske, Henderson, Shea, Schroll, Wetzel, Polickoski

Please read:

Peer teams are utilized to seek efficiencies in their respective functional areas with the common purpose to provide consistent, structured sharing of information, and implement changes in a standardized manner across the NPG fleet (NPG-SPP-01.5).

Agenda Topics

Immediate Peer Team Issues Requiring Discussion

- Next F2F: **proposed May dates?**
- WBN potential White Finding CR1393208: PAR Zone Omission from CECC-EPIP-1, WBN-EPIP-5, BFN-EPIP-5. WBN initiated new Reg Analysis to capture critical thinking; Corporate responsible for RCA/EOC with WBN MRC currently to support review. **BFN EP Program Baseline Inspection exited on 4/27 with an observation regarding the error found in BFN-EPIP5 (NRC characterized as near-miss).**

Immediate Plant Issues Requiring Peer Team Attention

BFN

- Regulatory Analysis: **none**
- Operability/Reportability/Other NRC Issues: **none**
- Inspections in progress:
 - **DBA Inspection (4/30- 5/18) - NRC scope narrowed to 4 components (with 1 alternate), 4 modifications, and 2 OE items....significant issues? status?**
- Upcoming inspections: **none**
- Inspection item tracking: **none**
- Other items of interest:
 - Request for withdrawal of violation for failure to report - **corporate concurrence on 5/1; submitted on 5/4**
 - Unit 1 Circumferential Weld Relief potential error in submittal - potential 50.9 issue; based on SI final report, discrepancy bounded and RA cancelled; how should error be corrected on docket in discussion. Gordon Williams discussed with NRR; NRR considers this a technical issue requiring a public meeting. On 3/28, Jamie Paul sent an email to the BFN NRR PM posing an administrative process question regarding the correct regulatory process to resolve this issue **and discussion held on 4/19; awaiting further discussion with NRR PM and technical reviewer**
 - SRI IDO/PDO NCV - consolidated Eng IDO/PDO/POE issue email sent to Eng/Ops CFAMs; BFN Ops initiated trend CR; Eng CFAM recommends Elevation - not issued yet; Corp Eng additional meeting planned. Re-establishing IDO quality review board with NRC attendance - insights?
 - C3 EECW pump breaker - Peer challenge on 3/27 concluded reportable; POE completed on 3/29; NRC notification of unanalyzed condition on 3/29. Corporate PRA is developing a qualitative PRA evaluation to demonstrate functionality and no PRA impact. **This evaluation was completed on 4/25 and states that "between operations using additional available equipment, manually charging the closing spring, and the PRA success criteria being satisfied, the condition outlined in CR 1394604 is considered to have negligible risk impact."**
 - RHR SW water hammer issue - NRC notification of unanalyzed condition on 3/29. Initial PRA look is "Yellow;" Low pressure system needs to be built into PRA model. PRA work continues. The RELAP model used by S&L was questioned; Engineering to verify how the scenario was modeled in more detail and engage MPR to perform a review of S&L's work. Feedback from the SRA obtained via the acting SRI is that risk is perceived as low. S&L has reviewed the issue further and believe they can demonstrate the functionality of the HX - **S&L received PO on 4/20, TVA to receive draft product for**

review on 5/11, TVA comments to S&L by 5/16, S&L to complete final deliverable on 5/21.

- Coordinate with WBN regarding Oak Ridge survey review for WBN CWEL/CO June inspection - NRC plans to look at Fleet
- EOC public meeting 5/30
- Regulatory Document Quality Elevation: on-track; extended IQR run time for sustainability; **next status meeting date? timeline for closure?**

SQN

- Regulatory Analysis: **none**
- Operability/Reportability/Other NRC Issues: **none; non-1E Vital Battery Board breakers all tested satisfactorily**
- Inspections in progress: **none**
- Upcoming inspections:
 - 50.59 Inspection (6/4-8); planning status - **will engage with WBN regarding lessons learned**
- Inspection item tracking:
 - IP 95001 inspection of IT SGI control White Finding - exited on 3/29 with no issues. Expect white finding to be closed and return to Response Column 1 on July 1. Formal critique conducted; documentation in progress; Complete **COC to comment/review—expect more follow-up...Jim status?**
 - DBA EQ inspection - report issued 1/24 with 2 NRC-identified green NCVs, 4 URIs and 1 Minor Violation. 1 URI done; contract support for other 3 URIs. Final evaluations complete; **sent information to CFAM for review...Jim status?**
- Other items of interest:
 - EOC public meeting 6/6; will include NRC HQ and RII staff.
 - Coordinate with WBN regarding Oak Ridge survey review for WBN CWEL/CO June inspection - NRC plans to look at Fleet

WBN

- Regulatory Analysis:
 - FAQ for WBN2 scram PI count - White NRC PI; FAQ 18-02 submitted via NEI and ROP TF 3/1; discussion with NRR DIRS that FAQ in consideration and should not expect Regional response until FAQ resolved; NRC draft FAQ response is negative. FAQ Revisions and RCA provided to NRC. MRC to determine L1 or L2 evaluation. Licensing and PI recommending a C-3 with 3 actions: (1) track FAQ, (2) track ROP deviation, and (3) upon completion of actions 1 and 2, document critical thinking on whether or not a Level 1 analysis is needed to prepare for 95001; tracking ROP Deviation NRC conversation - continuing discussions with NRC. **Impact of recent plant trip on PI discussion? CR is being initiated to track 95001 inspection and drive site support, MRC decisions, and leadership awareness....status?**
 - EP procedure missing B3 sector for 10 mile radius PAR - initial analysis indicates White. Corporate EP owns RCA.....**status?**
- Operability/Reportability/Other NRC Issues:
 - **EN on 4/20 involving ECCS gas accumulation/voiding nonconservative acceptance criteria (unanalyzed condition); 2 ENs on 4/22 for U1/U2 RHR inoperability due to failed surveillances (gas voids); considering retraction of RHRS ENs based on new analysis; see below Special Inspection**
- Inspections in progress:
 - **Special Inspection regarding ECCS gas accumulation/voiding issues began on 4/27; exit TBD.....significant issues? status?**
- Upcoming inspections:
 - CWEL/CO followup inspection (6/18-22) - external prep support; effectiveness review due 4/30. Considering a SA to start 5/14 with external support; has not been funded yet. Challenge board scheduled 6/4. NRC plans to use Oak Ridge survey review for WBN to look at SQN/BFN
 - Scram PI - IP 95001 (TBD) - see above FAQ discussion
- Inspection item tracking:
 - **Security Baseline inspection exited on 4/27 with one Self-Revealing green NCV (unsecured Safeguards container located at COC)**
 - 50.59 inspection exited on 3/23 with 3 URIs; more information exchange expected
 - CWEL/CO inspection exited on 02/02 with no findings or performance deficiencies but caution on NSC aspects; will return to inspect CWEL RCA closure; held informal post-inspection critique; **CR initiated?**
 - EQ Inspection - URI responses provided to NRC; Region brief with executive participation on 10/27; re-exit not scheduled based on Region engagement week of 1/29; waiting for public meeting (confirmed it is not yet scheduled)
 - CDBI related electrical - awaiting final exit and Choice Letter; unclear of possible other issues; expect 50.9 violation 2Q18 IR
- Other items of interest:
 - Safety function/PI items (CR door; shield building vent/annulus) - RA cancelled; site took 2 SSFF hits

for each unit; SRI concurred with PI view; waiting for inspection report; NRC will want to know what is going to prevent recurrence of MCR door issue...**design change? SRI questioning S&L evaluation; is help needed here for eng eval?** Subsequently, 2 separate CRE boundary door reportable events occurred on 3/26....status of actions and engineering solution? Initial scoping for magnetic security lock and push button installation complete. **PHC status?**

- EOC public meeting 6/7 at Spring City Municipal Building

Peer Challenge/Mutual Support Topics

- Tracking Eng Peer Team discussion on Eng product quality Elevation and other Corp Eng actions for PDO/POE process/procedure improvement; recent BFN 805 unanalyzed condition accelerated procedure rev discussion
- Fleet EQ URIs - expect major resolution at upcoming NRR public meeting to discuss generic challenges in DBAEQ inspections; meeting tentative in mid-May (will strategize attendance once scheduled)

Issues for potential elevation/escalation (added per 1331340-044)

- Working with WBN PM/SLM on site-wide regulatory performance based Elevation; red metrics in nearly all WBN Regulatory MRM for >12 months; held joint meeting with WBN PM; **expect to issue Elevation week of 4/16....status?**

Programmatic/Corporate/Peer Team Initiatives

- BPI FY18 action status summary - **updated in email**
- Action Items from 3/21 F2F **stated at 4/27 F2F meeting**
- OE MRM TOP report generation: BFN - 6/6; WBN - 6/12; SQN - 7/10
- Peer team strategic initiative; discussed in 3/21 F2F; Comments incorporated and briefed at company Business Planning meeting. **Discussed with Peer Team in 4/26 meeting; next step is to draft meeting results and actions.**
- Action Item tracker updates - **email from Alesia**
- Procedure revisions in flight: NPG-SPP-03.3; NPG-SPP-03.10 - **CFAM approved on 4/26**; PCR's next for 3.9, NLDP-3
- SAs/BMs: FY18 list on PI SharePoint; tracked on Action Item tracker
- Trending: LER trending product maintained by Peggy - updated for reportability project
- Improving submittal process - Fleet Licensing has modified their current process to become a more learning organization by performing a "cold read" of the submittal for understanding and by sharing findings during peer checks. **This process will be piloted for a month while evaluating other methods to improve performance.—This is an aspect of the "Path to Excellence."**
- Common Cause Evaluation - Suggest Corporate review and conduct a common cause evaluation of recent (past 2-3 years) issues that have resulted in site significant regulatory exposure, violations, or loss of regulatory margin, and which appear to have a strong corporate fingerprint; e.g.,
 - Failing to respond to SQN 2015 Mods Inspection NCVs for over two years - NRC was prepared to issue a Cited Violation to SQN to require a response.
 - White Finding at SQN for Uncontrolled SGI
 - Individual site NCV's for recent Uncontrolled SGI
 - 50.9 violation associated with response to WBN CWEL ultimately leading to the 2017 Confirmatory Order
 - Data omitted from REP plan which resulted in individual site NCVs
 - Recent data omitted from EPIP resulting in potential GTG Findings at BFN and WBN

Exhibit 4

Agenda, Licensing (May 7, 2018)
(revised version by Ms. Henderson)

Agenda

CFAM Area:

Licensing

Attendees/Sponsor:

423-751-7777

423-751-3928#

Hulvey, McBrearty, Paul, Pate, Johnson, Oliver, Justice, Thompson
Bradshaw, Rescheske, Henderson, Shea, Schroll, Wetzel, Polickoski

Please read:

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Agenda Topics

Immediate Peer Team Issues Requiring Discussion

- Next F2F: **proposed May dates?**
- WBN potential White Finding CR1393208: PAR Zone Omission from CECC-EPIP-1, WBN-EPIP-5, BFN-EPIP-5. WBN initiated new Reg Analysis to capture critical thinking; Corporate responsible for RCA/EOC with WBN MRC currently to support review. **BFN EP Program Baseline Inspection exited on 4/27 with an observation regarding the error found in BFN-EPIP5 (NRC characterized as near-miss).**

Immediate Plant Issues Requiring Peer Team Attention

BFN

- Regulatory Analysis: **none**
- Operability/Reportability/Other NRC Issues: **none**
- Inspections in progress:
 - **DBA Inspection (4/30- 5/18) - NRC scope narrowed to 4 components (with 1 alternate), 4 modifications, and 2 OE items....significant issues? status?**
- Upcoming inspections: **none**
- Inspection item tracking: **none**
- Other items of interest:
 - Request for withdrawal of violation for failure to report - **corporate concurrence on 5/1; submitted on 5/4**
 - Unit 1 Circumferential Weld Relief potential error in submittal - potential 50.9 issue; based on SI final report, discrepancy bounded and RA cancelled; how should error be corrected on docket in discussion. **Based on discussions with NRR PM, TVA will resubmit the Relief Request superseding the previous one, this time using the correct input data.**
 - SRI IDO/PDO NCV - consolidated Eng IDO/PDO/POE issue email sent to Eng/Ops CFAMs; BFN Ops initiated trend CR; Eng CFAM recommends Elevation - not issued yet; Corp Eng additional meeting planned. Re-establishing IDO quality review board with NRC attendance - insights?
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- plans to look at Fleet
 - EOC public meeting 5/30
- Regulatory Document Quality Elevation: on-track; extended IQR run time for sustainability; **next status meeting date? timeline for closure (end of May)?**

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- Discuss Mike McBrearty suggestion for Corporate common cause evaluation

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KRISTEN SINISI

MICHAEL ELLEMENT

DEVIN WRIGLEY

KAIYA LYONS*

*ADMITTED IN MN ONLY

By Hand Delivery

September 26, 2018

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
United States Department of Labor
200 Constitution Avenue, NW
Room S-2315
Washington, D.C. 20210

Re: Michael McBrearty v. Tennessee Valley Authority.

Dear Ms. Sweatt:

On behalf of my client, Mr. Michael McBrearty, I am filing a complaint with the Department of Labor, Occupational Safety and Health Administration, under Section 211 of the Energy Reorganization Act (“ERA”), 42 U.S.C. § 5851 *et seq.*, and NRC Regulation 10 C.F.R. § 50.7, against the Tennessee Valley Authority (“TVA”) for its retaliation against Mr. McBrearty, because he engaged in activities protected under the ERA.

Mr. McBrearty was a dedicated manager at TVA, with over 28 years’ experience in the nuclear power industry. As set forth below, he repeatedly reported, and attempted to solve, TVA’s refusal to address violations that affected nuclear safety at TVA’s Sequoyah nuclear power plant, and TVA’s improper closing out of his Condition Reports (CRs) without conducting the required investigation and resolution. TVA took little to no action to address his concerns, and instead reprimanded him for retaliatory reasons, culminating with the indefinite suspension of his employment, which resulted in his constructive discharge.

I. Mr. McBrearty's Professional Background and Employment at TVA.

Mr. McBrearty earned his Bachelor of Science degree in Mechanical Engineering at Drexel University in 1986. From 1986 to 1990, he worked for the General Electric Company. In 1990, the NRC hired him, initially as a Technical Reviewer (NRC/NRR), and subsequently promoted him to Resident Inspector at the Peach Bottom Atomic Power Station and then to Engineering Inspector in NRC Region I. In 1998, Southern California Edison hired him to work at the San Onofre Nuclear Generating Station, where he worked for 13 years as a Regulatory Compliance Manager. He then spent two years (2011 to 2013) at General Atomics (San Diego), initially as a Quality Assurance Manager, then as a Regulatory Compliance Manager. Thus, as of 2013, Mr. McBrearty had over two decades' experience in increasingly complex positions in the nuclear regulatory and compliance field, both with the NRC and with the licensees.

TVA hired Mr. McBrearty in early 2013 as the Manager for Sequoyah Site Licensing, where his primary job duties focused on ensuring that Sequoyah complied with all NRC regulations governing nuclear power operations, which was critical in light of the fact that the NRC was then considering TVA's application for a renewal of the licenses to operate Sequoyah (which were scheduled to expire in 2021-2022). In that role, Mr. McBrearty oversaw all aspects of compliance and licensing issues at Sequoyah, including, but not limited to (1) maintaining and processing changes to Sequoyah's licensing and design bases in compliance with federal regulations, (2) assessing daily plant operational activities and providing counsel to plant senior management to ensure compliance with federal regulations, (3) supporting licensed Control Room Operators to assess and ensure compliance with federal regulations, (4) coordinating all Sequoyah site organizations in supporting NRC inspections conducted by the onsite NRC Resident Inspectors and by NRC Region II based inspectors, (5) ensuring that potential and identified noncompliances were entered into Sequoyah's Corrective Action Program and appropriately resolved, and (6) maintaining daily communications with NRC personnel to ensure a clear and accurate understanding of Sequoyah plant status.

In these positions at TVA, he was responsible for ensuring TVA's compliance with the regulations of the Nuclear Regulatory Commission, including those relating to investigation and resolution of the Condition Reports. In that capacity, he routinely initiated Condition Reports, which are designed to report a condition that needs to be addressed, and to identify its probable cause, so that the originator or others can then take prompt action to remedy the condition. These Condition Reports also serve to identify trends, such as recurring problems that require organizational reform to prevent their recurrence. He also initiated, drafted, and followed-up on the adequacy of corrective actions taken to address the Condition Reports.

The NRC specifically requires nuclear plant personnel, such as Mr. McBrearty, to file Condition Reports to document NRC regulatory and non-regulatory compliance concerns, and to set forth a detailed plan for their resolution. *See* 10 C.F.R. Part 50, Appendix B, Criterion I (“The persons and organizations performing quality assurance functions shall have sufficient authority and organizational freedom to identify quality problems; to initiate, recommend, or provide solutions; and to verify implementation of solutions.”), and 10 C.F.R. Part 50, Appendix B, Criterion XVI, Corrective Actions (“Measures shall be established to assure that conditions adverse to quality, such as failures, malfunctions, deficiencies, deviations, defective material and equipment, and nonconformances are promptly identified and corrected.”). These regulations thus require TVA not only to document issues through Condition Reports, but also to address them through an investigation and resolution.

However, after Mr. McBrearty started filing Condition Reports about the failure of TVA’s Corporate Nuclear Licensing office (at the headquarters in Chattanooga), senior TVA managers – in particular, Joseph Shea, Vice President of Regulatory Affairs and Erin Henderson, Director of Regulatory Affairs – started closing out his Condition Reports before any investigation had been conducted. Mr. Shea and Ms. Henderson did this because they viewed Mr. McBrearty’s Condition Reports as a criticism of their lackadaisical and non-responsive approach to addressing the Condition Reports. As set forth below, Mr. Shea, Ms. Henderson, and their colleagues also retaliated against Mr. McBrearty through a series of other adverse employment actions, including initiating a spurious workplace investigation and placing him on indefinite leave, while making clear that if he did not resign, he would be fired.

II. Mr. McBrearty’s Work as the Site Licensing Manager for Sequoyah.

Mr. McBrearty, as the Site Licensing Manager for Sequoyah, has reported to a number of different Sequoyah Plant Support Directors since his hiring in 2013, with his most recent Directors being Dennis Dimopoulos (2016-2017), and more recently (since February 2018) to Al Dodds. His supervisors reported directly to the Sequoyah Site Vice President (five individuals have held that title on a permanent or acting basis since 2013, with Anthony Williams as the current Site Vice President).

In his role, Mr. McBrearty regularly interacted with Corporate Regulatory Affairs. His key counterpart there was Erin Henderson (Senior Manager, Fleet Regulatory Operations), who reported to Joseph Shea (Vice President, Nuclear Licensing), who, in turn, reports to David Czufin (Senior Vice President, Engineering & Operations Support). Although Mr. McBrearty

did not report to either Ms. Henderson or Mr. Shea, their approvals are required for Sequoyah to submit certain documents to the NRC, such as denials of violations.

A. Mr. McBrearty's Job Performance.

Mr. McBrearty received commendable performance reviews from Mr. Dimopoulos for both 2016 and 2017. He was commended for his accountability and addressing licensing issues:

Accountability and ownership for issues within the Licensing department and activities associated with inspections is strong. Mike looks well in advance (strategic) to ensure the site is prepared for significant inspections and audits. **As a result, the regulatory posture for the station is the best in the fleet and top quartile in the industry. There has been significant improvement with regulatory posture with Mike in his present role.**

As the Licensing Manager, there has been significant improvement with regulatory posture with Mike in his present role. Mike's background and leadership at the site are reflective of his commitment and drive for regulatory excellence. Additionally, Mike's counsel throughout the fleet regulatory affairs are taken in high regard. In fact, during an NRC senior leader "drop in," **NRC senior leadership spoke specifically in high regard about Mike's diligence, communication and transparency with the [NRC] Staff. Those same position experiences have been repeated numerous times by the onsite NRC residents.**

I strongly believe it was Mike's influence on the team that reduced the overall level of [IAEA] findings to 50% of the original identified. **His talents with working with the NRC in similar roles paid off handsomely for the site.** I would strongly recommend Mike as a host peer for the 2018 INPO assessment.

See TVA Manager Evaluation (Nov. 30, 2017) (emphasis added).

Mr. Dimopoulos noted that several weak areas were caused by problems beyond Mr. McBrearty's control, e.g., "It was [a] tough year for SQN performance due to equipment reliability and decision making by the site;" "the organization as a whole did not function to meet site objectives;" and "inconsistent performance is reflective of overall site performance."

B. Mr. McBrearty Protested TVA's Delays in Addressing NRC Violations.

When the NRC identifies a potential violation, it has several alternatives for classifying the level of that violation. The lowest level is a minor violation, and the second lowest possible level is a "Non-Cited Violation" (NCV). A potential NCV requires the licensee (here, TVA), to either assess the violation and implement corrective actions to prevent recurrence, or else provide a written response to the NRC within 30 days of the inspection report denying the violation. If TVA does not promptly deny the violation, then TVA is required to implement corrective actions to return Sequoyah to compliance. Otherwise, the NRC can then elevate the NCV to a more serious "Notice of Violation" (NOV), which can in the most serious circumstances lead to a civil penalty. But, even a NOV without a civil penalty can still be considered by the NRC when evaluating TVA's applications for renewal of the Sequoyah operating licenses. Further, failure to address a proposed NCV usually reflects the licensee's inability to resolve the underlying problem that led to the NCV, meaning that the problem is likely to reoccur, both at the original plant and at the licensee's other plants (here, TVA has licenses for three nuclear power plants, so an NCV at one plant could reflect a fleet-wide problem).

Mr. McBrearty protested TVA's failure to address two NCVs that the NRC identified during the 2015 Baseline NRC Modifications Inspection at Sequoyah – (1) a service life issue involving replacement of the molded case circuit breakers, and (2) the improper removal of a mechanical interlock device. Initially, TVA investigated and conducted a Regulatory Analysis, which concluded that both NCVs lacked an appropriate regulatory basis and should be promptly denied. As a result, Jonathan Johnson, then the Acting Sequoyah Site Licensing Manager, notified the NRC that TVA intended to deny both NCVs, requested an extension of time to do so, and drafted the denial letters. However, Mr. Shea and Ms. Henderson repeatedly directed Mr. McBrearty to rewrite the two denial letters as "informational" letters. This was improper because the NRC only allows for either admission or denial letters, and nothing in between, as Mr. Shea and Ms. Henderson were now demanding. In response, Mr. McBrearty repeatedly told them that if TVA did not deny the violations, then TVA had a regulatory obligation to implement corrective actions. Mr. Shea also directed Mr. McBrearty to contact his counterpart at the NRC (Jonathan Bartley, NRC Region II Engineering Branch Chief), to advise the NRC that TVA would be submitting these "informational" letters. Mr. Bartley promptly told Mr. McBrearty that the NRC does not recognize "informational" letters and that TVA was still obligated to either issue a formal denial, or else to initiate corrective actions. Mr. McBrearty promptly communicated Mr. Bartley's reply to both Ms. Henderson and Mr. Shea.

The first NCV involved the replacement of safety-related molded case circuit breakers installed in non-harsh operating environments, which involved a service life issue. This NCV had far-reaching implications for the entire TVA nuclear fleet and other nuclear power plants elsewhere in the U.S., since it challenged the programmatic adequacy for safety-related equipment installed in non-harsh environments. Mr. McBrearty knew that if TVA did not deny this NCV for Sequoyah, TVA would be legally obligated to take corrective action at all three of TVA's nuclear sites, which would have significant operational and financial impact on TVA, and could have led to uncovering yet other problems with the circuit breakers. Further, failing to deny or correct the NCV left open the question of whether the subject safety-related equipment was qualified for plant operations. However, despite his efforts to prepare the "informational" letter that Mr. Shea and Ms. Henderson were demanding, they stalled for over two years – from October 2015 through December 2017 – in responding. Not until sometime in March or April 2017 did Mr. Shea and Ms. Henderson belatedly realize that this open issue would be reviewed by the NRC during the forthcoming NRC Biennial Baseline Problem Identification & Resolution Inspection (PI&R) scheduled for June 2017. Only then did they demand that Mr. McBrearty change the letter into a combined denial and backfit letter (pursuant to 10 C.F.R. § 150.109), but even then, they stalled in providing any responses to the letter. Even after the June 2017 NRC inspection had passed, Mr. Shea and Ms. Henderson continued to refuse to address the issue, which was now in noncompliance for two years.

In November 2017, the NRC Resident Inspectors told Mr. McBrearty that they were now reviewing TVA's corrective actions for the Service Life NCV, and had determined that TVA had failed to implement corrective actions (since TVA had never submitted the denial letter). Therefore, the NRC intended to issue a new violation, which would be a higher-level "Cited Level IV Violation" that would require TVA's prompt response. Mr. McBrearty promptly notified Mr. Shea, Ms. Henderson, and James Polickoski (who also worked in TVA Corporate Nuclear Licensing), and only then did Mr. Shea finally sign the denial letter, which TVA belatedly submitted to the NRC. In June 2018, the NRC completed its review of the denial letter that Mr. McBrearty had been advocating for over two years, and the NRC withdrew the NCV.

The second NCV involved a design change that removed a Kirk Key Interlock installed in Motor Control Centers on the safety-related Essential Raw Cooling Water System (ERCW). The Kirk Key interlock is a mechanical device designed to prevent the reactor operators from improperly paralleling multiple equipment power supplies which could result in equipment damage. As with the other NCV (*supra*), Mr. Shea and Ms. Henderson improperly directed Mr. McBrearty to prepare an "informational" letter instead of the denial letter that he had originally drafted, and Mr. McBrearty then submitted that letter to the NRC. Since TVA had neither

confirmed nor denied the issue, Mr. McBrearty repeatedly told Mr. Shea and Ms. Henderson that the failure to address the issue created the potential for significant regulatory exposure to TVA.

In March 2017, Mr. Bartley told Mr. McBrearty that the NRC was upholding the original Kirk Key NCV. Mr. McBrearty told Mr. Shea and Ms. Henderson that he was recommending that TVA submit a License Amendment Request (LAR) to the NRC, which would request NRC's after-the-fact approval for having removed the Kirk Key Interlock. Mr. McBrearty consulted with an outside expert, who agreed with his assessment. However, Mr. Shea unilaterally rejected Mr. McBrearty's proposal but without providing any alternative resolution. Even after Mr. McBrearty told the NRC inspectors during the June 2017 inspection that TVA would be submitting a LAR, Mr. Shea kept stalling, and one was not approved and submitted until March 2018, after continuous challenges and insistence by Mr. McBrearty. In fact, when Mr. Dodds told Mr. McBrearty of his suspension on May 25, 2018, *infra*, Mr. Dodds expressed his understanding that the suspension arose from a March 2018 text message Mr. McBrearty had sent to Mr. Polickoski which described Mr. McBrearty's concerns with the ongoing refusal of TVA Corporate Regulatory Affairs (*i.e.*, Ms. Henderson and Mr. Shea) to submit the LAR.

Moreover, Mr. Shea's and Ms. Henderson's constant resistance to Mr. McBrearty's efforts to ensure regulatory compliance at Sequoyah created significant tension and a lack of trust by the Sequoyah Site Licensing Group regarding TVA's Corporate Regulatory Affairs. Mr. McBrearty and his colleagues at Sequoyah could no longer rely upon Mr. Shea, Ms. Henderson, and their staff for accurate information and legally acceptable decisions regarding licensing issues. Mr. Shea's and Ms. Henderson's actions also created significant regulatory exposure for TVA and individually for Mr. McBrearty. The NRC has established precedence in taking individual enforcement action against individual Site Licensing Managers for not being appropriately intrusive and challenging to ensure regulatory compliance (see NRC Order issued to Dale L. Miller, Davis Besse Nuclear Plant, dated Sept. 22, 2006). TVA acted illegally when it retaliated against Mr. McBrearty and suspended him for his dedication and persistence in resolving regulatory compliance issues.

Because of Mr. Shea's and Ms. Henderson's improper conduct regarding the two aforementioned NCVs, Mr. McBrearty was understandably concerned that TVA's senior managers would similarly resist any efforts to investigate other violations that the NRC may find in the future. Initially, he tried to address this during TVA Licensing Peer Team teleconferences and meetings, by requesting that TVA Corporate Regulatory Affairs generate CRs to review these issues in a prompt way and develop immediate corrective actions. Not surprisingly, TVA's Corporate Regulatory Affairs rejected his proposal.

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 8 of 18

In response, Mr. McBrearty initiated not one but two Condition Reports on February 14, 2017, and he solicited input from Corporate Regulatory Affairs on them before formally entering the Condition Reports into TVA's Corrective Action Program. Mr. McBrearty generated CR 1262488 on February 14, 2017, requesting that Corporate Regulatory Affairs review and assess the decision-making that led to the failure to deny or correct the NCV, and to develop and implement corrective actions (e.g., process changes) to prevent recurrence. However, once Mr. McBrearty had entered this Condition Report into TVA's CAP system, Ms. Henderson quickly closed the Condition Report on April 21, 2017, falsely indicating that no action was needed. Mr. McBrearty properly challenged this lack of action, and requested that this topic be included on the agenda for the next Licensing Peer Team Face-to-Face Meeting. Peter Wilson (who reported to Ms. Henderson), told Mr. McBrearty that Ms. Henderson specifically directed that he not include this item on the agenda. Mr. McBrearty then called Mr. Wilson to inquire whether he (Wilson) thought that Ms. Henderson's closure of the Condition Report was appropriate – Mr. Wilson candidly responded, “Oh no, I am not answering that – I know who signs my paycheck!” (This conversation was overheard by Jonathan Johnson, a colleague in Mr. McBrearty's Sequoyah Licensing Group.)

Notwithstanding Ms. Henderson's refusal to add the item to the meeting agenda, during the face-to-face meeting on April 28, 2017, Mr. McBrearty voiced his concern with the manner in which CR 1262488 was inappropriately closed. Mr. Shea then asked Ms. Henderson to either re-open CR 1262488 or create a new CR to address Mr. McBrearty's concerns. Ms. Henderson then created CR 1289450 on April 28, 2017, and on June 8, 2018, similar to her handling of the previous CR, Ms. Henderson closed this new CR to no action, again refusing to address Mr. McBrearty's concern.

Mr. McBrearty also generated a second CR 1262490 on February 14, 2017, requesting that Corporate Regulatory Affairs perform the following two actions: “1. Perform a new Regulatory Analysis of any potential additional NRC enforcement actions due to the lack of corrective actions and continued non-compliance,” and “2. Develop and recommend a strategy to address the 2015 NCV's and potential additional enforcement actions, including any needed corrective actions and a communication plan to ensure alignment with TVA NPG executives.” Mr. Shea again rejected Mr. McBrearty's recommendation, stated that Corporate Regulatory Affairs would not accept this action, and directed that Sequoyah Site Licensing needed to perform a new Regulatory Analysis and to develop a strategy to address the two 2015 NCV's.

C. NRC’s March 2016 Investigation of Chilled Work Environment at TVA.

Meanwhile, in late 2015, the NRC had initiated a review to investigate the environment at Watts Bar for raising and addressing safety issues. The NRC convened a meeting on March 22, 2016 with TVA and public representatives, and issued a letter to TVA on March 23, 2016, specifically identifying a “chilled work environment for raising and addressing safety concerns” at Watts Bar. *See* NRC letter to J. Grimes, TVA (Mar. 23, 2016) (attached hereto as Exhibit 1). The NRC “determined there is sufficient evidence to support the existence of an environment within the Operations Department where your employees do not feel free to raise safety concerns to your management because they fear retaliation and do not feel that their concerns are being addressed.” *Id.* The NRC also wrote that “we are concerned an environment exists where control room operations may be influenced by management in a manner that undermines licensed senior operator responsibility for directing licensed activities.” *Id.* The NRC concluded that, “we are concerned that a fear of retaliation exists to the extent that it is impeding open communication within the Operations Department.” *Id.*

The NRC requested that TVA notify its workforce of the issuance of this letter, and submit its response, so that the NRC could continue its investigation. Subsequently, on October 26, 2016, the NRC issued its follow-up report on its investigation of the “chilling effect” on TVA employees. The NRC notified TVA that its investigation had found that numerous employees did not believe that they could report problems without retaliation:

Most prominent was that ... **nearly half [of the employees] believed retaliation was a potential outcome for raising concerns.** In addition, most employees did not believe that concerns were promptly reviewed or appropriately resolved, either by their management or via the Corrective Action Program.

The NRC has determined that, given the current state of the site’s safety culture, you [TVA] are not meeting the Commission’s expectation that licensees establish and maintain a positive safety culture and safety conscious work environment as described in the Safety Culture and SCWE Policy Statements...

See NRC letter to J. Shea (TVA), at 2 (Oct. 26, 2016) (attached hereto as Exhibit 2) (emphasis added). This issue, which remained open into 2018 and is still open, confirmed that TVA was not creating an atmosphere that was conducive for reporting and addressing safety issues at the nuclear plants. Both the chilling effect letter and the follow-up letter are still open.

D. Ms. Henderson Initiated a Retaliatory “Investigation” of Mr. McBrearty.

In April 2016, shortly after Mr. McBrearty first started raising concerns about Mr. Shea’s and Ms. Henderson’s improper stalling in responding to the NRC’s proposed NCV, Ms. Henderson initiated an unjustified “investigation” of Mr. McBrearty’s alleged “relationship” with one of Ms. Henderson’s reports. This was based on a false allegation, since there was no such relationship. Indeed, the TVA Human Resources managers who conducted this investigation determined that there was no impropriety involved, and told that to Mr. McBrearty. Thus, investigation was designed to harass Mr. McBrearty for having raised concerns about Ms. Henderson’s conduct over the past several months.

After that investigation collapsed, Ms. Henderson then made repeated accusations that Mr. McBrearty had not included her on meeting invitations, even though these were meetings that other managers had requested be set up – and those other managers had not included Ms. Henderson in the list of requested attendees.

When those accusations also failed to hold up, Ms. Henderson then falsely told her direct reports that Mr. McBrearty had been “found guilty” of creating a chilled work environment for her. Mr. McBrearty then filed a concern with the Employee Concerns Program (ECP), which did an investigation that substantiated his concern (not hers), and the ECP told him that Ms. Henderson would be disciplined for her false accusations.

E. Ms. Henderson Escalated Her Retaliation Against Mr. McBrearty.

On May 4, 2018, Mr. McBrearty responded to a routine, weekly query from TVA’s Corporate Nuclear Regulatory Affairs to identify items for the Licensing Peer Team Conference Call. His response requested that the agenda include a discussion of the numerous recent TVA Fleet regulatory violations that appeared to have originated from the Corporate headquarters office, and Mr. McBrearty suggested that Corporate conduct a common cause evaluation. Mr. McBrearty listed six items, of which the first was the failure to respond to or correct the NRC’s two proposed NCVs for a period of over two years, along with five other violations, including the improper response to the aforementioned NRC’s Chilled Work Environment letter, all as part of the broader context of “Corporate review and conduct a common cause evaluation of recent (past 2-3 years) issues that have resulted in site significant regulatory exposure, violations, or loss of regulatory margin, and which appear to have a strong corporate fingerprint.” However, Ms. Henderson refused to include these six items in the agenda, which instead merely indicated

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 11 of 18

that Mr. McBrearty would “discuss [his] suggestion for Corporate common cause evaluation.”
See Agenda, Licensing (May 7, 2018) (two versions attached hereto as Exhibits 3-4).

During the May 7, 2018 call, Mr. McBrearty explained that it was “unusual” that actions taken at TVA’s headquarters (the Nuclear Fleet corporate office) would cause regulatory violations at the site level (Sequoyah and the other two nuclear plants), and he went through the six specific violations that were listed in his email and original agenda. Mr. Shea twice badgered Mr. McBrearty by asking if he (McBrearty) was suggesting that there was a problem in Mr. Czufin’s organization (Mr. Czufin is a Senior Vice President, reporting directly to the Chief Nuclear Officer). Mr. McBrearty responded that he was only listing examples, not singling out any one organization, although it was the case that TVA’s headquarters was causing these problems. When Mr. McBrearty recommended that they follow-up on this issue at the next monthly in-person meeting, Ms. Henderson expressed her strong disapproval, which she carried out by deleting that item from the agenda for the next in-person meeting (which occurred after Mr. McBrearty had been suspended).

On May 25, 2108, shortly before the next in-person meeting, Mr. Dodds told Mr. McBrearty that he was being placed on indefinite suspension (paid administrative leave), with his site access suspended. Mr. Dodds stated that an “investigation” had concluded that Mr. McBrearty had somehow “harassed” Ms. Henderson. Mr. Dodds said that the potential termination of Mr. McBrearty’s employment “was on the table.”

Mr. Dodds said he thought that the specific event was a text message that Mr. McBrearty had sent to James Polickoski (who worked in Ms. Henderson’s office), where Mr. McBrearty explained his concern that Corporate (*i.e.*, Ms. Henderson) was improperly closing out Condition Reports without investigating them as required by the NRC regulations, and that she (and Mr. Shea) were stalling on responding to the NRC’s proposed NCVs, both of which were creating significant “regulatory exposure issues” for TVA. He also wrote that “Joe [Shea] and Erin [Henderson] blow off procedures and everybody in Corp Reg Affairs are afraid or refuse to write a CR,” and that “It seems like all the issues in Corp Reg Affairs is swept under the rug or ignored.” He concluded that “These are major issues with significant SCWE [Safety Conscious Work Environment] implications.” Mr. McBrearty explained to Mr. Dodds why he had sent this text message, and why he thought it was important that TVA address these issues instead of continuing to “blow off” Mr. McBrearty and the NRC.

While Mr. McBrearty was on leave, Mr. Dodds called him on June 7, 2018, and told him that he was not approved to return to work, and that there was no indication as to when that

might happen. Mr. Dodds told Mr. McBrearty that his possible termination was still “on the table,” and that either Human Resources or the Office of General Counsel might be contacting him (in fact, neither entity ever did contact him). Throughout June, July, and early August 2018, Mr. McBrearty remained on paid leave, with the continued threat of termination. As a result, he had no choice but to resign in lieu of termination (so that his ability to work in the nuclear industry would not be affected by a termination), which he did on August 16, 2018.

III. TVA’s Retaliation Violated the Energy Reorganization Act.

Section 211 of the Energy Reorganization Act (“ERA”) prohibits an “employer [from] discharg[ing] any employee or otherwise discriminat[ing] against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee notified his employer of an alleged violation of this chapter.” 42 U.S.C. § 5851; *see also In re Five Star Prod., Inc.*, 38 N.R.C. 169, 179 (NRC Oct. 21, 1993) (“Any attempt to ‘chill’ this access to the NRC by harassing, intimidating, or firing employees who could report conditions that could adversely affect the public health and safety violates Section 211 [of the ERA]”).

This federal statute seeks to “promote a working environment in which employees are ... free from the debilitating threat of employment reprisals for publicly asserting company violations of statutes protecting the environment.” *Trimmer v. U.S. Dep’t of Labor*, 174 F.3d 1098, 1104 (10th Cir. 1999).

A. TVA Unlawfully Took Adverse Employment Actions Against Mr. McBrearty in Retaliation for Reporting Significant Safety Problems.

To establish a claim under the ERA whistleblower provision, an employee must demonstrate that (1) he engaged in protected activity; (2) the employer subjected him to an adverse employment action; and (3) a nexus existed between the protected activity and the adverse employment action. *TVA v. U.S. Dep’t of Labor*, 59 Fed. Appx. 732, 738 (6th Cir. 2003). As set forth below, Mr. McBrearty can easily prove all three elements of his claim.

1. Mr. McBrearty engaged in protected conduct when he repeatedly reported and protested problems with compliance issues at TVA.

Mr. McBrearty’s internal complaints constitute protected activity under the whistleblower provision of the ERA. *See* 42 U.S.C. § 5851 (prohibiting retaliation when an “employee notified his employer of an alleged violation.”); *see also Jones v. TVA*, 948 F.2d 258, 264 (6th Cir. 1991)

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 13 of 18

(“An employee who is retaliated against for filing internal reports concerning situations of nuclear regulatory laws has recourse under the ERA.”).

Here, Mr. McBrearty made numerous separate reports and protests that constitute protected activity. These include complaints that TVA was improperly closing out Condition Reports without investigating the issues, and was improperly stalling in addressing the NRC’s proposed NCVs. He also complained about other systemic problems with TVA’s safety and licensing issues that affected TVA’s entire nuclear fleet, not just the two plants at Sequoyah.

In response, Ms. Henderson rejected Mr. McBrearty’s efforts to address these issues, and instead created a chilled work environment through prematurely closing out his Condition Reports before they could even be investigation. She, and Mr. Shea, stalled in responding to his proposals to address the NRC’s proposed NCVs. She also falsely accused him of having harassed her (not once but twice), and falsely accused him of having an affair with someone in her office.

It is settled law that a nuclear power plant’s attempts to “chill” reporting of workforce issues, as TVA has done to Mr. McBrearty, is improper retaliation:

Here ... management placed an inordinate amount of pressure on its employees to avoid delays at all costs. . . . **Simply put, management wanted to invoke a chilling of employee complaints** The fastest way to achieve restart at Cook would be for the employees to work continuously until done irrespective of the limitations. . . . Consequently, I find that here ... Employer’s stated reasons are false.

Tipton v. Indiana Michigan Power Co., No. 2002-ERA-00030, at 95 (ALJ June 29, 2004) (emphasis added).

2. TVA subjected Mr. McBrearty to adverse employment actions by escalating the retaliation, culminating in forcing her resignation.

TVA escalated its retaliation against Mr. McBrearty, by subjecting him to increasingly harsh adverse employment actions – starting with the false accusations and investigations, and culminating with placing him on paid leave, while making clear to him that he would likely be terminated. Forcing an employee to resign – a constructive discharge – is an adverse employment action under the whistleblower statutes. *See, e.g., Kahn v. Commonwealth Edison*

Co., 92-ERA-58, at 3 (Sec’y Oct. 3, 1994) (“Edison took adverse action against Kahn when it gave him the option of resigning or being fired, which constituted a constructive discharge.”); *Johnson v. Old Dominion Security*, 86-CAA-3, at 13 (Sec’y May 21, 1991) (finding constructive discharge where “Complainants made repeated attempts to elicit responsible action by Old Dominion; [but] Old Dominion instituted a program of inadequate response to complainants’ concerns”). Here, Mr. McBrearty had no choice but to resign in order not to lose his ability to obtain other employment in the nuclear power industry.

More generally, in *Green v. Brennan*, 578 U.S. ___, 136 S. Ct. 1642 (2016), the Supreme Court addressed two issues relevant here. First, in considering that a constructive discharge claim consists of “discriminatory conduct by the employer that leads to resignation of the employee,” the Court stated, “So long as those acts are part of the same, single claim under consideration, they are part of the ‘matter alleged to be discriminatory,’ whatever the role of discrimination in each individual element of the claim.” The Court thus made clear that a constructive discharge can arise through any connection between the discriminatory or retaliatory conduct and the separation from employment.

3. TVA subjected Mr. McBrearty to adverse employment actions, culminating in constructive discharge, because of his protected activities.

To establish a causal link between an employee’s protected activity and an employer’s adverse employment action, the employee need only demonstrate that his protected activity was a “contributing factor.” *TVA*, 59 Fed. Appx. at 738; *see also* 42 U.S.C. § 5851(b)(3)(C). As the Department of Labor held in *Kahn*, another constructive discharge case, the employer “was aware of Kahn’s protected activities when it constructively discharged him, since his safety complaints were made to his Edison supervisors.” *Kahn*, 92-ERA-58, at 3 (Sec’y Oct. 3, 1994). Here, too, Mr. McBrearty’s complaints were made directly to senior management at TVA, both in his own direct reporting line and to senior managers at Corporate Regulatory Affairs.

Temporal proximity is powerful evidence of retaliatory motivation. The Administrative Review Board recently explained, in upholding the ALJ’s determination that a nuclear licensee had violated Section 211 by terminating an employee who had engaged in protected activity, that temporal proximity can be powerful evidence of retaliatory motivation:

USEC has not demonstrated on this record that it would have placed Pierce on DML and terminated his employment when it did even if he had not engaged in protected activity. **The strongest evidence of a retaliatory motive on USEC’s**

part is the swiftness of its moving from [a performance plan] to administrative leave . . . and ultimately to termination and the temporal proximity of the protected activity and the adverse action. And, the record contains **no evidence that USEC acted similarly toward other employees**, or that its progressive disciplinary procedures dictated termination of a 26-year employee without any intervening disciplinary steps. We conclude, like the ALJ, that USEC failed to demonstrate that it would have taken adverse action against Pierce, absent his protected activity.

Pierce v. U.S. Enrichment Corp., ARB Case No. 06-055, 2004 ERA 001, at 17 (ARB Aug. 29, 2008) (emphasis added); *see also Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 2000) (close temporal proximity of adverse action to protected activity supported *prima facie* retaliation case).

Here, as in *Pierce* and *Cones*, the close temporal proximity of Mr. McBrearty's protected conduct to TVA's adverse employment actions – within weeks of his last report on May 4, 2018 – is sufficient to show causation. Moreover, the retaliation escalated when Mr. McBrearty was not intimidated by the earlier retaliatory events, and he persisted in reporting these chronic problems at TVA. Each of these alone is evidence of the close temporal proximity between his protected conduct and the adverse employment actions.

B. The Proffered Reason is a Pretext for Retaliation.

Once the aggrieved employee satisfies his initial burden, the employer must demonstrate by clear and convincing evidence that it would have taken the same adverse action in the absence of the protected activity. *TVA*, 59 Fed. Appx. at 738; *see also* 42 U.S.C. § 5851(b)(3)(D).

TVA cannot satisfy this heightened burden. Any claim that TVA took these actions against Mr. McBrearty because he allegedly harassed Ms. Henderson is merely a pretext for retaliating against him for repeatedly insisting that TVA comply with its regulatory obligations under the NRC regulations, and by the fact that his concerns about Ms. Henderson were specifically that she was creating a chilled work environment.

The *only* difference between other employees who were not disciplined and Mr. McBrearty is that those other employees did not report or protest compliance issues at TVA's nuclear power plants, in contrast to Mr. McBrearty. Thus, TVA's assertion that Mr. McBrearty was suspended and considered for termination because of his alleged conduct is pretextual, given that TVA favorably treated other managers who engaged in actual misconduct. For example,

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 16 of 18

TVA promoted Ms. Henderson from a Senior Manager to a Director in the Fall of 2017. Additionally, in 2014, TVA's Employee Concerns Program determined that Mr. Shea created a Chilled Work Environment within the TVA Corporate Licensing organization by the inappropriate manner in which he treated a contract worker. Since that time, Mr. Shea's scope of authority has been expanded to include the TVA Nuclear Security Department and the TVA Emergency Preparedness Department. The Department of Labor, in *Tipton*, held that the "uneven application of company policy," so that only whistleblowers were suspended, was probative evidence of discriminatory animus:

The facts here involve the uneven application of company policy as well. Kelly testified that the MARC policy dictated the suspension of all employees involved in an incident of suspected misconduct. She also testified that the handling of the Tech Databook change prompted the investigation. If true, then all "key personnel" as identified by Molden, should have received suspensions. **The fact that only Tipton and Turcotte, both of whom complained about the work hour policy violations, were suspended presents evidence of an impermissible motive** on the part of I&M.

Tipton, 2002-ERA-00030, at 102 (emphasis added).

Further, Inza Hagins-Dyer, the TVA Corporate ECP Senior Manager, told Mr. McBrearty, during one of their meetings, that during the ECP's investigative interviews with the Corporate Regulatory staff (which included first-line managers and individual staffers), that nearly everyone at ECP expressed significant concern about the failure of Corporate Regulatory Affairs to address the two Sequoyah NCVs from 2015 – the ones that Mr. McBrearty had initiated and protested. This shows that these managers and employees, while concerned about the noncompliances, were afraid to voice their concerns with Ms. Henderson and Mr. Shea.

More recently, in *Armstrong*, the ARB held that it was reversible error to rule in the respondent's favor, where, as here, the complainant had put forward evidence of pretext, which further bolstered a finding of retaliation:

Armstrong's evidence of pretext provides additional support for an inference of retaliatory intent or motive. **A complainant is not required to prove either pretext or retaliatory motive to prevail under the ERA. But a proffer of such evidence is sufficient to preclude summary judgment in a respondent's favor, since evidence of pretext creates a genuine issue of disputed fact regarding**

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 17 of 18

the legitimacy of respondent’s reasons for discipline. Even in the context of Title VII—where a plaintiff’s burden is higher and a defendant’s burden is lower than under ERA—most circuits have held that evidence of pretext compels the denial of a defendant’s motion for summary judgment.

Armstrong v. Flowserve US, Inc., ARB Case No. 14-023, ALJ Case No. 2012-ERA-017, at 15-16 (Sept. 14, 2016) (emphasis added).

Here, too, TVA’s proffered explanations for its adverse employment actions against Mr. McBrearty are pretextual.

REQUESTED RELIEF

TVA’s unlawful and retaliatory actions have caused Mr. McBrearty significant economic damages, emotional distress, and damage to his professional reputation and career opportunities.

Mr. McBrearty requests the following relief:

- (1) Front pay for up to five years (or whenever he is able to obtain comparable employment elsewhere) to compensate him for his future economic losses due to the damage TVA has caused to his professional reputation;
- (2) Removal of any documentation relating to the “investigations” and “complaints” that Ms. Henderson initiated from Mr. McBrearty’s personnel file, and from all other human resources files;
- (3) An order requiring TVA to ensure that there is a safe and harassment free work environment for all nuclear power plant personnel at TVA; and
- (4) An award of the reasonable attorneys’ fees and costs Mr. McBrearty has incurred in bringing this action.

Please serve all official documents on Mr. McBrearty and on the law firm of Bernabei & Kabat, PLLC, who is representing him in this matter. Mr. McBrearty’s temporary mailing address is [REDACTED]. My email address is: Kabat@Bernabeipllc.com.

Ms. Loren Sweatt
Acting Assistant Secretary of Labor
Occupational Safety and Health Administration
September 26, 2018
Page 18 of 18

The addresses of the respondent is:

Sherry A. Quirk, Esquire
Executive Vice President and General Counsel
Tennessee Valley Authority
400 West Summit Hill Drive
Knoxville, TN 37902

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink that reads "Alan R. Kabat". The signature is written in a cursive style with a large initial 'A' and 'K'.

Alan R. Kabat
Attorney for Michael McBrearty

Enc.

cc: Mr. Michael McBrearty
Mr. Kurt Petermeyer (OSHA, Regional Administrator)