

From: JSheaIA-Hearing Resource
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To: JSheaIA-HearingNPEM Resource
Subject: Dave's comments on CP - TVA 2020 Discrimination Communication Plan_Final_Update 8.4.20
Attachments: Dave's comments on CP - TVA 2020 Discrimination Communication Plan_Final_Update 8.4.20.docx

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STATUS OF AGENCY ACTIONS FOR TVA DISCRIMINATION CASES

Key messages

- The Office of Enforcement (OE) plans to issue a letter to the Tennessee Valley Authority (TVA) in August 2020 identifying a Severity Level (SL) I problem and SL II problem related to the discrimination of two TVA licensing employees in 2018. The letter will be publicly available and provide TVA with the option of post-enforcement Alternative Dispute Resolution (ADR). This yellow sentence relates to next blue highlight question. The total civil penalty is \$606,942.
- In addition, OE plans to issue individual enforcement actions to two TVA managers for deliberate misconduct associated with retaliation for employees engaging in protected activity. One individual will receive an SL II Notice of Violation and the other individual will receive an Order prohibiting involvement in NRC-licensed activities for 5 years. Offering ADR to EH so should we condition this bullet accordingly? Can I assume you guys found guidance for the JS letter saying when banning we don't offer ADR from all your template queries/samples?
- OE plans to issue a close out letter to the third individual that was notified of an apparent violation, as the NRC concluded that their actions did not constitute deliberate misconduct.
- The NRC staff is reviewing several TVA-related issues, including other enforcement actions, these two separate discrimination issues, and potential closure of a Chilling Effect Letter. The staff is mindful of understands the interrelationship of the issues and will continue to assess, coordinate, and respond with a broad and integrated approach.
- TVA's nuclear plants continue to operate safely. This is based on insights gained from NRC assessments, including the NRC's Reactor Oversight Process and Performance Indicators. The NRC conducts more than 2,000 hours of safety and security inspections every year at each TVA nuclear plant. The NRC's resident inspectors maintain an onsite presence and have been focused on understanding the status of TVA's safety culture. Additional information about plant safety can be found in the "Status of Agency Actions for TVA January 2020" communication plan. I think we should leave this to Dori and other CP parts because maybe PEC results are beginning to worry people they can operate all that safely. Also there have been subsequent inspections conducted which we don't know anything about. Was this paragraph in last version? Then leave it
- All communications involving pending enforcement actions at TVA will be closely coordinated through OE and Region II and the EDO to ensure proper messaging to internal and external stakeholders.

Background

- One Office of Investigations (OI) substantiated discrimination case (2-2018-033) was issued in October 2019. OI initiated the investigation to determine whether a former Site Licensing Manager employed at TVA Sequoyah Nuclear Plant was discriminated against for engaging in protected activity. Based on the evidence developed during the investigation, the allegation was substantiated. The preponderance of the evidence indicated that the deliberate misconduct of the former Director of Corporate Nuclear Licensing and the Senior Vice President of

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Engineering and Operations Support, in violation of 10 CFR 50.5, “Deliberate Misconduct,” caused TVA to be in violation of 10 CFR 50.7, “Employee Protection.”

- A second OI substantiated discrimination case (2-2019-015) was issued in January 2020. OI initiated the investigation to determine whether a former Manager of Emerging Regulatory Issues employed at the TVA Corporate Office in Chattanooga, TN, was the subject of discrimination for participating in a protected activity. Based on the evidence developed during the investigation, the allegation was substantiated. The preponderance of the evidence indicated that the deliberate misconduct of the former Director of Corporate Nuclear Licensing and the Vice President of Regulatory Affairs, in violation of 10 CFR 50.5, caused TVA to be in violation of 10 CFR 50.7. In addition, the Department of Labor (DOL) substantiated discrimination in August 2019 (which is a public process). After TVA appealed appealing the finding (we say later they appealed finding, certainly not CI), TVA and the individual subsequently settled the DOL complaint.
- OE issued a letter to the TVA in March 2020 identifying significant potential enforcement actions involving two OI cases for alleged discrimination of two TVA licensing employees in 2018. The letter is publicly available and provided TVA with the option of either attending a Predecisional Enforcement Conference (PEC) or ADR. TVA requested a PEC, which was held remotely on June 30, 2020.
- In addition, three individual managers received non-public letters requesting their attendance at a PEC due to apparent deliberate misconduct associated with retaliation for employees engaging in protected activity. These PECs were conducted remotely between June 23-25, 2020.
- The pertinent requirements are:
 - 10 CFR 50.7(a), states, in part, that discrimination by a Commission licensee or a contractor or subcontractor of a Commission licensee against an employee for engaging in certain protected activities is prohibited.
 - 10 CFR 50.5(a) states, in part, that any employee of a licensee or any contractor, may not engage in deliberate misconduct that causes a licensee to be in violation of any regulation of the Commission.
- Violations
 - a. TVA:
 - Four violations (two SL II violations for Sequoyah related to ROI 2-2018-033, and SL I and SL II violations for TVA Corporate related to ROI 2-2019-015).
 - Sequoyah violations related to ROI 2-2018-033 were grouped into an SL II problem.
 - The TVA Corporate violations related to ROI 2-2019-015 were grouped into an SL I problem.
 - Credit for identification and corrective actions was not warranted in these cases. Each problem is limited to the statutory maximum of \$303,471 for a single day violation ($\$303,471 \times 2 = \$606,942$). The total proposed civil penalty imposed to TVA is \$606,942.
 - b. Individual Actions:
 - Order imposing a 5-year ban for the Vice President of Regulatory Affairs.

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- SL II Notice of Violation with two examples for the former Director of Corporate Nuclear Licensing.
- Deliberate misconduct was not ultimately substantiated for the Senior Vice President of Engineering and Corporate Support. No individual action will be taken; however, TVA still receives an SL II violation for the adverse action taken against the former Sequoyah employee.
- In accordance with the Enforcement Policy, the Commission will be notified of the three SL II violations and consulted with regarding the SL I violation prior to their issuance. This reads like we are required to notify them for SL2s, so please adjust this to we are only required for SL1s. This communication will be in the form of a Notification of Significant Enforcement Action with a 10-day hold on issuance of the letters to TVA and the individuals.
- Previous TVA Discrimination Cases: In 2009, the NRC issued a confirmatory order (CO) (EA-09-009; ML093510993) to TVA to address safety conscious work environment (SCWE) issues related to adverse actions taken against employees for raising concerns at Browns Ferry, including a contractor. In 2017, the NRC issued another CO (EA-17-022; ML17208A647) to TVA, in part, to address deficiencies noted in TVA’s implementation of the 2009 CO. TVA has submitted formal requests to the NRC since January 2018 to combine these two COs into one.
- NRC Integrated Approach:

The NRC staff (e.g., OE, Office of the General Counsel (OGC), Region II, OI) identified potential common themes related to the issues above. The recommended approach is to evaluate the above issues in parallel and in accordance with existing processes (i.e., enforcement, inspection, assessment, allegations, investigations). Continued dialogue between OE, OGC, Region II, and OI is warranted to assess and respond with a broad and integrated view when practical (i.e., identification of common causes and concerns, leveraging NRC processes and regulatory oversight).

Audience

Internal Stakeholders	External Stake holders
<ul style="list-style-type: none"> • Commission • OEDO • OE • OI • OPA • OCA Yep, good addition if not there previously • NRR • Region II • TVA Tiger Team • 2.206 Petition Review Board 	<ul style="list-style-type: none"> • Public • Specific Congressional/Senate members and staff as determined by OCA • Tennessee (What about Alabama?) State Liaison Officers • Media representatives

Communication Team

Title	Names/Numbers
Region II	Tom Stephen (Acting BC) 404-997-4703
Office of Investigation Point of Contact (POC) RII	Alex Echavarria 404-997-4698
Tiger Team	Ken O'Brien 630-829-9700
NRR	Brian Hughes 301-415-6582
Office of the Executive Director of Operations	Darrell Roberts 630-829-9644 Chris Cook 301-415-6397 Jessie current until 8/10, Colon after that
Office of General Counsel	Sara Kirkwood 301-287-9187
RII Regional Counsel	Sarah Price 404-997-4414
Office of Enforcement	Catherine Thompson 301-287-9515 Ian Gifford 301-287-9216 Lisamarie Jarriel 301-287-9006 Dori Willis 301-287-9423 Why these 2 in CRB CP?
Public Affairs Officer/RII	Roger Hannah 404-997-4417 Joey Ledford 404-997-4416
Public Affairs HQ	Scott Burnell 301-415-8204
State Liaison Office/RII	John Pelchat 404-997-4427
Office of Congressional Affairs	Lynnea Wilkins 301-415-1377

Communication Tools

Questions and Answers are provided in the attachment. The Communication Team will use available tools on an as-needed basis depending on stakeholder involvement and inquiry type.

Next Steps:

Step	Action	Responsible Organization	Date	Status
1	Panel – both discrimination cases	OE	2/19/2020	Complete
2	Notification calls to TVA and individuals	OE	2/28/2020	Complete
3	Issue non-public conference letter to TVA individuals	OE	3/2/2020	Complete
4	Issue choice letter to TVA	OE	3/2/2020	Complete
5	Conduct PEC for TVA individuals	OE (Lead), OGC, NRR and Region II	6/23 – 6/25/2020	Complete

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6	Conduct PEC for TVA	OE (Lead), OGC, NRR and Region II	6/30/2020	Complete
7	Final caucus	OE (Lead), OGC, NRR and Region II	7/20 and 7/28/2020	Complete
8	Develop / Refine final action documents	OE (I. Gifford/C. Thompson)	8/3/2020	Complete
9	Route final action documents for review	OE (Lead), OGC, NRR and Region II	8/5/2020	Pending
10	Notification and advance consultation with Commission through Notification of Significant Enforcement Action	OE (Lead), OGC, OI	8/5/2020	Pending
11	Inform OPA and other internal stakeholders of proposed date to issue final actions	OE (I. Gifford/C. Thompson)	8/5/2020	Pending
12	Brief Commission TAs	OE (Wilson and team)	8/7/20	Pending
12	Issue Enforcement Notifications	OE (I. Gifford/C. Thompson)	8/17/2020	Pending
13	Issuance of final actions to TVA and individuals	OE (G. Wilson)	8/17/2020	Pending

Questions & Answers

Q1. *How did the discrimination concern come to the attention of NRC?*

[OUO - The individuals who were the subject of the alleged retaliations contacted the NRC and the individuals' concerns were handled through the NRC's allegation process.]

Q2. *What is the NRC's threshold for investigating discrimination concerns?*

OI investigates cases that meet the prima facie threshold as determined during the allegation review process.

Q3. *What is the prima facie threshold for discrimination cases?*

To constitute a prima facie case, the complainant must assert that:

- A. The individual engaged in a protected activity;
- B. Management had knowledge of the protected activity;
- C. An adverse action was taken (or threatened); and
- D. A nexus exists between the adverse action and the protected activity (i.e., the action was taken in part (contributing factor), or in close temporal proximity to, the protected activity).

Q4. *Did the individuals file a claim with the Department of Labor (DOL)?*

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[OUO - Yes, the individuals filed claims with DOL. For the first case (2-2018-033), the individual filed a claim with DOL, but the claim was never investigated by DOL because the individual settled with TVA in June 2019.]

For the second case (2-2019-015), DOL substantiated the case in August 2019 (which is a public process). TVA appealed the DOL determination and the case was settled between the parties involved in February 2020.

Q5. *How was the Severity Level determined in the discrimination case?*

Section 6.10 of the Enforcement Policy (ML19352E921) was used. The primary factors included:

- A. Whether the act was willful (i.e., deliberate)
- B. The positions (authority level) of the involved person(s)
- C. Whether the adverse action was more significant for the individual or had a widespread site impact

Should we not tell the reader how we arrived at decision using above 3 factors?

Q6. *What is a safety conscious work environment?*

A safety conscious work environment (SCWE) is an environment in which employees feel free to raise safety concerns, both to their management and to the NRC, without fear of retaliation.

Q7. *Will the conference letters to the individuals be publicly available?*

The conference letters to the individuals, which include the apparent violation and the redacted OI report (discrimination case only), will be issued as non-public. For the issuance of a final action letter, the previously issued non-public conference letters will be re-classified as public. If no final action is taken, the conference letters will not be made public. The redacted OI report will not be made public at any point in the process, but would be re-evaluated under FOIA or a hearing, if requested.

Q8. *What is a redacted OI Report?*

A redacted OI Report is copy of OI's Report of Investigation, with appropriate redactions (to protect witness identities and investigation techniques) and without the supporting documentation (exhibits or other referenced information). It is provided to discrimination case participants prior to a predecisional enforcement conference.

Q9. *How is the length of a ban be determined?*

Typically, bans are fixed at one, three, or five years. Factors considered when determining the length of a ban include, but are not limited to, the position of the

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individual in the organization and the significance (or potential significance) of the underlying violation. See “Action against the Individual”, Section 1.4.6 of the Enforcement Manual (Part II). **Really like when you reference where your getting answers from.**

Q10. Given that TVA is already subject to two orders associated with employee protection, why are you offering them ADR yet again?

This may be an opportunity to respond with a broad and integrated view. Specifically, TVA has identified lessons learned based on implementation of the previous two orders where modifications could improve the effectiveness of the required actions. Additionally, the current cases indicate that there are either gaps in the existing orders, or more significant actions need to be taken in addition to the existing requirements. The use of ADR provides an opportunity to enhance both effectiveness and clarity.

Q11. Why wasn't ADR offered in the letter to the individuals?

The reasons for not offering ADR at this point in the process included 1) the particularly egregious actions of the high-level officials (Section 2.4.3 of the Enforcement Policy), 2) the potential impact of ADR confidentiality agreements (e.g., information from a specific ADR session could not be used to determine actions for the other cases), and 3) the need for more information to determine if the discrimination had a widespread impact as described in Section 6.10 of the Enforcement Policy. The staff will determine whether ADR will be offered should final action letters be warranted. **Model answer.**

Q12. What is a Chilling Effect Letter?

A Chilling Effect Letter (CEL) is a formal notification to the licensee and a regulatory tool that the NRC uses to ensure that licensees are taking appropriate actions to foster a workplace environment that encourages employees to raise safety concerns and to feel free to do so without fear of retaliation. The purpose of the CEL is to notify the licensee of the NRC's concern with the SCWE at its facility on the public record. NRC uses the CEL to obtain information about the licensee's assessment of its employees' willingness to raise safety concerns at the facility and the description of any remedial action the licensee has taken or plans to take to address any identified weakness because of its assessment. Specifically, in this case, the NRC inspectors noted an increase of operational issues that were of minor and very low safety significance. **I think this is very well written.... Hopefully we got this from Lisa/Tamara or ran by them previously. Would not hold up the works to get feedback if have not before. I would just make changes IF any came.**

Q13. Will there be a press release announcing the issuance of the letters to TVA and the individuals?

No, there will not be a press release accompanying issuance of the TVA choice letter or individual conference letters. The NRC may issue a public meeting notice to announce

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the time and date of a PEC with TVA; however, the PEC would be closed to public observation. News releases may be issued if the process results in ADR resolution or issuance of final actions.

Q14. *Why is it safe to allow TVA plants to continue operating?*

TVA's nuclear plants continue to operate safely. This is based on insights gained from NRC assessments, including the NRC's Reactor Oversight Process and Performance Indicators. The NRC conducts more than 2,000 hours of safety and security inspections every year at each TVA nuclear plant. The NRC's resident inspectors maintain an onsite presence and have been focused on understanding the status of TVA's safety culture. Additional information about plant safety can be found in the "Status of Agency Actions for TVA January 2020" communication plan. This has to be updated by Dori since she knows the larger picture for why they can operate given the TT issues as well.

DRAFT