UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Paul S. Ryerson, Chairman
E. Roy Hawkens
Dr. Sue H. Abreu

In the Matter of	Docket Nos. EA-20-006 and EA-20-007
TENNESSEE VALLEY AUTHORITY	ASLBP No. 21-969-01-EA-BD01
(Enforcement Action)	March 25, 2021

MEMORANDUM AND ORDER
(Denying Erin Henderson's Hearing Request)

In this enforcement proceeding, the NRC has imposed a civil penalty of $606,942 on the Tennessee Valley Authority (TVA) for alleged violations of the NRC's employee protection regulation.[1] TVA denies the alleged violations,[2] and the Board has granted its request for an evidentiary hearing.[3]

Also before the Board is a hearing request from Erin Henderson,[4] a TVA employee who is not the subject of the TVA Order. Atomic Safety and Licensing Boards exist only for the

[1] In the Matter of Tennessee Valley Authority, Chattanooga, TN, 85 Fed. Reg. 70,203 (Nov 4, 2020) [hereinafter TVA Order]; TVA Order for Civil Penalty (Oct. 29, 2020) (ADAMS Accession No. ML20297A544); TVA Order for Civil Penalty, Appendix (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) [hereinafter TVA Order Appendix].

[2] Tennessee Valley Authority's Answer and Request for Hearing (Nov. 30, 2020) [hereinafter TVA Answer].

[3] Licensing Board Order (Notice of Hearing) (Jan. 21, 2021) (unpublished); Licensing Board Order (Initial Scheduling Order) (Jan. 14, 2021) (unpublished).

[4] Erin Henderson's Request for a Hearing of the NRC Staff's October 29, 2020 Order or, in the Alternative, Discretionary Intervention (Nov. 30, 2020) [hereinafter Henderson Hearing Request]; Erin Henderson's Reply to NRC Staff Answer to Erin Henderson's Request for

purposes specified in section 191 of the Atomic Energy Act of 1954, as amended.[5] Consistent with Commission guidance, a majority of the Board reads the right to a hearing before this Board less broadly than our dissenting colleague, whose rationale includes arguments that Ms. Henderson never advanced.[6] Because Ms. Henderson does not have standing to demand a hearing, and has not shown why the Board should authorize discretionary intervention in TVA's hearing, we deny her request.

I. BACKGROUND

A. Factual Background

Although the parties disagree about motivation and intent, the essential facts are not otherwise in dispute.

Ms. Henderson filed a complaint against two other TVA employees—Michael McBrearty and Beth Wetzel—alleging that they had exhibited inappropriate and unprofessional workplace behavior toward her.[7] After an internal investigation, TVA concluded that both employees had engaged in "intolerable and inappropriate behavior."[8] It placed Mr. McBrearty on paid administrative leave and terminated the employment of Ms. Wetzel.[9]

Hearing or in the Alternative Discretionary Intervention (Dec. 30, 2020) [hereinafter Henderson Reply].

[5] Atomic Energy Act of 1954 § 191, 42 U.S.C. § 2241.

[6] As the Commission has cautioned, licensing boards should not "make arguments for the litigants that were never made by the litigants themselves." DTE Elec. Co. (Fermi Nuclear Power Plant, Unit 2), CLI-15-18, 82 NRC 135, 149 & n.74 (2015) (citing Crow Butte Res., Inc. (In Situ Leach Facility, Crawford, Nebraska), CLI-09-9, 69 NRC 331, 353–54 (2009); Crow Butte Res., Inc. (North Trend Expansion Project), CLI-09-12, 69 NRC 535, 565–71 (2009)).

[7] TVA Order Appendix at 1, 3.

[8] TVA Answer at 2.

[9] TVA Order, 85 Fed. Reg. at 70,203.

The NRC Staff claims, however, that Ms. Henderson's complaint was really a "pretext" to punish Mr. McBrearty and Ms. Wetzel for raising safety concerns.[10] The NRC Staff therefore contends that Ms. Henderson's complaint was an adverse action that caused TVA to violate 10 C.F.R. § 50.7, which prohibits NRC licensees such as TVA from discriminating against employees who raise safety concerns.

B. Procedural History

After investigating these events,[11] the NRC Staff issued the TVA Order, which assessed TVA four violations and imposed a $606,942 civil penalty.

Initially, the NRC Staff also asserted that, when she filed her internal TVA complaint, Ms. Henderson engaged in deliberate misconduct in violation of 10 C.F.R. § 50.5. Therefore, although it did not subject her to a civil penalty, the NRC Staff issued her a notice of violation under 10 C.F.R. § 2.201.[12] The notice of violation publicly identified Ms. Henderson by name and warned that "additional deliberate violations could result in more significant enforcement action or criminal penalties."[13]

In response, Ms. Henderson submitted her first hearing request, asking for a hearing before the Commission on her notice of violation.[14] The NRC Staff opposed this request.[15] Thereafter, however, the NRC Staff advised Ms. Henderson that, "[u]pon further review of the

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[10] TVA Order Appendix at 2, 4.

[11] See TVA Order, 85 Fed. Reg. at 70,203.

[12] IA-20-009, Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (ADAMS Accession No. ML20218A584).

[13] Id. at 2.

[14] Erin Henderson's Request for a Hearing at 25 (Sept. 13, 2020) [hereinafter Henderson Notice of Violation Hearing Request].

[15] NRC Staff Answer to Erin Henderson's Request for Hearing (Oct. 8, 2020).

facts of your case," it was rescinding her notice of violation.[16] As a result, Ms. Henderson's first hearing request became moot.[17]

But Ms. Henderson also submitted a second hearing request—for a hearing on the TVA Order—in order "to protect at least some of her rights, and to remedy some of her reputational harms."[18] Ms. Henderson claims the TVA Order has harmed her reputation and chilled her willingness and the willingness of other TVA employees to complain about inappropriate workplace behavior.[19] Ms. Henderson's second hearing request remains pending before this Board. Although the NRC Staff did not oppose TVA's hearing request on the TVA Order, it opposes Ms. Henderson's request for a hearing on the TVA Order.[20]

The TVA Order does not name Ms. Henderson or impose a penalty on her, although she is identified by her former position (Director of Corporate Nuclear Licensing) in the appendix to the order.[21] Specifically (although none of the participants are identified by their names), the appendix to the TVA Order explains Ms. Henderson's involvement in two of the alleged violations by TVA.

Although it identifies her only by her former position, Violation 1 alleges Ms. Henderson filed a complaint against Mr. McBrearty because he engaged in protected activity:

> Contrary to [10 C.F.R. § 50.7(a)], on March 9, 2018, TVA discriminated against a former Sequoya employee for engaging in protected activity. Specifically, the former Sequoya employee engaged in protected activity by raising concerns regarding a chilled work environment, filing complaints with the Employee

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[16] NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

[17] Commission Order, Erin Henderson, No. IA-20-009-EA (Mar. 12, 2021) (unpublished).

[18] Henderson Hearing Request at 2.

[19] Id. at 5–8.

[20] See NRC Staff Answer to Erin Henderson's Request for Hearing (Dec. 23, 2020) [hereinafter NRC Staff Answer]. TVA does not oppose Ms. Henderson's request for a hearing on the TVA Order. See TVA's Answer to Erin Henderson's Request for a Hearing or, in the Alternative, Discretionary Intervention (Dec. 28, 2020).

[21] See TVA Order Appendix at 1–4.

> Concerns Program (ECP), and by raising concerns regarding the response to two non-cited violations. After becoming aware of this protected activity, the former Director of Corporate Nuclear Licensing (CNL) filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA Office of the General Counsel (TVA OGC). This action was based, at least in part, on the former employee engaging in protected activity.[22]

Although it likewise identifies her only by her former position, Violation 3 alleges Ms. Henderson filed a complaint against Ms. Wetzel because she engaged in protected activity:

> Contrary to [10 C.F.R. § 50.7(a)], on March 9, 2018, TVA discriminated against a former corporate employee for engaging in protected activity. Specifically, the former corporate employee engaged in protected activity by raising concerns of a chilled work environment. After becoming aware of this protected activity, the former Director of CNL filed a formal complaint against the former employee. The filing of a formal complaint triggered an investigation by the TVA OGC that resulted in the former employee being placed on paid administrative leave followed by termination. This action was based, at least in part, on the former employee engaging in a protected activity.[23]

The Board conducted an oral argument on Ms. Henderson's second hearing request, by telephone, on February 17, 2021.[24]

II. DISCUSSION

Ms. Henderson's hearing request presents two issues:

1. Do Ms. Henderson's claims entitle her to a hearing before this Atomic Safety and Licensing Board? In other words, could Ms. Henderson independently challenge the TVA Order even if TVA did not?

2. If Ms. Henderson's claims do not entitle her to a hearing, should the Board permit her to intervene as a party in TVA's hearing as a matter of discretion?

The answer to both questions is no.

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[22] TVA Order Appendix at 1.

[23] Id. at 3. The NRC Staff alleges that TVA further violated 10 C.F.R. § 50.7 by placing Mr. McBrearty on paid administrative leave (Violation 2) and by terminating Ms. Wetzel's employment (Violation 4). Id. at 2–3, 4.

[24] Tr. at 30–106.

Ms. Henderson may demand a hearing if she has been "adversely affected by" the order against TVA.[25] This language in the Federal Register notice to which she responded is identical to the language in 10 C.F.R. § 2.202(a)(3). That regulation, in turn, is identical to the standard in section 189(a)(1)(A) of the Atomic Energy Act, which provides a hearing opportunity to "any other person adversely affected by" an enforcement "order."[26] The Commission interprets this statutorily derived language to include only adverse effects that implicate the purposes of the statutes the NRC enforces.[27] As we show below, Ms. Henderson's assertion of reputational injury and a "chilling" claim do not qualify.

In ruling on her alternative request for discretionary intervention, the Board applies the six-factor test in 10 C.F.R. § 2.309(e). The Commission considers discretionary intervention to be "an extraordinary procedure" and, insofar as we are aware, it has never upheld a request for discretionary intervention in an enforcement proceeding.[28] Our analysis of the six relevant factors does not lead us to conclude that Ms. Henderson's request should be the first.

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[25] TVA Order, 85 Fed. Reg. at 70,204. The NRC Staff challenges only Ms. Henderson's standing, and not whether she has submitted an admissible contention. See NRC Staff Answer at 12 n.48.

[26] Atomic Energy Act § 189(a)(1)(A), 42 U.S.C. § 2239(a)(1)(A).

[27] See Yankee Atomic Elec. Co. (Yankee Nuclear Power Station), CLI-96-1, 43 NRC 1, 6 (1996) ("In order to establish standing to intervene in a proceeding, a petitioner must demonstrate that (1) it has suffered a distinct and palpable harm that constitutes injury-in-fact within the zone of interests arguably protected by the governing statute; (2) that the injury can fairly be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision." (emphasis added)); accord, e.g., Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 258 & n.16 (2008) (citing Consumers Energy Co. (Palisades Nuclear Power Plant), CLI-07-18, 65 NRC 399, 408–09, reconsideration denied, CLI-07-22, 65 NRC 525 (2007); Power Auth. of the State of New York (James A. FitzPatrick Nuclear Power Plant; Indian Point, Unit 3), CLI-00-22, 52 NRC 266, 293 (2000); Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Units 1 & 2), CLI-99-30, 50 NRC 333, 340–41 & n.5 (1999)).

[28] See Andrew Siemaszko, CLI-06-16, 63 NRC 708, 716 & n.12 (2006) (quoting Changes to Adjudicatory Process, 69 Fed. Reg. 2,181, 2,201 (Jan. 14, 2004)).

A. Reputational Injury

If Ms. Henderson has been "adversely affected by" the TVA Order, within the meaning of 10 C.F.R. § 2.202(a)(3) and section 189(a)(1)(A) of the Atomic Energy Act, she has standing to request a hearing.[29] Although the NRC Staff argues otherwise,[30] we conclude that Ms. Henderson's reputation may have suffered during the course of this ongoing enforcement proceeding.[31]

But has Ms. Henderson suffered reputational injury "by" the TVA Order that is before the Board? That may be a closer question. Ms. Henderson is not named in the relevant order, or subject to its provisions, although she is identified in the appendix by her former position.

Surely other aspects of the TVA enforcement proceeding have played a larger role in her alleged reputational injury. As Ms. Henderson pointed out in her first hearing request—that is, for a hearing before the Commission on her (now rescinded) notice of violation—her notice of violation explicitly named her and "is part of the Commission's permanent publicly available record[;]" moreover, "the NRC took the additional step of widely publicizing the outcome in a press release."[32] In her first hearing request, Ms. Henderson therefore claimed "there is no question that the [notice of violation] in Ms. Henderson's case amounts to reputational injury."[33]

Likewise, even in this proceeding, Ms. Henderson blames much of her reputational injury on the "broad publication"[34] of her alleged misconduct in NRC's press release and in "repeated

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[29] 10 C.F.R. § 2.309(d); Yankee Nuclear, CLI-96-1, 43 NRC at 6.

[30] NRC Staff Answer at 5; Tr. at 68 (Kirkwood).

[31] See Va. Elec. & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 105 (1976) (discussing the existence of reputational injury, the Appeal Board acknowledged that a petitioner need only show that the interest "may" be affected).

[32] Henderson Notice of Violation Hearing Request at 27 (footnotes omitted).

[33] Id.

[34] Henderson Hearing Request at 7; Tr. at 43 (Walsh).

articles in widely circulated newspapers,"[35] rather than directly on the enforcement order that this Board has authority to review. Indeed, both the NRC's press release and most of the articles she cites in support were published months before issuance of the TVA Order.[36] She is also concerned about what "any cursory internet search" will show about her job history.[37]

Of course, this Board cannot withdraw a press release, erase the internet, or even edit the TVA Order's explanatory appendix. The scope of the Board's hearing on the TVA Order is limited to "whether this Order should be sustained."[38]

In any event, assuming without deciding that Ms. Henderson suffered reputational injury "by" the enforcement order imposing a civil penalty on TVA, such claims do not give rise to standing before this Board. As Ms. Henderson correctly states, the relevant "question is whether the asserted harm arguably falls within the zone of interests of the Atomic Energy Act."[39]

It is said "a good reputation is more valuable than money."[40] However, a good reputation is not an interest that is protected by the Atomic Energy Act, as squarely held by both the Commission and the former Appeal Board. We are bound to follow their precedents.[41]

In North Anna, the Appeal Board held that reputational injury "is not even arguably within the 'zone of interests' to be protected or regulated by the Atomic Energy Act."[42] It found no

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[35] Henderson Reply at 3.

[36] See Henderson Hearing Request at 6 nn.20–21.

[37] Id. at 7.

[38] TVA Order, 85 Fed. Reg. at 70,205.

[39] Henderson Hearing Request at 8.

[40] John Bartlett, Familiar Quotations 125 (Emily Morison Beck, ed., Little, Brown and Co., 14th ed. 1968) (attributed to Publilius Syrus (85–43 B.C.E.), Maxim 108).

[41] See Palisades, CLI-08-19, 68 NRC at 260 n.23.

[42] North Anna, ALAB-342, 4 NRC at 104.

legislative history or other authority that might provide "even a wobbly underpinning" for such a suggestion, "even as a secondary purpose" of the health and safety provisions of the Act.[43]

More recently, in Palisades, the Commission again confirmed that reputational injury is not within the zone of interests of the Atomic Energy Act.[44] The Commission held that the Appeal Board "correctly ruled"[45] in North Anna that "there is no relationship at all between the legislative purpose underlying the safety provisions of the Atomic Energy Act and [Petitioner's] interest in protecting its reputation."[46]

Ms. Henderson's attempt to distinguish this controlling authority is not persuasive.[47] The clear and unequivocal holding in North Anna is that reputation is "not even arguably" within the zone of interests protected by the Atomic Energy Act.[48] Ms. Henderson's effort to narrow the holdings in North Anna and Palisades (or to create an exception to them), based on the source of reputational harm, has no discernible statutory basis.[49]

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[43] Id. at 106.

[44] Palisades, CLI-08-19, 68 NRC at 266.

[45] Id.

[46] Id. (quoting North Anna, ALAB-342, 4 NRC at 107).

[47] Henderson Reply at 6–7; Tr. at 53–54 (Walsh).

[48] North Anna, ALAB-342, 4 NRC at 104; see Tr. at 87–88 (Kirkwood).

[49] The dissent's discussion of standing appears to equate administrative standing with Article III standing. See Dissent at 7–13. But as the Commission has stated, "[i]n determining whether a person is an 'interested person' for purposes of a section 189a(1)(A) standing determination, we are not strictly bound by judicial standing doctrines." Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 915 (2009). Thus, although the Commission applies contemporaneous judicial concepts of standing when assessing whether a petitioner has established standing, see id., that approach does not proscribe the Commission from also considering whether the injury alleged by a petitioner is "to an interest arguably within the zone of interests protected by the governing statute." Id.; see also id. at 917 n.27 (stating that, in assessing standing, the Commission "look[s] to judicial standing doctrines simply as guidance, and as a useful barometer of standing jurisprudence"). It is well established that the NRC has broad discretion regarding the adoption and implementation of procedural rules governing its hearings. See, e.g., Citizens Awareness Network v. NRC, 391 F.3d 338, 352 (1st Cir. 2004) ("[A]gencies have broad authority to

We are not insensitive to the frustration that Ms. Henderson might feel arising from her inability to participate as a party in this proceeding. But the same might be said of numerous unsuccessful petitioners—in enforcement and licensing proceedings—who are unable to satisfy the zone-of-interests test. The Commission's adoption of that test for determining whether a petitioner has established standing reasonably cabins the scope of hearings in a manner that comports with governing statutes, fosters safety interests, conserves agency resources, and promotes adjudicatory efficiency.[50] We are not at liberty to ignore it.[51]

B. Chilling Effect

Alternatively, Ms. Henderson tries to bring her "chilling effect" claim within the ambit of the Atomic Energy Act. It is true the NRC is concerned about actions or events that might result in "a perception that the raising of safety concerns to the employer or to the NRC is being suppressed or is discouraged."[52]

But Ms. Henderson does not claim that she was retaliated against or harassed for raising nuclear safety concerns. Rather, she claims the TVA Order could discourage the nuclear workforce from complaining (as she did) about being "subjected to an unprofessional, hostile environment."[53]

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formulate their own procedures—and the NRC's authority in this respect has been termed particularly great.").

[50] Cf. Envirocare of Utah v. NRC, 194 F.3d 72, 75–78 (D.C. Cir. 1999) (holding that the Commission can permissibly deny the hearing request of a petitioner who satisfies Article III standing requirements provided the Commission's interpretation of its jurisdictional statute, 42 U.S.C. § 2239(a)(1)(A), is reasonable).

[51] Ms. Henderson's inability to participate as a party does not deprive her of an opportunity to make her views known in this proceeding. As discussed infra Part II.C, pursuant to NRC regulations she can (1) request to participate as an amicus; (2) request to provide an oral limited appearance statement; and (3) submit a written limited appearance statement.

[52] Office of Enforcement, NRC, Allegation Manual § 5.2.i (Dec. 22, 2016) (emphasis added) (ADAMS Accession No. ML17003A227).

[53] Henderson Hearing Request at 9.

Ms. Henderson contends that (1) the TVA Order has the potential to silence employees who are being subjected to an unprofessional, hostile work environment; (2) their silence will empower "bad actors" who act unprofessionally and fail to treat other employees with respect; (3) such bad behavior will be detrimental to a respectful workplace environment; and (4) a respectful workplace environment, "where trust and respect permeate an organization," is critical to maintaining a safety conscious work environment.[54] Therefore, Ms. Henderson argues, her "chilling effect" claim "directly implicates public health and safety."[55]

We disagree. Ms. Henderson tries to link her "chilling effect" claim to nuclear safety through an extended chain of causation that is entirely conjectural. Because she fails to show her "chilling effect" claim is "directly related to environmental or radiological harm,"[56] it does not fall within the zone of interests of the Atomic Energy Act. As the Commission has explained, third parties may request hearings on NRC enforcement orders because "conceivably" the enforcement order might actually worsen the safety situation, but the Commission expects such situations should be very rare.[57]

In her reply, Ms. Henderson raises an entirely different argument. She points out, for the first time, that the regulation on which the TVA Order is based—10 C.F.R. § 50.7—is grounded not only on the nuclear safety concerns underlying the Atomic Energy Act, "but also on the Energy Reorganization Act of 1974."[58]

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[54] Id.

[55] Id.

[56] See Pac. Gas & Elec. Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), CLI-02-16, 55 NRC 317, 336 (2002) (emphasis added).

[57] Alaska Dep't of Transp. & Pub. Facilities, CLI-04-26, 60 NRC 399, 406 n.28 (2004) (quoting Bellotti v. NRC, 725 F.2d 1380, 1383 (D.C. Cir. 1983)). Ms. Henderson's "chilling effect" claim, with its lengthy and speculative chain of causation, also fails to allege a concrete and particularized injury sufficient to satisfy standing.

[58] Henderson Reply at 4.

We do not entertain arguments that are advanced for the first time in a reply brief.[59] The Commission "will not permit, in a reply, the filing of new arguments or new legal theories that opposing parties have not had an opportunity to address."[60]

Regardless, the Energy Reorganization Act provides protection for whistleblowers and establishes "the right to defend against a whistleblower discrimination charge."[61] Thus, that Act and its implementing regulation, 10 C.F.R. § 50.7, (1) protect employees who raise safety concerns,[62] and (2) authorize a defense for licensees who are the subjects of civil penalties.[63] Those provisions do not contemplate the protection of employees who (like Ms. Henderson) only raise concerns about an unprofessional or hostile work environment.[64]

C. Discretionary Intervention

The Commission has directed that discretionary intervention is an "extraordinary procedure."[65] Ms. Henderson does not show why she is more deserving of discretionary intervention than numerous other individuals.

Corporate licensees, such as TVA, can only act through their individual officers and employees. Whenever a corporate licensee is accused of wrongdoing, such individuals will almost always feel they have a personal stake in the outcome, even when they have not been subjected to an NRC enforcement order or civil penalty themselves.

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[59] Nuclear Mgmt. Co. (Palisades Nuclear Plant), CLI-06-17, 63 NRC 727, 732 (2006).

[60] USEC, Inc. (American Centrifuge Plant), CLI-06-9, 63 NRC 433, 439 (2006).

[61] Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 192 (2004).

[62] See 10 C.F.R. § 50.7(a).

[63] See id. § 50.7(d).

[64] See Watts Bar, CLI-04-24, 60 NRC at 185–87.

[65] Siemaszko, CLI-06-16, 63 NRC at 716 (quoting Changes to Adjudicatory Process, 69 Fed. Reg. at 2,201).

Indeed, NRC Staff counsel represented that alleged individual wrongdoers, in addition to the licensee, can often reasonably be identified in notices of violations.[66] This is particularly true in cases alleging employee discrimination[67] and is necessary to provide licensees with sufficient notice of alleged wrongdoing.[68]

The Commission has determined that such persons should not be routinely admitted as parties to hearings on enforcement orders when they are not, themselves, subjected to any

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[66] Tr. at 81–82 (Kirkwood).

[67] See, e.g., Letter to Bruce Kenyon, Northeast Nuclear Energy Co., from Hubert J. Miller, NRC Regional Administrator, EA 98-325, Notice of Violation, NRC Office of Investigations Report Nos.1-96-002, 1-96-007, and 1-97-007, at 2–3 (Apr. 6, 1999) ("The three violations described in the enclosed Notice involved actions by plant management. Violation A. involves actions by a former Millstone Vice President for Nuclear Engineering Services. Violation B. involves actions by the former Millstone Vice President for Nuclear Engineering Services and two former Directors of the Engineering Department. Violation C. involves actions by a former Director of Nuclear Engineering and a former Manager of Nuclear Design Engineering.") (ADAMS Accession No. ML003673788); Letter to R.P. Powers, American Electric Power Co. (AEP), from J.E. Dyer, NRC Regional Administrator, EA-99-329, Notice of Violation, NRC Office of Investigations Report No. 3-1998-041, at 1 (May 5, 2000) ("Contrary to [10 C.F.R. 50.7(a)], . . . American Electric Power Company (AEP) through the actions of the acting AEP Nuclear Engineering Structural Design Manager, discriminated against an engineer employed by its contractor, Cataract, Inc., for having engaged in protected activities.") (ADAMS Accession No. ML003712002); Letter to Lew W. Meyers, FirstEnergy Nuclear Operating Co., from J.E. Dyer, NRC Regional Administrator, EA 99-012, Notice of Violation and Proposed Imposition of Civil Penalty - $110,000, NRC Office of Investigations Report Number 3-98-007, at 1 (May 20, 1999) ("Based upon the evidence developed, OI determined that the Perry Radiation Protection Manager (RPM) discriminated against an RPS for engaging in protected activities within the scope of 10 CFR 50.7.") (ADAMS Accession No. ML20207B125); Letter to John P. Stetz, Centerior Service Co., from A. Bill Beach, NRC Regional Administrator, EA 96-253, Notice of Violation and Proposed Imposition of Civil Penalty - $160,000 U.S. Department Of Labor (DOL) Administrative Law Judge (ALJ) Recommended Decision and Order (Case No. 96-ERA-6), at 2 (Oct. 9, 1996) "[T]he discrimination involved actions by the then-Director of the Perry Nuclear Services Department.") (ADAMS Accession No. ML20128N001); Letter to Mano Nazar, Florida Power & Light Co., from George A. Watson, NRC OE, EA-18-066, EA-19-045, St. Lucie Plant – Notice of Violation and Proposed Imposition of Civil Penalty - $232,000 (NRC Investigation Report Numbers 2-2017-024 and 2-2019-009) encl. 1, at 1 (Notice of Violation and Proposed Imposition of Civil Penalty) (Sept. 12, 2019) ("A Florida Power and Light Regional Vice President - Operations deliberately discriminated against a Framatome (formerly known as Areva) contract employee for engaging in a protected activity in March of 2017.") (ADAMS Accession No. ML19234A332).

[68] Tr. at 81–82 (Kirkwood).

penalty. Rather, discretionary intervention is permitted only when justified by a six-factor analysis set forth in 10 C.F.R. § 2.309(e)(1). Ms. Henderson's request for discretionary intervention fails this test.

Factor 1—"[t]he extent to which the requestor's/petitioner's participation may reasonably be expected to assist in developing a sound record"—is both the first and most important factor.[69] It weighs heavily against discretionary intervention by Ms. Henderson.

In Pebble Springs, the Commission ruled that petitioners ought to contribute on "substantial issues of law or fact that will not otherwise be properly raised or presented."[70] Here, TVA counsel represents that Ms. Henderson's contentions "overlap entirely" with the issues that are already going to be litigated by TVA.[71] Ms. Henderson's own counsel conceded at oral argument that her ultimate objective is a ruling "in Ms. Henderson's favor, finding that Violations 1 and 3 are unfounded, or otherwise unsupported by law."[72] Rather than contribute on an issue that would not otherwise be presented, Ms. Henderson and TVA want exactly the same thing.

Factor 2—"[t]he nature and extent of the requestor's/petitioner's property, financial or other interests in the proceeding"—also does not favor intervention by Ms. Henderson.[73] Although Ms. Henderson might have a reputational interest in the outcome of the hearing on the TVA Order, as TVA counsel again concedes the issue underlying her interest (that is, whether the TVA Order should be upheld) is "already going to be litigated in TVA's proceeding

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[69] 10 C.F.R. § 2.309(e)(1)(i); see Portland Gen. Elec. Co. (Pebble Springs Nuclear Plant, Units 1 & 2), CLI-76-27, 4 NRC 610, 617 (1976).

[70] Pebble Springs, CLI-76-27, 4 NRC at 617.

[71] TVA Answer at 4.

[72] Tr. at 44 (Walsh).

[73] 10 C.F.R. § 2.309(e)(1)(ii).

regardless of whether [Ms.] Henderson is found to have standing."[74] In other words, TVA's litigation strategy will be, inter alia, to demonstrate that Ms. Henderson did nothing wrong. If TVA prevails, Ms. Henderson's interest will be vindicated.

Factor 3—which is "[t]he possible effect of any decision or order that may be issued in the proceeding on the requestor's/petitioner's interest"—similarly does not favor intervention.[75] Again, the key point for purposes of this balancing test is that, as TVA recognizes, Ms. Henderson's contentions are "material to the potential findings" and "overlap entirely" with issues that TVA intends to litigate.[76] If TVA prevails, Ms. Henderson's interest will be vindicated.

Factor 4—"[t]he availability of other means whereby the requestor's/petitioner's interest will be protected"—also weighs heavily against discretionary intervention by Ms. Henderson.[77] Importantly, because they share some of the same lawyers, Ms. Henderson can be expected to work closely with TVA's counsel. She likely will be called as a key fact witness. If she wishes, she can ask to file an amicus brief, without being a party, as well as request permission to submit a written or oral limited appearance statement.[78]

Factor 5—"[t]he extent to which the requestor's/petitioner's interest will be represented by existing parties"—likewise weighs against discretionary intervention.[79] Ms. Henderson's interest will, as a practical matter, be represented by TVA. Ms. Henderson's interest in vacating the TVA Order coincides with TVA's interest in vacating the TVA Order.

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[74] TVA Answer at 4.

[75] 10 C.F.R. § 2.309(e)(1)(iii).

[76] TVA Answer at 4.

[77] 10 C.F.R. § 2.309(e)(2)(i).

[78] See id. § 2.315(a), (d).

[79] Id. § 2.309(e)(2)(ii).

Factor 6 is "[t]he extent to which the requestor's/petitioner's participation will inappropriately broaden the issues or delay the proceeding."[80] This factor would not appear to weigh significantly against intervention by Ms. Henderson (because TVA's issues and Ms. Henderson's issues "overlap entirely").[81]

Finally, in deciding whether to permit discretionary intervention, the Board is mindful of the Commission's longstanding policy that notices of violations do not trigger hearing opportunities.[82] This Commission position undoubtedly reflects how it prefers to allocate the agency's resources.

In the early 2000s, for example, a Discrimination Task Group was chartered to consider recommendations for improving the NRC's handling of employee protection matters.[83] After two rounds of public meetings at six locations around the country, the Discrimination Task Group published a draft report on which it accepted public comment. Ultimately, the Task Group did not recommend extending hearing opportunities to recipients of notices of violations, a Senior Management Review Team agreed, and the Commission did not further pursue the issue.[84]

Notices of violations name their recipients and can have real potential consequences, as demonstrated by the warning in Ms. Henderson's own (now rescinded) notice. It would appear contrary to the Commission's decision not to expand hearing opportunities, beyond those provided by statute, to permit Ms. Henderson's participation as a party in the hearing on TVA's

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[80] Id. § 2.309(e)(2)(iii).

[81] TVA Answer at 4.

[82] The regulations governing notices of violations, demands for information, and requests for enforcement action do not provide for hearing opportunities. 10 C.F.R. §§ 2.201, 2.204, 2.206. In contrast, both orders and civil penalties may be challenged in a hearing. Id. §§ 2.202, 2.205.

[83] SECY-02-0166, Policy Options and Recommendations for Revising the NRC's Process for Handling Discrimination Issues, at 1 (Sept. 12, 2002) (ADAMS Accession Nos. ML022120479, ML022120535 (package)); id. attach. 1, (Discrimination Task Group Report) (ADAMS Accession No. ML022120514) [hereinafter Task Group Report].

[84] See Task Group Report at 63.

civil enforcement order, which does not specifically name Ms. Henderson or penalize her in any way. Now that the NRC Staff has rescinded Ms. Henderson's own notice of violation—which she acknowledges to be the cause of much (perhaps most) of her claimed injury—to single out Ms. Henderson for participation as a party in the hearing on TVA's alleged violations would seem especially ironic.[85]

III. ORDER

Ms. Henderson's hearing request is denied.

Under 10 C.F.R. § 2.311, any appeal to the Commission from this Memorandum and Order must be taken within twenty-five (25) days after service.

It is so ORDERED.

THE ATOMIC SAFETY
AND LICENSING BOARD

/RA/

Paul S. Ryerson, Chairman
ADMINISTRATIVE JUDGE

/RA/

E. Roy Hawkens
ADMINISTRATIVE JUDGE

Rockville, Maryland
March 25, 2021

[85] Moreover, to grant Ms. Henderson's hearing request could convert discretionary intervention from an "extraordinary procedure" into a common occurrence in the context of future enforcement proceedings. See supra notes 65, 67.

Judge Abreu, Dissenting

The majority focuses on the "zone-of-interests" test as the reason to deny Ms. Henderson standing to pursue redress for her alleged injuries. I respectfully disagree. Ms. Henderson's request for a hearing is based on the TVA Enforcement Order provision that "TVA and any other person adversely affected by this Order may request a hearing on this Order within 30 days of the date of the Order."[1] She asserts that she is "adversely affected" by the allegedly erroneous assertions that are causing her harm and identifies the statements in the Order with which she disagrees.[2] Ms. Henderson cites two injuries caused by alleged errors in the Enforcement Order: reputational harm and a chilling effect on her willingness to raise concerns or file complaints.[3] Under the plain language of 10 C.F.R. § 2.202(a)(3), Ms. Henderson, as an "other person adversely affected by the order," is entitled to "to demand a hearing on all or part of the order" to rebut the Staff's allegations against her.[4] The zone-of-interests test is not needed to determine the nexus of the harm.

Moreover, even if the zone-of-interests test were to apply, I agree with Ms. Henderson that she has set forth sufficient allegations to show that she satisfies the test.[5] Further, I find that Ms. Henderson has pled an admissible contention, [6] which the Staff has not disputed.

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[1] TVA Order for Civil Penalty (Oct. 29, 2020) (ADAM Accession No. ML20297A544) [hereinafter TVA Order]; TVA Order for Civil Penalty, Appendix (Oct. 29, 2020) (ADAMS Accession No. ML20297A552) [hereinafter TVA Order Appendix].

[2] Erin Henderson's Request for a Hearing of the NRC Staff's October 29, 2020 Order or, in the Alternative, Discretionary Intervention at 3–4 (Nov. 30, 2020) [hereinafter Henderson Hearing Request]; Erin Henderson's Reply to NRC Staff Answer to Erin Henderson's Request for Hearing or in the Alternative Discretionary Intervention at 2 (Dec. 30, 2020) [hereinafter Henderson Reply].

[3] Henderson Hearing Request at 6–9; Henderson Reply at 5.

[4] 10 C.F.R. § 2.202(a)(3).

[5] Henderson Hearing Request at 8–10; Henderson Reply at 2–11.

[6] 10 C.F.R. § 2.309(f)(1); Henderson Hearing Request at 10–20.

Therefore, she has satisfied all the requirements to grant her hearing request, even if she must also satisfy the zone-of-interests test.

A. The Petition

The Staff has abandoned its enforcement action against Ms. Henderson,[7] but she requests a hearing before a neutral adjudicator to defend herself against the Staff's assertions in its Enforcement Order against TVA that identifies her as a wrongdoer.[8] Ms. Henderson seeks to set the record straight on the damaging claims that the Staff has set forth against her.[9]

She is uniquely identified in the Order by position title, employer, and the dates involved, narrowing this description to her and her alone.[10] The Order identifies the Director, Corporate Nuclear Licensing (Director of CNL) at Sequoyah in March 2018, May 2018, and January 2019, as being involved in all four violations described.[11] That position was held by Ms. Henderson at those times.[12]

Violations 1 and 3 of the Enforcement Order state that "[t]he NRC staff determined that [the Sequoyah Director of CNL's] filing the formal complaint that triggered an investigation is considered an adverse action in this case. When an investigation is so closely related to a personnel action that it could be a pretext for gathering evidence to retaliate, it is an adverse action."[13]

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[7] NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

[8] Henderson Hearing Request at 1–3.

[9] Id. at 26–28.

[10] TVA Order at 3; TVA Order Appendix at 2; see Tr. at 67, 81–82 (Kirkwood).

[11] TVA Order Appendix at 5–7.

[12] Id.

[13] TVA Order Appendix at 2–4.

Any statement by the NRC that a nuclear industry manager's actions are the basis for a serious violation of NRC regulations is sufficient to cause a serious reputational injury.[14] Here, two violations directly make such assertions against Ms. Henderson. When the person identified is a manager in a role responsible for compliance with NRC regulations, the harm is even greater. An enforcement order is intentionally a public punishment for serious infractions and is intended to deter those who might consider violating the agency's regulations.[15] Irrespective of the Henderson Notice of Violation (NOV)[16] and the Staff's press releases,[17] the Staff's statements in Violations 1 and 3 alone are sufficient to cause Ms. Henderson harm. Ms. Henderson has shown that her reputation as a nuclear worker has been damaged by the Enforcement Order, and the Staff's other public communications have compounded the harm.[18]

The Enforcement Order did not need to specifically identify Ms. Henderson's position. But the Staff chose to provide sufficient information to identify her.[19] At oral argument, the Staff asserted that it needed to identify her with sufficient specificity in the Order to adequately support the bases for the violations,[20] but this assertion is directly contradicted by the fact that the Order did not specifically identify the individuals who were alleged to have suffered retaliation.[21] The Staff could have identified her as "a corporate manager," just as the Staff

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[14] Id.

[15] See Henderson Reply at 5 & n.19 (citing Revisions to Procedures to Issue Orders: Deliberate Misconduct by Unlicensed Persons, 56 Fed. Reg. 40,664, 40,665 (Aug. 15, 1991)).

[16] IA-20-009, Notice of Violation, Nuclear Regulatory Commission Office of Investigations Report Nos. 2-2018-033 and 2-2019-015 (Aug. 24, 2020) (ADAMS Accession No. ML20218A584). This notice was later rescinded. NRC Staff Commission Notification in the Matter of Erin Henderson (Enforcement Action) Docket No. IA-20-009 (Jan. 22, 2021).

[17] Henderson Hearing Request at 6–7 & n.21.

[18] Id. at 5–7. As of the date of this order, the Staff has not issued a press release concerning the rescission of the NOV previously issued to Ms. Henderson.

[19] TVA Order Appendix at 2–4.

[20] Tr. at 67 (Kirkwood).

[21] TVA Order Appendix at 1–4.

identified others as "a former Sequoyah employee" and "a former corporate employee."[22] The Staff also fails to acknowledge that it is familiar with the use of non-public communications with licensees. The Staff could have provided specific details using non-public means, but instead chose to communicate the information via public routes that could cause reputational harm.

Ms. Henderson's claim of a chilling effect on her willingness to raise concerns or file complaints is also based on her argument that the Staff has made erroneous assertions as the bases for the violations.[23] She claims that the Staff's assertion that her formal complaint was a "pretext" to the investigation and was considered an adverse action now makes her "no longer . . . secure in raising concerns or filing complaints."[24] Despite the majority's summary dismissal of the concern, the NRC's own guidance establishes that it can be a serious matter.

The NRC Allegation Manual defines a "chilling effect" as "[a] condition that occurs when an event, interaction, decision, or policy change results in a perception that the raising of safety concerns to the employer or to the NRC is being suppressed or is discouraged."[25] That well fits the situation in which Ms. Henderson finds herself. Ironically, here the NRC's action is causing the "chill" that could reduce the willingness of Ms. Henderson and other mangers to raise concerns.

Employee harassment concerns, the subject of Ms. Henderson's formal complaint, are relevant to the work environment. All employees, even managers, should be free to file truthful complaints of employee harassment. To have it otherwise could lead to a workplace in which communications are stifled and workers feel unsafe. Good regulatory compliance is more likely

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[22] Id. at 1–2 (identifying "a former Sequoyah employee" without more specificity); id. at 3–4 (identifying "a former corporate employee" without more specificity).

[23] Henderson Hearing Request at 8–9.

[24] Id. at 7.

[25] Office of Enforcement, NRC, Allegation Manual § 5.2.i (Dec. 22, 2016) (ADAMS Accession No. ML17003A227).

in a positive workplace free of harassment. Such an environment is more likely to encourage the reporting of issues that are specifically safety related. In fact, this is the very reason for the NRC's concern that the work environment not suffer from a "chilling effect."

Violations 2 and 4 are based on that same chilling effect, which shows how important any chilling effect is to the NRC.[26] That an NRC action creates the same chilling effect matters no less than when a licensee does so. Both have the potential to reduce communication and employee performance essential to safety. And safety is integral to all NRC licensed activities. Ms. Henderson traces the chilling effect on her and other managers to the same allegedly erroneous statements in the Enforcement Order that are the basis for her reputational injury.[27] As noted above, Ms. Henderson seeks to participate in this proceeding to ensure that her side of the story is told, to show that the NRC's assertions about her complaint are not correct, and to obtain the redress she believes she deserves. Despite the majority's assertion,[28] Ms. Henderson did present supporting arguments in her petition.

Ms. Henderson contends that the Staff's actions causing her harm are unlawful because the Staff failed to comply with 10 C.F.R. § 50.7, the regulatory basis for the Enforcement Order.[29] Section 50.7 prohibits various entities, including Commission licensees, from discriminating against an employee for engaging in certain protected activities. But it also provides that "actions taken by an employer, or others, which adversely affect an employee may be predicated upon nondiscriminatory grounds."[30]

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[26] See TVA Order Appendix at 2, 4.

[27] Henderson Hearing Request at 8.

[28] See Majority at 2.

[29] Henderson Hearing Request at 10.

[30] 10 C.F.R. § 50.7(d) (emphasis added). The regulation goes on to explain that "[t]he prohibition applies when the adverse action occurs because the employee has engaged in protected activities. An employee's engagement in protected activities does not automatically

Ms. Henderson argues that section 50.7(d) authorizes the very conduct that the Enforcement Order cites as improper because, she claims, her conduct was motivated by permissible justifications (i.e., "nondiscriminatory grounds"), and therefore she should not have been accused of unlawful action in the Staff's order.[31] As Ms. Henderson puts it, "the facts clearly show that [she] had ample nonprohibited justifications for filing her Complaint against Mr. McBrearty . . . and to include Ms. Wetzel as a potential co-conspirator."[32] The substance of Ms. Henderson's allegations is that her specific injuries directly result from the Staff's alleged failure to correctly apply section 50.7.

B. Under the Plain Language of Section 2.203(a)(3), Ms. Henderson's hearing demand must be granted.

Under the plain language of 10 C.F.R. § 2.202(a)(3), Ms. Henderson is an "other person adversely affected by the order," and, as such, is entitled "to demand a hearing on all or part of the order" to rebut the Staff's allegations against her.[33] Rather than being a mere third party who might claim an indirect injury from the Enforcement Action, Ms. Henderson is directly harmed by the Staff's assertions in the Enforcement Action.[34] Ms. Henderson claims that the erroneous statements in the Enforcement Order have harmed her reputation and have caused her to be hesitant to report personnel issues (the "chilling effect").[35] Consequently, she has properly alleged a direct harm from the language of the Enforcement Order.

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render him or her immune from discharge or discipline for legitimate reasons or from adverse action dictated by nonprohibited considerations." Id.

[31] Henderson Hearing Request at 10.

[32] Id. at 11.

[33] 10 C.F.R. § 2.202(a)(3)

[34] Henderson Hearing Request at 4–9.

[35] Id. at 3, 9.

Moreover, Ms. Henderson has met the three-part judicial test for standing applied in NRC proceedings: injury, causation, and redressability.[36] Essentially, if she has injuries that are traceable to the order and are redressable, she has met the requirements for standing.[37] The majority did not decide whether damage to Ms. Henderson's reputation is an injury for standing purposes.[38] When Article III courts have been faced with allegations of a government action causing a reputational injury that is redressable, they have found that the injury is sufficient to establish standing. The majority provides no valid reason why we should not do the same.

In McBryde v. Commission to Review, the D.C. Circuit found the harm to a judge's reputation from a public reprimand for misconduct was a sufficient injury for him to establish standing.[39] Similarly, in Sullivan v. Committee on Admissions, the D.C. Circuit found that the

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[36] See 10 C.F.R. § 2.309(d); Changes to Adjudicatory Process, 69 Fed. Reg. 2,182, 2,220–21 (Jan. 14, 2004).

[37] Henderson Hearing Request at 4–7. Section 2.309(d) requires Ms. Henderson to provide the basis for her right to be part of the proceeding; her interest in the proceeding; and the possible effect of the proceeding on her interest. 10 C.F.R. § 2.309(d)(1). She met the first requirement by citing the TVA Order's provision for those "adversely affected" and showing she has been injured by the TVA Order, see Henderson Hearing Request at 1–2, 4–8, the next, by her statements about wanting to defend her reputation and remove the stigma that causes the chilling effect, see id., and the last by her request that the Board's favorable decision could require the Staff to rescind the erroneous statements that cause the harm. Id. at 8.

The majority is concerned about different types of standing determinations. Majority at 9–10 & n.49. But this is just a distraction from whether Ms. Henderson has demonstrated standing based on the facts unique to this case. The Commission has flexibility in determining standing and may use somewhat more- or less-restrictive criteria than courts, but that criteria must still be reasoned based on the facts of the case. See Envirocare of Utah, Inc. v. NRC, 194 F.3d 72, 75–79 (D.C. Cir. 1999); Calvert Cliffs 3 Nuclear Project, LLC (Calvert Cliffs Nuclear Power Plant, Unit 3), CLI-09-20, 70 NRC 911, 914–18 (2009). The case before us presents just the sort of circumstance where standing has been demonstrated regardless of how it is characterized, and zone of interests is not necessary to evaluate a nexus between the claimed harm and a statute at issue.

[38] See Majority at 6–8.

[39] McBryde v. Comm. to Rev. Cir. Council Conduct & Disability Orders of Jud. Conf. of U.S., 264 F.3d 52 (D.C. Cir. 2001); see also Foretich v. United States, 351 F.3d 1198, 1214 (D.C. Cir.

District Court's determination that an attorney had violated Canons of Ethics "plainly reflects adversely on his professional reputation. In a sense, Appellant's posture is not unlike that of an accused who is found guilty but with penalties suspended. We conclude this gives him standing to appeal."[40] And, in Meese v. Keene, the Court found that government action labeling an individual's showing of films as "political propaganda" caused "risk of injury to [Keene's] reputation" that was traceable to the government's action.[41] Because the injury in Meese could be redressed by enjoining the government's action, the Court found that this reputational harm was sufficient to establish standing to contest the action.[42] In all three cases, the government actions were not retracted and were found to have sufficiently raised the harm of a damaged reputation. The same could be said for the TVA Enforcement Action relative to Ms. Henderson. And because the agency "applies contemporaneous judicial concepts of standing,"[43] Ms. Henderson's injury is caused by the Staff's assertions in the Enforcement Order and is redressable by this Board.

Section 2.202(a)(3) unequivocally grants Ms. Henderson the right, within twenty (20) days of the date of the order, "to demand a hearing on all or part of the order."[44] Given that Ms. Henderson alleges a direct, judicially recognized injury caused by the Staff's alleged failure to correctly apply 10 C.F.R. § 50.7, the zone-of-interests test does not apply. The Commission's summary of the zone-of-interests test in Quivira Mining Co., states that "[w]here the plaintiff itself is not itself the subject of the contested regulatory action, the [zone of interests] test denies

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2003) (determining that "reputational injury that derives directly from government action will support Article III standing to challenge that action").

[40] Sullivan v. Comm. on Admissions and Grievance of the U.S. Dist. Ct. for D.C., 395 F.2d 954, 956 (D.C. Cir. 1967).

[41] Meese v. Keene, 481 U.S. 465, 466 (1987).

[42] Id. at 465–77.

[43] Sequoyah Fuels Corp. (Gore, Oklahoma Site), CLI-94-12, 40 NRC 64, 71 (1994).

[44] 10 C.F.R. § 2.203(a)(3).

a right of review if the plaintiff's interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot be assumed that Congress intended to permit the suit."[45] But here, when Ms. Henderson's conduct is the subject of the disputed agency action, and she challenges the legality of that action, there is no need to apply the zone-of-interests test to determine the nexus of the harm.[46]

C. Even assuming the zone-of-interests test applies, Ms. Henderson satisfies its requirements.

The Supreme Court has construed the zone-of-interests test liberally, stating that it is "not meant to be especially demanding."[47] Even if the zone-of-interests test is applied in this case, Ms. Henderson has satisfied this "not . . . especially demanding" standard. The Supreme Court has explained that the zone-of-interests test is not determined by the statute's overarching purpose, but instead "by reference to the particular provision of law upon which the

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[45] Quivira Mining Co. (Ambrosia Lake Facility, Grants, New Mexico), CLI-98-11, 48 NRC 1, 12 (1998) (citing Clarke v. Sec. Indus. Ass'n, 479 U.S. 388, 399 (1987)) (emphasis added).

[46] Going forward, as the Commission analyzes the use of the zone-of-interests test, it may wish to consider reviewing the current Supreme Court stance that the test is no longer considered part of the standing analysis, but instead is part of the determination of the proximity of the cause of action to the statute involved by the plaintiff, see Bank of Am. Corp. v. City of Miami, Fla., 137 S. Ct. 1296, 1302–03, 1307 (2017), and consider whether the requirement that a contention must be within the scope of the proceeding adequately addresses the issue. 10 C.F.R. § 2.309(f)(1)(iii). If not, the Commission may wish to consider amending regulations to add the zone-of-interests test with guidance for when it should be applied. As a distinguished commentator pointed out, "the Court has not provided any authoritative text to illuminate [the test's] scope or purpose." 13.A. Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3531.7 (3d ed. 2020) (Zone of Protected Interests) (stating "[t]he lack of clear defining principles in turn has led to occasional frustration, seeming changes in character, and uncertain application" of the zone-of-interests test, which can be said equally about NRC cases). Because the Commission "applies contemporaneous judicial concepts of standing," Sequoyah, CLI-94-12, 40 NRC at 71, and the Court has shifted from its 1970's era approach to today's use of the zone-of-interests test to evaluate the relationship of the action to the invoked statute, the Commission might also consider whether North Anna and Palisades cases' use of the zone-of-interests test as part of the standing analysis should be seen as precedential.

[47] Clarke, 479 U.S. at 399; see also Howard R.L. Cook & Tommy Shaw Found. ex rel. Black Emp's of Library of Congress, Inc. v. Billington, 737 F.3d 767, 771 (D.C. Cir. 2013) (stating "the zone of interests requirement poses a low bar").

plaintiff relies."[48] The analysis is not based on the purpose of the entire act, but only on the specific provision invoked by the plaintiff.[49] "The plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint."[50]

As previously explained, violations cited in the Enforcement Order are based on 10 C.F.R. § 50.7, the employee protection regulations.[51] These regulations are grounded in section 211 of the Energy Reorganization Act of 1974 (ERA), as amended.[52] Ms. Henderson has made clear that she is challenging the Staff's action under section 50.7.[53] Thus, if the zone-of-interests test were applied here, the "relevant statute" is primarily the ERA and the relevant regulation implementing the ERA, i.e., 10 C.F.R. § 50.7.

Ms. Henderson maintains that her conduct on which the Staff's Enforcement Order is based is in fact allowed by section 50.7(d) because it was motivated by permissible justifications (i.e., "nondiscriminatory grounds").[54] Therefore, she argues, she should not have been accused of unlawful action in the Staff's order. The obvious purpose of section 50.7(d) is to provide protection for actions "taken by an employer, or others, which adversely affect an employee" but which are predicated upon nondiscriminatory grounds.[55] Ms. Henderson is one of the "others" to whom this provision applies and for whose benefit it was created. Her alleged injuries are the

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[48] Bennett v. Spear, 520 U.S. 154, 175–76 (1997).

[49] Id. at 163 (citing Ass'n of Data Processing Service Org., Inc. v. Camp, 397 U.S. 150, 155–56 (1970)).

[50] Lujan v. Nat'l Wildlife Fed., 497 U.S. 871, 883 (1990); see also Air Courier Conf. v. Postal Workers, 498 U.S. 517, 523–24 (1991).

[51] TVA Order at 2.

[52] 10 C.F.R. § 50.7(a).

[53] Henderson Hearing Request at 2.

[54] Id. at 2, 12.

[55] 10 C.F.R. § 50.7(d).

direct result of the Staff's alleged failure to correctly apply that provision. Therefore, Ms. Henderson's alleged injuries fall squarely within the zone of interests protected by section 50.7(d) and which that provision was intended to prevent.

In his dissent in Dresden, Commissioner Baran discussed the zone-of-interests test and explained that he would have found the petitioner union's claim—i.e., that the enforcement order would harm its members and reduce safety—was a protected interest, rather than finding the case moot, as did the majority.[56] Here too, there is a clear connection between the protection of public health and safety and Ms. Henderson's claim that the Staff's Order fails to properly apply section 50.7(d). Protecting the right to discipline employees on nondiscriminatory grounds preserves supervisors' ability to discipline employees who pose a threat to public health and safety.

Ms. Henderson argues that this Order has "serious potential to silence individuals who are being harassed."[57] She observes that "rather than file a complaint and risk career-threatening reputational injury, individuals will instead keep silent, thus empowering bad actors."[58] She further notes that "the Commission has recognized such a workplace, where people are permitted to act unprofessionally and not treat others with respect, directly impacts public health and safety."[59] She observes that "[i]n the nuclear industry, zero tolerance for bullying and harassment is essential to ensure a Respectful Work Environment (one of the Commission's own established Positive Traits of a Nuclear Safety Culture) where trust and

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[56] Exelon Generation Co., LLC (Dresden Nuclear Power Station, Units 2 & 3), CLI-16-6, 83 NRC 147,160–62 (2016).

[57] Henderson Hearing Request at 9.

[58] Id.

[59] Id. (citation omitted).

respect permeate an organization and are critical to maintaining a safety conscious work environment."[60]

Furthermore, there is a sufficient relationship between the ERA and the AEA that place Ms. Henderson's allegations squarely within the zone of interests protected by the AEA. The agency, in promulgating section 50.7, invoked its authority under the ERA, but the agency applies the regulation under its authority derived from both the ERA and AEA.[61] As stated above, the zone-of-interests test should not be applied in Ms. Henderson's case, but if it is, Ms. Henderson's claims are directly relevant to 10 C.F.R. § 50.7, which is related to the ERA and the AEA.

The majority states that the North Anna "Appeal Board held that reputation 'is not even arguably within the "zone of interests" protected or regulated by the Atomic Energy Act,'"[62] without explaining why North Anna applies to Ms. Henderson's claims.[63] That Appeal Board ruling was based on the particular facts of the case and did not establish that reputational injury could never be within the zone of interests of any NRC proceeding.[64] Ms. Henderson's claims here are distinctly different from those in the North Anna operating licensing proceeding. There, a contractor sought to intervene based on potential "reputational and economic" losses that the

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[60] Id. (citation omitted).

[61] The regulation on which the Order is based is grounded in the AEA and in the Energy Reorganization Act of 1974, as amended. See 10 C.F.R. § 50.7 (stating that "[t]he protected activities are established in section 211 of the Energy Reorganization Act of 1974, as amended, and in general are related to the administration or enforcement of a requirement imposed under the Atomic Energy Act or the Energy Reorganization Act"); see also Tenn. Valley Auth. (Watts Bar Nuclear Plant, Unit 1), CLI-04-24, 60 NRC 160, 185 (2004) (the Commission explained that it invoked both the AEA and the ERA as authority when promulgating section 50.7).

[62] Majority at 8 (quoting Va. Elec. & Power Co. (North Anna Power Station, Units 1 & 2), ALAB-342, 4 NRC 98, 104, (1976)).

[63] Id.; see North Anna, ALAB-342, 4 NRC at 102, 107. The Appeal Board determined that the contractor's "financial and reputational losses," were sufficient as an injury-in-fact, though not within the Atomic Energy Act's zone of interests. Id. at 104.

[64] See generally North Anna, ALAB-342, 4 NRC at 98.

contractor might incur were a problem with the power plant to arise after it began operating.[65] Similarly, the majority the cited the Palisades license transfer case in support of its denial of standing to Ms. Henderson.[66] Palisades, however, was not an enforcement action and the petitioners' reputational injuries there were remote.[67] Both North Anna and Palisades concerned third parties who were seeking intervention in operating licensing and license transfer proceedings. In contrast, the case before us concerns an enforcement action that involves employee protection, 10 C.F.R. § 50.7. Ms. Henderson's injuries are a direct result of the NRC Staff's Enforcement Action in which she is identified.

D. Contention Admissibility

Ms. Henderson now has only one contention that simply asserts "[t]he facts do not support the Staff's conclusion in Violations 1 and 3 that Ms. Henderson's Complaint was filed for prohibited reasons."[68] She addresses the six-section 2.309(f)(1) contention admissibility requirements and provides sufficient information to fulfill each.[69] The Staff did not oppose the contention, and in fact, did not reference any part of her contention admissibility discussion at all.[70]

Accordingly, I would find that Ms. Henderson has met the requirements for standing and contention admissibility and would grant Ms. Henderson's request.

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[65] Id. at 108.

[66] Majority at 9 (citing Entergy Nuclear Operations, Inc. (Palisades Nuclear Plant), CLI-08-19, 68 NRC 251, 266 (2008)).

[67] Palisades, CLI-08-19, 68 NRC at 266. The group of unions who petitioned to intervene in this license transfer were concerned about a plant's reputation affecting the interests of the workers.

[68] Henderson Hearing Request at 10; Tr. at 41–42 (Walsh).

[69] 10 C.F.R. § 2.309(f)(1); Henderson Hearing Request at 10–20.

[70] See generally NRC Staff Answer.

E. Discretionary Intervention

Because Ms. Henderson has met the requirements for standing and contention admissibility, her request for discretionary intervention need not be analyzed. But if I were to analyze it, I would note that the harm she alleges and her need for an administrative route to defend herself would weigh heavily in favor of granting her request.

The majority does not find that any of the six factors for discretionary intervention favor Ms. Henderson.[71] In analyzing the factors, the majority states that Ms. Henderson's contention is material to the case,[72] yet decides that her admission to the proceeding would not contribute to the record. Most perplexing is that the majority finds that Ms. Henderson's interests can be adequately protected by means other than being admitted to the proceeding and that her interests will be adequately represented by TVA.[73] According to the majority, "weigh[[ing] heavily against her" are that Ms. Henderson and TVA currently have the same counsel, that she will likely be a fact witness, and that she might be allowed to submit an amicus brief.[74]

Ms. Henderson has no other administrative route to seek redress. Having an opportunity to defend her reputation as a nuclear worker is important. Her interests are not necessarily protected just because her case overlaps with TVA's. If she is not admitted as a party to a proceeding, she is not at the table to defend herself. Reliance on her employer for that protection does not guarantee that her interests will be adequately addressed.

TVA's attorney must act in TVA's best interest, regardless of how that impacts Ms. Henderson. TVA's attorney noted at oral argument that he had ethical concerns that likely would cause him to have to withdraw from representing Ms. Henderson if she were not a

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[71] Majority at 12–16.

[72] Id. at 14.

[73] Id. at 13–14.

[74] Id. at 14.

party.[75] If he represents TVA alone, he could be faced with an option that is optimal for TVA, but not beneficial for Ms. Henderson. Admitting her as a party eliminates that problem.

Ms. Henderson's admission to the proceeding is not likely to inappropriately delay or expand the proceeding. Allowing discretionary intervention is rare, but this is just the sort of unique case that would justify its use if no other path for admission to the proceeding were available. As the Commission said in Pebble Springs, "we would expect [the] practice [of applying the discretionary intervention factors] to develop . . . through attention to the concrete facts of particular situations."[76]

Ms. Henderson should be made a party to the proceeding based on her demonstration of standing and provision of an admissible contention, but in the alternative, the unique situation in which Ms. Henderson finds herself, given the facts presented, also justifies her request for a hearing as a matter of discretion.

[75] Tr. at 60–62 (Walsh).

[76] Pebble Springs, CLI-76-27, 4 NRC at 617.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	)	
	)	
TENNESSEE VALLEY AUTHORITY	)	Docket Nos. EA-20-006 and 20-007-EA
	)	
(Enforcement Action)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing **MEMORANDUM AND ORDER (Denying Erin Henderson's Hearing Request) (LBP-21-03)** have been served upon the following persons by Electronic Information Exchange.

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Office of the Secretary of the Commission

Dated at Rockville, Maryland,
this day 25th of March 2021.