

May 29, 2013

Special Counsel Carolyn Lerner  
U.S. Office of Special Counsel  
1730 M St, NW  
Washington, DC 20036

**Via:** Jason Zuckerman, Senior Advisor to the Special Counsel [jzuckerman@osc.gov](mailto:jzuckerman@osc.gov)

**Subject:** Request for Office of Special Counsel (OSC) assistance in obtaining resolution of two issues of law that, in my professional opinion, place the State of Tennessee at an unnecessarily increased risk of a nuclear accident and/or other serious mishap at Tennessee Valley Authority

Dear Ms. Lerner,

By the federal Whistleblower Protection Act (WPA) of 1989, the Office of Special Counsel (OSC) has a statutory mandate to “act in the interests of employees who seek assistance” from it.<sup>1</sup> I am a current federal employee, a licensed professional engineer (PE) in the State of Tennessee, a 37 year nuclear professional, and 23 year-long resident of the State of Tennessee who seeks OSC’s assistance in resolving two issues of law that I publicly claim - putting my PE license on the line - place the State of Tennessee at an unnecessarily increased risk of a nuclear accident or other serious mishap at Tennessee Valley Authority (TVA) facilities.<sup>2</sup>

Consistent with engineering ethics and the rules of professional conduct for PE’s licensed in Tennessee for public reports at this, I contend the State of Tennessee is at an unnecessarily increased risk of a nuclear accident at the nuclear power plants operated by the Tennessee Valley Authority (TVA), a wholly-owned government corporation. This is because both the TVA and OSC misinterpret essential parts of the Civil Service Reform Act of 1978, the 1994 amendments to the WPA, and, now, the 2012 Whistleblower Protection Enhancement Act.

**Issue One: Do the definitions of all types of prohibited personnel practices apply at TVA?**

According to TVA, no. According to TVA, 5 U.S.C. section 2302(a)(1) is moot, so the definitions of prohibited personnel practices (PPPs) in 2302(b) simply do not apply at it, unless specifically cited in section 2302(a)(2)(C)(i). By TVA’s reading of the law, the definitions of PPPs also do not apply to the other agencies cited in 2302(a)(2)(C), including FBI, CIA and

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<sup>1</sup> This appears in the “findings and purpose” section of the WPA, Pub. L. 101-12, Section 2(b)(2)(B), and can be found in the notes of 5 U.S.C. section 1201.

<sup>2</sup> I invite anyone who contends my claims are not truthful and objective to file a professional misconduct complaint with my PE licensing authority, for violating its mandatory rule of professional conduct, see <http://www.tn.gov/regboards/ae/>.

intelligence agencies. By TVA's reading of the law, it is not that OSC lacks jurisdiction to protect employees from PPPs in these agencies, it is that the term PPPs is meaningless in them.

I would agree with TVA's interpretation, except that the section 2302(a)(1) states the definitions of PPPs apply, not just in section 2302, but throughout Title 5, and because by 5 U.S.C. section 1204(a)(3), the U.S. Merit Systems Protection Board (MSPB) is to conduct special studies necessary to determine and report "as to whether the public interest in a civil service free of PPPs is being adequately protected," including in agencies that employ members of the civil service and which are also listed in section 2302(a)(2)(C).

Additionally, I am unaware of any MSPB special study, including its 1989 special study of TVA, that states the definitions of PPPs do not apply in agencies listed in 2302(a)(2)(C). Finally, while OSC's PPP/other prohibited activities complaint form, form OSC-11, states that OSC lacks jurisdiction for PPP complaints in the agencies included in section 2302(a)(2)(C), it does not say that the definitions of PPPs do not apply in these agencies.<sup>3</sup>

Why is this relevant to safety in TVA's nuclear facilities? Because if the definitions of 11 of the 13 types of PPPs are meaningless in TVA, then it greatly impacts how the TVA Board and CEO should ensure compliance with their fundamental statutory duty, by the CSRA, to TVA employees to "take any action....necessary" to ensure employment at TVA embodies the merit system principles in operating TVA's nuclear facilities - they have no duty to TVA employees to ensure, on some objective basis, that TVA employees are adequately protected from them.<sup>4</sup> A federal agency management culture that allows ANY kind of PPP, more likely allows EVERY kind of PPP - and other dysfunction, corruption and unnecessarily risks to public health and safety too.

## **Issue 2 - TVA employees are unlawfully prevented from "blowing whistles" to OSC, including about nuclear safety issues**

By TVA's own argument though, the definition of the whistleblower reprisal type PPP applies at TVA, since 1994.<sup>5</sup> By this PPPs explicit words, TVA employee can make disclosures to OSC, in

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<sup>3</sup> See OSC-11, page 1, available at <http://www.osc.gov/documents/forms/osc11.pdf>

<sup>4</sup> At this point, OSC has jurisdiction to enforce the two reprisal type PPPs at TVA, but lacks jurisdiction for the other 11 types of PPPs codified at 2302(b). So the TVA Board has responsibilities by both 2302(c) - for the 2 reprisal type PPPs - and 2301(c) - "to take any action .....necessary" - for the other 11 types of PPPs.

<sup>5</sup> MSPB conducted a "special study" of TVA in 1989, with a particular focus on whistleblower protection, and found TVA's process to protect its employees from it deficient, see <http://www.mspb.gov/netsearch/viewdocs.aspx?docnumber=308201&version=308602&application=ACROBAT>. As a result, in 1994, via Pub. L. 103-424, section 5(c), Congress gave OSC

fact the law states that OSC is their primary disclosure channel when the information disclosed cannot be publicly released (as is much information about security at TVA's nuclear plants, particularly about their use in producing tritium for America's nuclear weapon stockpile).<sup>6</sup>

Consistent with my contentions that residents of Tennessee are at an unnecessarily increased risk of a nuclear accident at a TVA plant, TVA blithely dismisses, in its May 16, 2013 response to Attorney Loring Justice's letter of May 5, 2013, well-founded concerns that OSC is violating the law in denying TVA employees access to its disclosure function (TVA, based on my conversations with its Office of Inspector General, apparently does not want TVA employees to be able to bring their concerns, confidentially, to OSC - the TVA IG apparently wants to know who TVA's concerned employees are).<sup>7</sup>

Consistent with my concerns about Tennessee being at an unnecessarily increased risk of a nuclear accident, TVA takes no issue OSC's position that TVA employees cannot make disclosures to it, because, according to OSC, they are not "employees" for the purposes of 5 U.S.C. section 1213, despite TVA being a federal agency, and despite TVA agreeing that the law at 2302(b)(8) explicitly states that TVA employees can make disclosures to OSC.<sup>8</sup> Also consistent with my concerns is OSC's position that current or former federal employees at other agencies, such as the Environmental Protection Agency (EPA) or Nuclear Regulatory Commission (NRC), can make protected disclosures to OSC about TVA, as long as their disclosure is based on information obtained in their professional duties involving TVA.<sup>9</sup>

Additionally, OSC whistleblower disclosure form, OSC-12, does not state that TVA employees or employees of other wholly-owned government corporations cannot make whistleblower

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jurisdiction over the whistleblower reprisal type PPP at TVA and all other government corporations.

<sup>6</sup> See section 2302(b)(8)(B), which starts "Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority - take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of - any disclosure to the Special Counsel, ....."

<sup>7</sup> Mr. Justice is a graduate of Yale Law School, who clerked for a Federal Judge before starting his practice. His letter to TVA is available at <http://whsknox.blogs.com/covenant/justice-tva.pdf> and TVA's response is available at <http://whsknox.blogs.com/covenant/TVA-response-justice-may13.pdf>.

<sup>8</sup> OSC letter to me of May 12, 2012, see [http://whsknox.blogs.com/covenant/osc-carson\\_tva-disclosures.pdf](http://whsknox.blogs.com/covenant/osc-carson_tva-disclosures.pdf)

<sup>9</sup> See 5 U.S.C. section 1213(c)(2)(B)

disclosures to it.<sup>10</sup> Finally, TVA agrees that the 2302(b)(8) PPP applies to it - therefore the recently passed Whistleblower Protection Enhancement Act now requires TVA to ensure its employees know of their disclosure right at OSC. <sup>11</sup>

### **Conclusion and Request**

Ms. Lerner, it should really not be me, in 2013, raising these issues with you and TVA - if TVA was serious about nuclear safety and/or if OSC was serious about its duties to public health and safety - then they would have been resolved - at the request of both OSC and TVA - by the Office of Legal Counsel of the Department of Justice, decades ago.

I publicly state, consistent with my legal responsibilities as a PE in making public statements, that the failure or refusal of OSC and TVA to obtain resolution of these well-evidenced, long-standing, and significant issues, fundamental to management culture at TVA (including its safety and security cultures), justifies my claims that the State of Tennessee is now at an unnecessarily increased risk of a nuclear accident and/or other significant mishaps at TVA facilities.

Ms. Lerner, you - just as I and over 2 million federal agency employees, including at TVA - took an oath to "well and faithfully discharge the duties" of our positions. Special Counsel Lerner, your position is unique in its independence and responsibilities for the integrity, management culture, and proper functioning of EVERY federal agency. I now publicly claim that you are failing or refusing to discharge the duties of your office, resulting in the State of Tennessee being at an unnecessarily increased risk of a nuclear accident at TVA.

Honor your oath, Ms. Lerner - do your duty! Request the Office of Legal Counsel of the Department of Justice to resolve these issues and, if it will not, then publicly resign and call upon President Obama to so direct their resolution.

Respectfully,

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<sup>10</sup> See pages 1 and 2 of the OSC-12, available at <http://www.osc.gov/documents/forms/osc12.pdf>

<sup>11</sup> On November 29, 2012, Pub. L. 112-199, was passed and inserted, in 2302(c), ", including how to make a lawful disclosure of information that is specifically required by law or Executive order to be kept classified in the interest of national defense or the conduct of foreign affairs to the Special Counsel.....".