IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF KENTUCKY
OWENSBORO DIVISION

KENTUCKY COAL ASSOCIATION, INC., JAMES ROGERS, III, J.L. ROGERS FAMILY, LLC, TALMAGE ROGERS, TALMAR OF FL, LLC, PAT EARLY, KIRSTINE EARLY, BUCKINGHAM HOLLOW, LLC, KEVIN LAWRENCE AND BIG BUCKS, LLC Plaintiffs	)	
v.	)	
	)	Case No. 4:14-CV-73-M
TENNESSEE VALLEY AUTHORITY Defendant	)	

COMPLAINT FOR INJUNCTIVE AND DECLARATORY RELIEF

Plaintiffs Kentucky Coal Association, Inc., James Rogers, III, J.L. Rogers Family, LLC, Talmage Rogers, Talmar of FL, LLC, Pat Early, Kirstine Early, Buckingham Hollow, LLC, Kevin Lawrence and Big Bucks, LLC("Plaintiffs") state as follows for their Complaint against Defendant Tennessee Valley Authority ("TVA"):

NATURE OF THE ACTION

1. This is an action for preliminary and permanent injunctive relief against TVA; and for a declaratory judgment holding that TVA has acted arbitrarily, capriciously, and contrary to law and in abuse of its discretion and its statutory authority. As set forth below, this action challenges TVA's failure to undertake required environmental analysis under the National Environmental Policy Act ("NEPA") and failure to engage in least-cost planning per the TVA Act in connection with its decision to retire two coal fueled generating units at the Paradise Plant ("Paradise") and construct and operate a new major power generating combustion turbine/combined cycle ("CT/CC") natural gas plant.

2. NEPA itself, implementing regulations from the Council on Environmental Quality ("CEQ"), and TVA's own NEPA implementing regulations all direct that prior to deciding to retire the two coal fueled generating units known as Paradise Units 1 and 2 and construct a new natural gas-fired power generating facility with a summer generating capacity of up to approximately 1,025 megawatts (MW), TVA must prepare an Environmental Impact Statement ("EIS").

3. TVA did not prepare an EIS before deciding to construct this major new power generating facility with highly controversial environmental impacts. Instead, TVA conducted only a more limited Environmental Assessment to inform a decision with a significant effect on the quality of the human environment, unmistakable potential for controversy, and a cost of over a billion dollars.

4. TVA's Environmental Assessment purports to analyze how three alternatives would affect the human environment: (1) the No Action Alternative, under which TVA would allow the facility to operate out of compliance with the governing laws and regulations ("Alternative A"); (2) construction and operation of pulse jet fabric filter systems for emission control on Paradise Units 1 and 2 ("Alternative B"); and (C) retirement of Paradise Units 1 and 2 and construction and operation of a new natural gas-fueled generating CT/CC plant at Paradise ("Alternative C"). TVA ultimately selected Alternative C after finding it to have no significant impact on the quality of the human environment.

5. If performed correctly, TVA's EA would have acknowledged that Alternative C will have a significant impact on the quality of the human environmental and prompted TVA to initiate an EIS to comply with NEPA, CEQ regulations and its own NEPA implementing

regulations. In an attempt to avoid that requirement, TVA characterized the construction of a new 1,025 MW gas-fired facility and its related infrastructure as an "upgrade" or "maintenance" of the existing coal fueled facilities, implying that characterization allows it to ignore the significant environmental impacts of constructing an entirely new facility and associated fuel supply and storage structures and of decommissioning and demolishing the existing coal fueled units. This characterization is arbitrary and capricious, and unsupported by substantial evidence.

6. Further, TVA failed to prepare an EIS to inform its decision to decommission and demolish the two existing coal fueled generating units known as Paradise Units 1 and 2, a decision with significant environmental impacts.

7. The proposed action - abandoning TVA's previous investment in emission controls on Paradise Units 1 and 2, demolition and removal of those two units, and building a brand new facility with necessary infrastructure installations – is highly controversial, representing a sudden change of course by the TVA Board of Directors and running contrary to almost all public comment on the Environmental Assessment. It also sets a precedent to construct new gas-fired facilities and infrastructure rather than implementing less expensive and less environmentally impactful emission control upgrades, by segmenting and deferring analysis of the environmental impacts of various components and aspects of the decision.

8. In addition to failing to prepare an EIS, TVA:

a. failed to consider a legitimate No Action Alternative;

b. failed to examine reasonable alternatives to the chosen alternative;

c. prejudged its decision prior to and outside of the NEPA process;

d. failed to provide for adequate public comment on its Finding of No Significant Impact;

e. improperly segmented its environmental impact analysis and thus ignored the decommissioning component of the chosen alternative; and

f. improperly segmented and thus ignored the significant environmental impacts associated with constructing one or more 24" diameter natural gas pipelines extending up to 20 miles over private properties and the construction of a 5 million gallon fuel oil storage system.

9. The chosen action, viewed holistically, has far more significant environmental impacts than upgrading emission controls on the existing units.

10. TVA's decision to construct a major new power generating facility without engaging in the requisite environmental impact analysis violates NEPA and the governing regulations, and is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accord with the law.

11. In making its decision to retire Paradise Units 1 and 2 and construct a new CT/CC plant, TVA purposefully ignored alternatives having lesser environmental impact and lower cost, violating the Tennessee Valley Authority Act of 1933 as amended ("TVA Act"), 16 U.S.C. § 831m, by failing to engage in a least-cost planning approach.

12. TVA's failure to properly engage in a least-cost planning approach was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and in excess of the statutory authority granted to TVA by Congress in the TVA Act.

13. Accordingly, Plaintiffs ask this Court to invalidate TVA's decision to retire two coal fueled generating units and construct and operate a new gas-fired generating facility, made without undergoing an EIS or engaging in a least-cost planning approach. Plaintiffs further request that this Court enjoin TVA from taking any further action to implement the alternative it chose without due regard for TVA's statutory and regulatory obligations.

JURISDICTION, STANDING, AND VENUE

14. This action involves TVA, a United States federal corporation, as a defendant and arises under NEPA, 42 U.S.C. §§ 4321, *et seq*. This Court has jurisdiction of this action pursuant to 28 U.S.C. § 1331 as this action presents a federal question.

15. An actual and justiciable controversy exists between Plaintiffs and TVA, and the requested relief is therefore proper under 28 U.S.C. § 2201 and 5 U.S.C. §§ 705, 706.

16. This Court may issue a declaratory judgment and grant further relief pursuant to 28 U.S.C. §§ 2201, 2202.

17. The Administrative Procedure Act ("APA"), 5 U.S.C. §§701-06, entitles persons injured by the United States, such as Plaintiffs, to judicial review of agency action causing such injury. 5 U.S.C. § 702.

18. Plaintiffs have a right to bring this action pursuant to the TVA Act, 16 U.S.C. § 831c(b), as Plaintiffs are within the class which 16 U.S.C. § 831m is designed to protect.

19. Venue is proper in the Western District of Kentucky under 28 U.S.C. § 1391(b)(2) and 28 U.S.C. § 1391(e), as a substantial part of the events giving rise to the claims in this Complaint occurred in this judicial district and is where the adverse effects of the challenged

decision will be most directly felt. In addition, defendant TVA owns and operates the Paradise facility in this judicial district and maintains offices in this district.

PARTIES

20. Plaintiff Kentucky Coal Association, Inc. (KCA) is a 501(c)(6) non-profit organization. It traces its roots in Kentucky to April 28, 1947, and represents both eastern and western Kentucky operations that mine coal through surface and underground methods. The interests sought to be addressed in this action are germane to the KCA's purpose. KCA participated extensively in the NEPA process, coordinating 59 comments regarding the impacts of the preferred alternative and expressing support for Alternative B. The employees, officers, owners and directors of many KCA member companies live directly in or in close proximity to the area impacted by TVA's decision. KCA and its members have been and will continue to be directly and substantially injured as a result of this action because they bear the significant environmental and economic impacts of the proposed action. The relief sought in this case would provide redress for these injuries by ensuring a full and complete evaluation of the environmental impacts, including without limitation social, procedural, and economic impacts, from the proposed action.

21. Plaintiff James Rogers III ("Jimmy Rogers") is the controlling member of J.L. Rogers Family, LLC and purchases power generated by TVA (a TVA ratepayer). J.L. Rogers Family, LLC owns properties which are: (i) near or adjacent to Paradise Plant, and (ii) through which a new pipeline to supply the new gas-fired facility is proposed to be constricted. While walking and hiking on his property which has been owned by his family for generations, Jimmy Rogers' access to and through the property was recently restricted by TVA's initial construction

activities. Jimmy Rogers' use and enjoyment including hiking, fishing, hunting and the overall aesthetic beauty of the Rogers family property and the surrounding area has been and will be harmfully impacted by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

22. On or about June 24, 2014, Jimmy Rogers was contacted by TVA's agent or supplier, Texas Gas Transmission, LLC ("Texas Gas") who is developing a 24 inch diameter pipeline to supply TVA's new facility. Texas Gas seeks access to J.L. Rogers Family, LLC's property to "conduct land boundary engineering design, archeological and environmental surveys." Texas Gas advised that construction is expected to begin in the first quarter on 2016 and the pipeline is targeted to be in service by the third quarter 2016. This was the first notice Mr. Rogers or J.L. Rogers Family, LLC had that TVA and/or its agent and supplier intends to construct a 24-inch diameter natural gas pipeline across the property. Moreover, it is the first time TVA and/or its agent and supplier sought to conduct archeological and environmental surveys on his property. Mr. Rogers' use and enjoyment of the land and surrounding properties has been and will be harmed by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

23. Plaintiff Talmage Rogers is the controlling member of Talmar of FL, LLC, a landowner in Muhlenberg County, which owns properties: i) near or adjacent to Paradise, and (ii) through which a new natural pipeline to supply the new gas-fired facility is proposed to be constructed. Talmage Rogers' access to and through property, which has been owned by his family for generations, has also been restricted by TVA's initial construction activities. Talmage Rogers' use and enjoyment including hiking, fishing, hunting and the overall aesthetic beauty of

the Rogers family property and the surrounding area has been and will be harmfully impacted by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

24. On or about June 24, 2014, Talmage Rogers was contacted by TVA's agent or supplier, Texas Gas who is developing a 24 inch diameter pipeline to supply TVA's new facility. Texas Gas seeks access to Talmar of FL, LLC's property to "conduct land boundary engineering design, archeological and environmental surveys." Texas Gas advised that construction is expected to begin in the first quarter on 2016 and the pipeline is targeted to be in service by the third quarter 2016. This was the first notice Mr. Rogers or Talmar of FL, LLC had that TVA and/or its agent and supplier intends to construct a 24-inch diameter natural gas pipeline across the property. Moreover, it is the first time TVA and/or its agent and supplier sought to conduct archeological and environmental surveys on his property. Mr. Rogers' use and enjoyment of his land and surrounding properties has been and will be harmed by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

25. Plaintiff Kirstine Early is the controlling member of Buckingham Hollow, LLC. Buckingham Hollow, LLC, which is a TVA ratepayer, owns property in Muhlenberg County through which a new pipeline to supply the new gas-fired facility is proposed to be constructed. The property is a hunting preserve for deer and has a 50 acre fishing lake. Kirstine Early, her husband, Pat Early and their guests frequently hike, hunt and fish on the property and adjoining areas. Both Pat Early and Kirstine Early's use and enjoyment of the area has been and will be harmfully impacted by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

26. On or about June 24, 2014, Buckingham Hollow, LLC was contacted by TVA's agent or supplier, Texas Gas who is developing a 24 inch diameter pipeline to supply TVA's new facility. Texas Gas seeks access to Buckingham Hollow, LLC's property to "conduct land boundary engineering design, archeological and environmental surveys." Texas Gas advised that construction is expected to begin in the first quarter on 2016 and the pipeline is targeted to be in service by the third quarter 2016. This was the first notice Mr. and Mrs. Early or Buckingham Hollow, LLC had that TVA and/or its agent and supplier intends to construct a 24-inch diameter natural gas pipeline across his property. Moreover, it is the first time TVA and/or its agent and supplier sought to conduct archeological and environmental surveys on his property. The members' of Buckingham Hollow, LLC use and enjoyment of this land and surrounding properties has been and will be harmed by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

27. Plaintiff Kevin Lawrence is the controlling member of Big Bucks, LLC. Big Bucks, LLC is a TVA ratepayer and owns property in Muhlenberg County through which a new pipeline to supply the new gas-fired facility is proposed to be constructed. The property is a hunting preserve for deer, bison, and elk. Mr. Lawrence and his guests frequently hike, hunt and fish on his property and adjoining areas. Mr. Lawrence's use and enjoyment of the area has been and will be harmfully impacted by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

28. On or about June 24, 2014, Big Bucks, LLC was contacted by TVA's agent or supplier, Texas Gas who is developing a 24 inch diameter pipeline to supply TVA's new facility. Texas Gas seeks access to Mr. Lawrence's property to "conduct land boundary engineering

design, archeological and environmental surveys." Texas Gas advised that construction is expected to begin in the first quarter on 2016 and the pipeline is targeted to be in service by the third quarter 2016. This was the first notice Mr. Lawrence or Big Bucks, LLC had that TVA and/or its agent and supplier intends to construct a 24-inch diameter natural gas pipeline across his property. Moreover, it is the first time TVA and/or its agent and supplier sought to conduct archeological and environmental surveys on his property. Mr. Lawrence's use and enjoyment of his land and surrounding properties has been and will be harmed by TVA's chosen action and its failure to comply with NEPA and the TVA Act.

29. Plaintiffs frequently use, enjoy, appreciate and rely on the historic, natural, scenic and environmental resources that will be substantially injured or impaired as a result of the TVA's decision. These injuries and impairments include loss of plant and animal habitat (including habitat relied on by threatened or endangered species) and historic resources, resulting from building new generation facilities and natural gas pipelines; degradation of water and air quality resulting from construction of new generation facilities and decommissioning Paradise Units 1 and 2; and loss of prime hunting, fishing and recreational areas resulting from building substantial pipeline infrastructure to deliver gas to the new gas-fired generating unit. Their interest in protecting resources threatened by TVA's decision for their future use and enjoyment is an interest NEPA was enacted to protect. The relief sought in this case would provide redress for these injuries by ensuring a full and complete evaluation of the environmental impacts, including without limitation social and economic impacts, from the chosen action.

30. Plaintiffs have been injured by TVA's failure to comply with the procedural requirements of NEPA, NEPA's implementing regulations, TVA's own NEPA Procedures and the TVA Act.

31. Defendant TVA is a corporate agency and instrumentality of the United States, created and existing pursuant to the TVA Act, 16 U.S.C. §§ 831–831ee. TVA's headquarters are located at 400 W. Summit Hill Dr., Knoxville, Tennessee 37902-1499. TVA owns and operates Paradise, located at 13246 State Route 176, Suite 10, Drakesboro, Kentucky 42337-2345.

32. TVA is the federal agency that took the final agency action challenged here. TVA is amenable to suit under the Administrative Procedure Act and must comply with NEPA.

33. TVA is also amenable to suit under the TVA Act as it may sue or be sued in its corporate name.

LEGAL BACKGROUND

The National Environmental Policy Act

34. NEPA "contains 'action-forcing' provisions to make sure that federal agencies act according to the letter and spirit of the Act." 40 C.F.R. § 1500.1(a). "The President, the federal agencies, and the courts share responsibility for enforcing the Act …." *Id.* Since neither the President nor TVA have forced compliance with NEPA, Plaintiffs come to this Court seeking relief in the form of required NEPA compliance by TVA.

35. The CEQ has promulgated regulations implementing NEPA. 40 C.F.R. §§ 1500–1508. These regulations are designed to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken." 40 C.F.R. § 1500.1(b)–(c). Furthermore, TVA has its own regulations implementing NEPA that incorporate

and supplement the CEQ regulations, Procedures for Compliance with the National Environmental Policy Act (April 28, 1983) ("TVA NEPA Procedures").

36. NEPA requires federal agencies to prepare a "detailed statement," known as an Environmental Impact Statement ("EIS"), regarding all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C); 40 C.F.R. § 1502.3.

37. An agency that is uncertain whether an EIS is required must conduct an Environmental Assessment ("EA") to answer that question. An EA is a concise public document, developed with public input, that "provide[s] sufficient evidence and analysis" for determining whether to prepare an EIS or issue a Finding of No Significant Impact ("FONSI"). 40 C.F.R. §§ 1508.9(a).

38. The EA must discuss the need for the proposed project, as well as environmental impacts and alternatives. 40 C.F.R. § 1508.9(b). In the event an EIS is required, the EA may also facilitate its preparation. 40 C.F.R. § 1508.9(a)(3).

Whether to Prepare an EIS

39. CEQ regulations describe the process a federal agency is to follow in determining whether to prepare an EIS. First the agency is to "determine under its procedures supplementing these regulations whether the proposal is one which (1) normally requires an environmental impact statement, or (2) normally does not require either an environmental impact statement or an environmental assessment (categorical exclusion)." 40 C.F.R. § 1501.4(a).

40. If that does not answer the question a federal agency must involve environmental agencies and the public in the preparation of an EA, and use that EA to decide

whether to prepare an EIS and commence scoping that EIS, or issue a FONSI. 40 C.F.R. § 1501.4(b)-(e).

41. TVA's NEPA Procedures identify the types of TVA actions that "normally will require an environmental impact statement." These include (1) actions involving "[m]ajor power generating facilities;" (2) "any major action, the environmental impact of which is expected to be highly controversial"; and (3) "any other major action which will have a significant effect on the quality of the human environment." TVA NEPA Procedures § 5.4.1.

42. The construction of a new major power generating facility, capable of up to 1,025 MW, and of an associated pipeline system(s) for delivery of its natural gas fuel is an undertaking that would normally require an EIS.

What an EIS Requires

43. Because NEPA documents are intended to fully inform the public, they must reflect transparent decision-making and analysis by the agency. An agency cannot avoid compliance with NEPA's EA and EIS requirements by relying on analysis that has not been disclosed to the public.

44. Pursuant to CEQ regulations, among other things an EIS must include: (1) "an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action," 40 C.F.R. §1501.7; (2) a "full and fair discussion" of the significance of all "direct," "indirect," and "cumulative" effects of the action, 40 C.F.R. §§ 1502.1, 1502.16(a)–(b), 1508.25(c); and (3) a discussion of "means to mitigate adverse environmental impacts." 40 C.F.R. § 1502.16(h).

45. An EIS must also describe any adverse environmental effects that cannot be avoided should the proposal be implemented. 42 U.S.C. § 4332(2)(C)(ii).

46. Finally, an EIS must include a discussion of all "reasonable alternatives." 40 C.F.R. § 1502.14(a); *see also* 42 U.S.C. § 4332(2)(C)(iii). This is the "heart of the environmental impact statement" and "should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public." 40 C.F.R. § 1502.14.

47. While an agency may cite or "tier to" an earlier NEPA document, such as a "programmatic EIS" that collectively evaluates the impacts of many anticipated future actions, the agency must nevertheless ensure that environmental impacts and alternatives to mitigate those impacts are fully considered and disclosed for each individual major federal action that triggers NEPA. 40 C.F.R. § 1502.20.

48. NEPA's purpose is "not to generate paperwork - even excellent paperwork - but to foster excellent action. The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment." 40 C.F.R. § 1500.1(c).

49. NEPA prohibits major federal actions significantly affecting the quality of the human environment from moving forward until a complete EIS has been developed, with full public participation. Until the NEPA process has concluded, "no action concerning the proposal shall be taken which would . . . [h]ave an adverse environmental impact" or "[l]imit the choice of reasonable alternatives." 40 C.F.R. § 1506.1(a).

The Administrative Procedure Act

50. The APA, 5 U.S.C. §§ 701–706, governs judicial review of an agency's compliance with NEPA.

51. The APA provides that a reviewing court shall "hold unlawful and set aside agency action that it finds to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," "in excess of statutory jurisdiction [or] authority," or "without observance of procedure required by law." 5 U.S.C. § 706(2). The APA also directs a reviewing court to "compel agency action" that has been "unlawfully withheld or unreasonably delayed." *Id*. § 706(1).

The Tennessee Valley Authority Act

52. TVA's legal charge comes from the TVA Act, which provides in part that "[t]he Corporation shall charge rates for power … having due regard for the primary objectives of the Act, including the objective that power shall be sold at rates as low as are feasible." 16 U.S.C. § 831n-4(f).

53. The TVA Act, as amended by the Energy Policy Act of 1992, mandates a least-cost planning approach. The TVA Act requires TVA to "employ and implement a planning and selection process for new energy resources which evaluates the full range of existing and incremental resources … in order to provide adequate and reliable service to electric customers of the Tennessee Valley Authority at the lowest system cost." 16 U.S.C. § 831m-1(b)(1) (emphasis added).

54. The planning and selection process must consider "necessary features for system operation, including diversity, reliability, dispatchability, and other factors of risk …." 16 U.S.C. § 831m-1(b)(2).

55. Determining the "lowest system cost" requires an analysis of "all direct and quantifiable net costs for an energy resource over its available life, including the cost of production, transportation, utilization, waste management, [and] environmental compliance…." 16 U.S.C. § 831m-1(b)(3).

FACTUAL BACKGROUND

56. This case challenges a decision by TVA to spend $1.1 billion, and likely much more, to decommission and demolish two coal fueled generating units and construct and operate a new CT/CC plant without preparing an EIS to address the significant environmental impacts of the preferred alternative; without constructing and analyzing an appropriate No Action Alternative; without adequately analyzing the less environmentally impactful and more cost-effective alternative of upgrading Paradise Unit 1 and 2 emission controls; and other violations of NEPA. The selected alternative involves construction of "[m]ajor power generating facilities" because significant new construction is necessary for the new CT/CC plant. In contravention of its own NEPA Procedures, TVA chose to conduct only an EA, sidestepping significant and controversial environmental impacts by issuing a FONSI concluding an EIS was not necessary.

The Paradise Plant

57. The Paradise facility is located in Muhlenberg County in the central portion of western Kentucky, approximately 35 miles northwest of Bowling Green and 95 miles southwest

of Louisville. TVA began construction of Paradise in 1959 and completed Paradise Unit 1 and Paradise Unit 2 in 1963. Construction of Paradise Unit 3 began in 1966 and was completed in 1970.

58. Paradise Unit 1 and Paradise Unit 2 are coal fueled cyclone generating units, each with a rated capacity of 704 MW. Paradise Unit 3 provides a rated capacity of 1,150 MW. Combined, the three units have a generating nameplate capacity of 2,558 MW. The three units typically generate 14 million MW of electricity a year, enough to supply more than 950,000 homes. The units typically burn coal from nearby counties in western Kentucky and southern Illinois. Coal is transported to the plant by truck, rail, and barge.

59. Paradise Unit 1 and Paradise Unit 2 are equipped with selective catalytic reduction (SCR) systems to remove nitrogen oxides (NOx), and wet flue gas desulfurization (FGD) systems to remove sulfur dioxide (SO_2) and Particulate Matter (PM). Ammonia handling and storage is required to support SCR operations. The hydrated lime injection system was installed in the fall of 2011 to control sulfur trioxide (SO3) emissions. Paradise Unit 1 and Paradise Unit 2 already have low NOx and SO_2 emissions due to the installed emission controls set forth above. Unit 3 is equipped with an SCR to remove NOx, an electrostatic precipitator (ESP) to remove PM, and a recently installed FGD system to control SO_2 and acid gases.

60. Paradise has the lowest delivered fuel costs in the TVA fleet due to its favorable location near the Illinois Basin. The units also have the most stable coal prices, insulating TVA ratepayers from fuel price risk. Moreover, Paradise Unit 1 and Paradise Unit 2 are two of the most efficient TVA units, and Paradise Unit 2 recently set a new continuous operation record in 2013 with 259 consecutive days in operation.

The TVA Decision Making Timeline

61. TVA began to address emission controls at the Paradise facility over thirty years ago. Through 2011 TVA spent $5.4 billion – paid for by ratepayers in the Tennessee Valley, including these Plaintiffs – to control emissions at its coal fueled generating units. This included significant investments in SCR systems at Paradise to reduce nitrogen oxide emissions by about 90% and scrubbers to reduce sulfur dioxide emissions by about 94%.

62. In 2009, TVA started the process for preparing its Integrated Resource Plan (IRP) and related EIS to assess potential environmental effects of the plan's resource strategies. TVA completed its IRP process in the spring of 2011 when the IRP and its EIS were approved by the TVA Board of Directors.

63. The U.S. Environmental Protection Agency finalized the Mercury and Air Toxics Standards (MATS) at the end of 2011.

64. In August 2012, the TVA Board of Directors approved a budget that included the funding to upgrade the existing emission controls at Paradise Units 1 and 2 by the end of 2012, by installing pulse jet fabric filter systems to comply with MATS emission mandates.

65. In April 2013, TVA stated its plan to install pulse jet fabric filters on Paradise Units 1 and 2 to comply with MATS.

66. In August 2013, TVA released a Draft EA that, as a purported MATS compliance measure, proposed to retire Paradise Units 1 and 2 and replace these units with a separate and new natural gas-fired CT/CC plant. TVA offered a minimal 30-day comment period on the sudden change in direction, denying the public a meaningful opportunity to engage in the process.

67. During this short comment period, TVA received 304 comments on the draft EA, most of which supported the installation of the emission controls on Paradise Units 1 and 2 as a MATS compliance measure and opposed the chosen alternative due to its significant environmental impacts. Like the TVA Board of Directors in 2012, the public supported the continued long-term coal fueled operation as the more environmentally sound approach to MATS compliance at Paradise Units 1 and 2.

68. Notwithstanding this overwhelming public sentiment concerning the controversial environmental and economic impacts of its proposed change of course, the TVA Board of Directors reversed its 2012 decision to upgrade Paradise Units 1 and 2 to comply with the MATS standard, deciding to abandon its significant investments of ratepayer funds in Paradise Units 1 and 2 due to "[s]ignificant changes in TVA's business environment [that] required TVA to re-evaluate that decision."[1]

69. Between August 2012 and August 2013, the MATS standards had not changed, nor had there been any discernible changes in the overall business environment or regulatory scheme for utilities.

70. In deciding to change course, TVA short-circuited its environmental analysis and failed to adequately analyze the significant environmental impacts of decommissioning Paradise Units 1 and 2, building a major new gas-fired power generating facility, and building the extensive gas delivery infrastructure that the new facility will require.

[1] Presentation to TVA Board of Directors in Oxford, Mississippi, available at http://www.tva.com/abouttva/board/Nov_14_2013_Public_Board.pdf, at 51 (Nov. 13, 2013) .

The Environmental Assessment Process

71. TVA issued a Draft EA for public review and comment in August 2013 for a 30-day review. The Draft EA purports to identify and quantify the impacts on the environment of three alternatives: (1) the No Action Alternative, under which TVA would allow the facility to operate out of compliance with the governing laws and regulations ("Alternative A"); (2) construction and operation of pulse jet fabric filter systems for emission control on Paradise Units 1 and 2 to comply with governing laws and regulations (i.e., the MATS standard) ("Alternative B"); and (C) retirement of Paradise Units 1 and 2 and construction and operation of a new natural gas-fueled power generating CT/CC plant to avoid MATS requirements applicable to Paradise Units 1 and 2 ("Alternative C").

72. Public comments on the Draft EA raised the issues underlying the claims set forth in this Complaint. Plaintiff KCA submitted comments, as did numerous other members of the public, asserting, *inter alia*, that:

- New construction and operation of a new natural gas-fueled generating plant and retirement of Paradise Units 1 and 2 is a major federal action which will have a significant effect on the quality of the human environment, requiring preparation of an EIS.
- Alternative C will significantly impact the quality of the human environment given the methane emissions associated with Alternative C as well as the direct, indirect and cumulative impacts associated with a 50-year investment based on current, cheap natural gas costs.

- TVA did not fully research and account for the environmental and economic costs of Alternative C, including the price volatility of natural gas and potential impacts of fracking on natural gas prices.
- TVA did not establish a legitimate baseline upon which to measure the environmental impacts of the alternatives.
- TVA did not consider all reasonable alternatives.
- The environmental impact of this major federal action is expected to be highly controversial. There are significant concerns about the nature of the federal action and the direct, indirect and cumulative effects of the preferred alternative, including without limitation socioeconomic impacts.

73. TVA largely ignored the public's comments and failed to adequately analyze the significant environmental impacts of Alternative C.

74. Despite the majority of public comments supporting Alternative B, and those calling for TVA to complete an EIS, TVA issued a final EA/FONSI on November 13, 2013 and selected Alternative C as its preferred alternative. The TVA Board of Directors approved this course of action on the very same day.

75. Alternative C, which encompasses the construction of a new major power generating facility, comprises a major federal action significantly affecting the human environment and could not have been selected in compliance with NEPA without TVA first completing an EIS.

76. NEPA implementing regulations require comprehensive evaluation of "[p]roposals or parts of proposals which are related to each other closely enough to be, in

effect, a single course of action." 40 C.F.R. § 1502.4(a). But TVA illegally segmented the environmental impacts associated with decommissioning and demolition of Paradise Units 1 and 2 from its analysis of Alternative C. Furthermore, TVA failed to adequately evaluate impacts from the pipeline infrastructure that is necessary to deliver the required 200 million standard cubic feet per day of natural gas to operate the proposed new facility. TVA also failed to adequately evaluate the impact of a redundant fuel supply for any new CT/CC plant which would consist of either a second gas pipeline or above ground fuel oil tanks with a capacity of approximately 5 million gallons.

77. If TVA had complied with applicable NEPA and its implementing regulations by preparing an EIS, it would have been clear to TVA that the environmental impacts of Alternative C, when evaluated properly and comprehensively, are significantly greater than the impacts associated with Alternative B.

78. On information and belief, TVA prejudged the outcome of the NEPA process in an attempt to "comply" with President Obama's Climate Action Plan, which lacks force of law. The EA is replete with extensive discussion of reducing CO_2 emissions, notwithstanding that the preferred alternative is a purported MATS compliance measure. MATS does not regulate CO_2.

79. The EA inappropriately elevates carbon dioxide (CO_2) emissions and related air quality issues above all other environmental impacts. This priority scheme has no legal basis under NEPA or its implementing regulations and provides no justification for failing to complete an EIS.

80. Furthermore, the climate change analysis discussed in the EA is deficient because of its limited scope and failure to adequately address the climate change impacts from

the entire life cycle of natural gas production. The major federal action at issue here involves a decision to develop new gas supplies, which necessarily includes the development of both new sources of gas as well as an extensive infrastructure to transport gas to the Paradise facility. The lifecycle analysis for natural gas produced from both conventional and unconventional pathways is influenced significantly by upstream fugitive methane emissions. A best estimate of fugitive methane emissions from conventional natural gas production is approximately 1.6% of total production, but a best estimate of fugitive methane emissions from unconventional (*i.e.,* hydraulic fracturing) natural gas production can be as high as 9% of total production.

81. In order to comply with NEPA, TVA should have thoroughly evaluated all of these environmental impacts in its analysis. Had TVA done so, it would have found that as the fugitive methane emissions from natural gas increase, natural gas loses any advantage over coal altogether on a lifecycle greenhouse gas (GHG) basis.

82. In its EA TVA acknowledges that on a cost per kilowatt basis the cost of upgrading controls for Paradise Units 1 and 2 is significantly less than the cost of Alternative C. That will necessarily cause what TVA customers pay for electricity to increase significantly and that increase will produce significant adverse environmental impacts on both the natural environment and human health and welfare. Numerous studies show that as the availability of low cost electricity increases, overall emissions of pollutants (including greenhouse gases) decrease and human health and welfare improves. Availability of low-cost electricity promotes substitution of electrotechnologies for higher polluting (even when pollutants from electric power generation are considered) historic industrial processes and transportation methods and alleviates many harmful conditions of poverty. The change from coal at Paradise Units 1 and 2

to natural gas will certainly increase, and possibly dramatically increase the cost of electricity throughout the Tennessee Valley, and the adverse environmental and socioeconomic impacts caused by those increase, will fall disproportionately on people with the lowest incomes. TVA failed to identify or give any consideration to the environmental and socioeconomic impacts of increases in electrical costs that result from its chosen action.

83. The change from coal at Paradise Units 1 and 2 to natural gas at a new facility is significant enough standing alone that, even without considering the numerous other significant environmental and socio-economic impacts overlooked or ignored by TVA in its NEPA process, TVA should have prepared an EIS to evaluate its environmental impact. TVA ignored the significant published literature and analysis on this issue. This concern was raised in comments, and TVA cursorily replied: "Available life cycle analyses show lower overall greenhouse gas emissions, standardized to account for differing global warming potentials, for natural gas-fueled power plants than for coal fueled plants. For natural gas-fueled combined cycle plants, this difference is significant." EA at 130. This perfunctory statement does not constitute a full and complete analysis of these environmental impacts. TVA failed to analyze "available life cycle analyses," which can and do show increased overall GHG emissions for natural gas-fired generation. And TVA totally dismissed or ignored the impact high electricity prices will have on the human environment.

84. On information and belief, TVA predetermined the outcome of the Paradise NEPA process by allowing portfolio diversity considerations rather than analysis of environmental impacts to dictate the preferred alternative in the EA.

85. On information and belief, TVA prejudged the outcome of the Paradise NEPA process by approaching it as a horse trade involving the Gallatin Fossil Plant. In its Paradise EA, TVA stated: "The selection of CT/CC as the preferred alternative is also influenced by TVA's recent decision to install controls at its Gallatin Plant. Having preserved coal fueled generation capacity at Gallatin, TVA now has greater latitude to shift from coal to gas at Paradise in the interest of maintaining a diverse portfolio." EA at 28.

86. TVA recently decided to install emission controls via upgrade of existing generating facilities at Gallatin which, unlike the major construction project at issue here, did not involve construction of new "major power generating facilities." After conducting an EA for the Gallatin project, TVA determined that a retrofit alternative was less invasive and was more environmentally sound than decommissioning those coal fueled units and replacing them with a new natural gas facility and associated infrastructure. Since its decision did not involve construction of a major new generation facility at Gallatin, TVA's NEPA regulations did not require preparation of an EIS at Gallatin.

87. NEPA demands comprehensive evaluation of the environmental impacts of the specific proposed action at issue. The outcome of a separate NEPA process cannot dictate the result in this NEPA process. TVA's EA and subsequent decision to retrofit the facilities at Gallatin does not vitiate or mitigate TVA's failure to conduct an EIS in regards to its decision at Paradise.

88. TVA's conclusion that "[n]o potentially significant socioeconomic … impacts have been identified," EA at 107, from its decision to retire two coal-powered units and build a major new natural gas-powered facility, is arbitrary and capricious. TVA arbitrarily circumscribed its analysis of socioeconomic impacts to job losses at the Paradise facility, which do not fairly

quantify the extensive and far-reaching consequences of its decision to an entire region of the country. TVA ignored the likely significant socioeconomic impact stemming from job losses in the community from KCA member companies related to the retirement of Paradise Units 1 and 2.

89. Among other socioeconomic impacts, TVA also ignored the importance of electricity and availability of supply at a reasonable price. As TVA concedes in the EA, Alternative C will result in more expensive electricity for TVA customers. TVA's failure to analyze that effect violates the NEPA directive to take a hard look at all environmental consequences of its proposed action.

First Claim for Relief:
VIOLATION OF NEPA AND APA -
Failure to Prepare an EIS

90. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

91. TVA was required to prepare an EIS in connection with making its decision to retire and decommission Paradise Units 1 and 2 and construct a new natural gas-fired power generating facility, including a new gas pipeline supply infrastructure and alternative 5 million gallon fuel oil supply infrastructure.

92. NEPA requires the preparation of an EIS for every major federal action that will "significantly affect the quality of the human environment." 42 U.S.C. § 4332(2)(c); 40 C.F.R. § 1502.3.

93. TVA's own NEPA Procedures state that an EIS is "normally required" for projects relating to "[m]ajor power generating facilities … [a]ny major action, the environmental impact

of which is expected to be highly controversial … [and] [a]ny major action which will have a significant effect on the quality of the human environment." TVA NEPA Procedures § 5.4.1.

94. The EA fails to identify or adequately quantify the environmental impacts of the action that significantly affect the quality of the human environment, among them the impact of the full life cycle of producing and using natural gas that will be burned in a new gas-fired generating facility, including greenhouse effects caused by methane emissions that occur at every level of natural gas usage from drilling, storage, transportation, and burning.

95. TVA's statement in its EA that it will tier to the EIS associated with the 2011 IRP does not abdicate TVA's responsibility under NEPA to ensure that environmental impacts are fully considered and disclosed for each individual major federal action that triggers NEPA.

96. The construction and operation of a totally new CT/CC plant at the Paradise facility relates to a "major power generating facility," such that an EIS is required by TVA's own procedures.

97. The decommissioning of two major power generating facilities, Paradise Units 1 and 2, relates to a "major power generating facility." Regardless of the incorporation of the 2011 IRP EIS into the EA, the decision to decommission and demolish Paradise Units 1 and 2 constitutes a major federal action such that an EIS is required.

98. TVA's selection of a natural-gas powered facility and the retirement and replacement of these coal-fueled facilities is highly controversial in light of the devastating economic consequences to an already struggling area of the country. This decision also has a significant impact on the quality of the human environment.

99. The construction of an extensive new gas pipeline infrastructure to the proposed CT/CC plant also relates to a major power generating facility, will have a highly controversial environmental impact, and will have a significant effect on the quality of the human environment such that an EIS is required.

100. Major construction in the form of an extensive new gas pipeline infrastructure to the CT/CC plant is sufficient under NEPA, CEQ Regulations, and TVA NEPA Procedures such that an EIS is required.

101. Major construction of a redundant fuel supply consisting of either a second gas pipeline or above-ground fuel oil tanks with a capacity of approximately 5 million gallons is sufficient under NEPA, CEQ Regulations and TVA NEPA Procedures such that an EIS is required.

102. NEPA prohibits major federal projects with significant environmental impacts from moving forward until a complete EIS has been developed, with full public participation.

103. TVA's failure to prepare an EIS violates NEPA, 42 U.S.C. § 4332(2)(C); the CEQ Regulations, 40 C.F.R. §§ 1502.3, 1508.27; and TVA's NEPA Procedures. Its failure to act was arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

104. The failure to prepare an EIS is reviewable under the APA, 5 U.S.C. §§ 701-706.

Second Claim for Relief:
VIOLATION OF NEPA AND APA -
Failure to Adequately Consider a Legitimate No Action Alternative

105. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

106. TVA's NEPA analysis in the EA is deficient because it failed to consider a legitimate No Action Alternative.

107. An EA must evaluate a legitimate No Action Alternative, in part to "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement." 40 C.F.R. § 1508.9(a)(1). The No Action Alternative serves as the baseline for the related evaluation of the impacts of other alternatives under NEPA, and NEPA demands a full and fair analysis of the No Action Alternative. 42 U.S.C. § 4332(2)(E); 40 C.F.R. § 1502.14(d), 1508.9(b).

108. The EA prepared by TVA contemplates a No Action Alternative with "the continued operation of Units 1 and 2 without installing the additional emissions controls as the No Action Alternative in order to provide a benchmark…." EA at 9. The EA itself specifically notes that TVA "would not operate a facility out of compliance" yet it considers a No Action Alternative premised on exactly that scenario. The FONSI issued by TVA states that Alternative A (the No Action Alternative) "is not considered viable or reasonable." FONSI at 1.

109. The No Action Alternative, properly constructed, would look at a scenario where TVA upgraded emission controls to achieve minimum MATS compliance and evaluate all other reasonable alternatives against this baseline. By not considering minimal emission controls that could be included to achieve MATS compliance, TVA uses a materially flawed starting point for its environmental analysis.

110. TVA violated NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations, 40 C.F.R. §§ 1502.14(d), 1508.9(a)(1), and 1508.9(b), by constructing a No Action Alternative of running the Paradise Units 1 and 2 as an uncontrolled and noncompliant facility, a course of action that TVA expressly states it would not pursue. Its action is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

111. TVA's failure to consider a viable No Action Alternative is reviewable under the APA, 5 U.S.C. §§ 701-706.

Third Claim for Relief:
VIOLATION OF NEPA AND APA -
Failure to Examine Reasonable Alternatives

112. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

113. TVA's NEPA analysis in the EA is deficient because it failed to consider reasonable alternatives that would avoid the retirement of Paradise Units 1 and 2.

114. Analysis of viable alternatives is the heart of a NEPA analysis, which must rigorously explore and objectively evaluate all reasonable alternatives including the proposed action. NEPA demands that TVA consider a reasonable range of alternatives to the proposed action. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. §§ 1502.14(a), 1508.9(b).

115. TVA considered only one alternative for adding emission controls to Paradise Units 1 and 2 (Alternative B) against one alternative to construct a major new generating facility that uses natural gas instead of coal (Alternative C). The range of reasonable emission control alternatives that TVA should have considered in its analysis is far broader. Among other possible alternatives, TVA failed to consider idling one of the Paradise units and retrofitting the other unit. TVA also failed to consider retrofitting one unit and demolishing and decommissioning the other unit. Accordingly, TVA did not consider the environmental impacts of these alternatives as compared to the preferred Alternative C.

116. To the extent that TVA conducted any internal analyses of alternatives other than Alternatives B and C prior to issuing the EA, such internal analyses cannot support its FONSI because they were not provided to the public for review and comment.

117. TVA violated NEPA, 42 U.S.C. § 4332(2)(C)(iii), and its implementing regulations, 40 C.F.R. §§ 1502.14(a) and 1508.9(b), by failing to rigorously explore and objectively evaluate a range of reasonable alternatives. Its action is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

118. TVA's failure to evaluate a range of reasonable alternatives is reviewable under the APA, 5 U.S.C. §§ 701-706.

Fourth Claim for Relief:
VIOLATION OF NEPA AND APA -
Pre-Determination of Decision

119. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

120. TVA's decision to retire and decommission Paradise Units 1 and 2 and construct a new natural gas-fired power generating facility, including a new gas pipeline supply infrastructure and redundant fuel supply is deficient because it was determined prior to and outside of the NEPA process, without public participation or after analyzing environmental impacts or reasonable alternatives.

121. NEPA's purpose is to "insure that environmental information is available to public officials and citizens before decisions are made and actions are taken." 40 C.F.R. § 1500.1(b). Under NEPA, environmental analysis cannot "be used to rationalize or justify decisions already made." 40 C.F.R. § 1502.5.

122. TVA made the critical retirement decision without engaging in the NEPA process, then engaged in a subsequent and deficient NEPA process to validate the predetermination. TVA's discussion of the Gallatin facility in the EA reveals that purported concerns about

resource portfolio diversity, not the required NEPA analysis of environmental impacts, drove the selection of the preferred alternative here.

123. TVA violated NEPA, 42 U.S.C. § 4332(2)(C), and its implementing regulations, 40 C.F.R. §§ 1500.2(c), 1501.2, 1502.2, 1502.3, and 1502.5, by conducting the NEPA process to rationalize its desired outcome. TVA's actions and the resulting EA and FONSI are arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

124. TVA's pre-determination of its decision outside the NEPA process is reviewable under the APA, 5 U.S.C. §§ 701-706.

Fifth Claim for Relief:
VIOLATION OF NEPA AND APA -
Failure to Provide for Public Comment

125. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

126. TVA failed to provide the public with an opportunity to comment on the FONSI.

127. NEPA generally requires agencies to involve the public. TVA's NEPA Procedures specifically require TVA to make FONSIs available for public comment if the proposed action is or is similar to the actions described in Section 5.4.1 of the TVA NEPA Procedures (projects relating to "[m]ajor power generating facilities … [a]ny major action, the environmental impact of which is expected to be highly controversial … [and] [a]ny major action which will have a significant effect on the quality of the human environment.")

128. The retirement and replacement of capacity at Paradise Units 1 and 2 clearly relates to a major power generating facility and notwithstanding the rationale, the retirement and replacement of these facilities is and should have been expected to be highly controversial.

129. The public comment on the FONSI was particularly integral in this NEPA process given the short timeline for comments on the Draft EA and the sudden and complete reversal in direction by the TVA Board of Directors. The Draft EA was issued in August 2013 and a final decision was made in mid-November 2013. This short timeline, coupled with the significant environmental impacts of the newly preferred alternative, failed to provide the public with a meaningful opportunity to participate in the NEPA process.

130. Further, by improperly determining an EIS was not required, TVA failed to allow public participation and input in violation of NEPA implementing regulations, 40 C.F.R. § 1503.1(3), and TVA's own NEPA Procedures, § 5.4.3.

131. The failure of TVA to provide for public comment on the FONSI or on the required and omitted EIS violates NEPA's implementing regulations, 40 C.F.R. §§ 1506.6(a) and 1503.1(3). TVA's action is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

132. TVA's failure to provide for public comment is reviewable under the APA, 5 U.S.C. §§ 701-706.

Sixth Claim For Relief:
VIOLATION OF NEPA AND APA –
Impermissible Segmentation of Environmental Impact

133. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

134. In the Final EA, TVA impermissibly segmented integral components of Alternative C and accordingly failed to evaluate its environmental impacts when determining whether an EIS is necessary.

135. An EA must "provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement" and discuss "environmental impacts of the proposed action." 40 C.F.R. § 1508.9(a)–(b).

136. "Proposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action" must be evaluated together. 40 C.F.R. § 1502.4(a). Proposed actions are related closely enough if one action "automatically trigger[s]" another; one action "cannot or will not proceed unless" another action is "taken previously or simultaneously"; actions "are interdependent parts of a large action"; actions have "cumulatively significant impacts"; or actions are similar enough that simultaneous analysis is the "best way to assess adequately [their] combined impacts." 40 C.F.R. § 1508.25(a)(1)–(3).

137. TVA improperly and impermissibly segmented portions of the project to avoid recognition of many significant impacts of the proposed action and justify its decision not to prepare an EIS.

138. In the EA, TVA states that "[l]ong-term actions related to retirement, such as the potential demolition of the units, are outside the scope of this EA and will be addressed by TVA in the future should Alternative C be implemented." EA at 11. These "long-term actions," specifically the decommissioning and demolition of Paradise Units 1 and 2, are automatically triggered by the implementation of the preferred alternative, Alternative C.

139. TVA deferred its analysis and thus ignored the full impacts and risks of the actions associated with retirement, decommissioning and demolition of Paradise Units 1 and 2.

140. TVA is obliged to prepare an EIS that sufficiently analyzes and addresses the significant environmental impacts from the decommissioning and demolition component of Alternative C. 42 U.S.C. § 4332(2)(C)(i).

141. TVA's failure to evaluate the impacts associated with the retirements of Paradise Units 1 and 2 violates NEPA, 42 U.S.C. § 4332(2)(C)(i), and its implementing regulations, 40 C.F.R. §§ 1508.9(a)-(b),1502.4(a), and 1508.25(a). TVA's action is arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law.

142. TVA deferred its analysis and thus ignored and downplayed the full impacts and risks associated with the construction and operation of one or more gas pipelines and above ground fuel oil storage tanks with a capacity of approximately 5 million gallons.

143. In the FONSI TVA states "[t]he pipeline route(s) would be the subject of future environmental analysis by the Federal Energy Regulatory Commission and TVA.

144. TVA has an obligation to prepare an EIS that sufficiently analyzes and addresses the significant environmental impacts from the natural gas pipeline(s) and above ground fuel oil tanks. 42 U.S.C. § 4332(2)(c)(i).

145. TVA's failure to evaluate the impacts associated with the construction and operation of the gas pipelines and/or above ground fuel storage tanks violates NEPA, 42 U.S.C. § 4332(2)(C)(i), and its implementing regulations, 40 C.F.R. §§ 1508.9(a)-(b),1502.4(a), and 1508.25(a). TVA's action is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

146. TVA's failure to evaluate the decommissioning and demolition component of Alternative C is reviewable under the APA, 5 U.S.C. §§ 701-706.

147. TVA's failure to evaluate the gas pipeline(s) and/or fuel oil storage tanks components of Alternative C is reviewable under the APA, 5 U.S.C. §§ 701-706.

Seventh Claim for Relief:
Violation of the TVA Act

148. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

149. TVA has deviated from its statutory mission under the TVA Act, 16 U.S.C. § 831n-4(f), to conduct least-cost resource planning.

150. The TVA Act, as amended by the Energy Policy Act of 1992, mandates a least-cost planning approach. The TVA Act requires TVA to "employ and implement a planning and selection process for new energy resources which evaluates the full range of existing and incremental resources … in order to provide adequate and reliable service to electric customers of the Tennessee Valley Authority at the lowest system cost." 16 U.S.C. § 831m-1(b)(1) (emphasis added).

151. The planning and selection process must consider "necessary features for system operation, including diversity, reliability, dispatchability, and other factors of risk …." 16 U.S.C. § 831m-1(b)(3).

152. TVA's decision-making does not indicate that it engaged in the statutorily required least-cost planning approach. Instead, TVA acted in the face of significant regulatory uncertainty with respect to potential carbon dioxide emission guidelines, on the basis of (1) the President's Climate Action Plan, which lacks force of law; and, (2) speculative concerns about Clean Air Act Section 111(d) emission guidelines for carbon dioxide emissions from existing electric generating units which had yet to be proposed by the Environmental Protection Agency.

153. TVA couched its decision to decommission and demolish Paradise Units 1 and 2 and construct a new natural gas-powered facility as necessary to comply with MATS. But at the time of TVA's decision, the MATS regulations were under judicial review in the U.S. Court of Appeals,[2] making any decision to retire Paradise Units 1 and 2 as a purported MATS compliance measure self-evidently premature.

154. The EA reveals that TVA's motivations were nothing to do with MATS and everything to do with the CAP and speculation about future Section 111(d) standards:

- "Operation of the Alternative C CT/CC plant would result in a significant reduction in CO_2 emission relative to the continued operation of Paradise Units 1 and 2 under Alternative B." EA at 27.
- "On a kilowatt basis, the PJFF system at Paradise Units 1 and 2 will cost substantially less than both the new CT plant and the new CC plant under Alternative C. Both coal fired plants and CT/CC plants likely will have to make to additional environmental investments in the future, but the investments to meet regulations at coal plants are expected to be more as borne out by EPA's recent rulemaking efforts for coal fueled plants under the Clean Air Act, Clean Water Act and the Resource Conservation and Recovery Act." EA at 27 (emphasis added).

155. "EPA's recent rulemakings" for new and existing fossil fuel-fired generation are merely proposed at this point and they are far from becoming final or determinable. Furthermore, the rulemaking for existing fossil fuel-fired generation will only establish a

[2] The D. C. Court of Appeals recently upheld the MATS rule, but its decision may yet be reviewed by the U.S. Supreme Court and the rule vacated.

procedure for states to follow in adopting standards for existing fossil fuel-fired generation, and as currently proposed, they contain no mandate that states impose any limit on CO_2 emissions from individual generating facilities. Instead they require states to utilize a variety of tools, including promoting more efficient generation and use of electricity, to lower the amount of CO_2 emitted across a fleet of generating facilities than would have been emitted without those measures. Whether and to what extent, if any, the standards will require TVA to make additional investments cannot be determined until the standards become final, Kentucky prepares its State Implementation Plan (SIP) and EPA approves Kentucky's SIP or puts a Federal Implementation Plan in place. Action now to preemptively comply with undisclosed and nonexistent regulatory requirements that have no force of law is inappropriate, arbitrary and capricious.

156. TVA has violated its least cost planning mandate by basing its decisions in whole or in part on the CAP and speculation about future Section 111(d) requirements.

157. TVA's selection of Alternative C violates the least-cost planning mandate of the TVA Act. It is arbitrary, capricious, an abuse of discretion, unsupported by substantial evidence, and otherwise not in accordance with law.

158. TVA's action is reviewable under the APA, 5 U.S.C. §§ 701-706.

Eighth Claim for Relief:
Preliminary and Permanent Injunctions

159. Plaintiffs incorporate the allegations of the preceding paragraphs in full.

160. The damages and injuries caused to Plaintiffs by reason of TVA's violations of NEPA, the APA, and the TVA Act constitute damages and injuries which are ongoing and for which there is no adequate remedy at law.

161. Unless restrained and enjoined, TVA will proceed with the implementation of Alternative C, to Plaintiffs' irreparable damage.

162. Plaintiffs' remedy at law is not adequate to compensate them for the injuries threatened.

163. Plaintiffs are entitled to a preliminary and permanent injunction prohibiting the Defendant, TVA, from taking any actions to implement Alternative C without engaging in the appropriate environmental analyses as set forth herein.

PRAYER FOR RELIEF

Plaintiffs respectfully request that this Court:

A. Issue a declaratory judgment finding that TVA has violated NEPA and its implementing regulations;

B. Order that TVA's EA/FONSI be vacated, set aside, or rescinded;

C. Issue preliminary and permanent injunctive relief prohibiting TVA from taking any further action related to Paradise Units 1 and 2 until it has complied with all NEPA requirements;

D. Issue an injunction requiring TVA to comply with the provisions of NEPA and its implementing regulations as described above;

E. Issue a declaratory judgment finding that TVA's decision with regard to Paradise Units 1 and 2 is not least cost planning as required by the TVA Act;

F. Allow Plaintiffs to recover all costs of the action, including without limitation attorneys' fees; and

G. Grant Plaintiffs such further and additional relief as this Court deems necessary and appropriate.

Respectfully submitted,

/s/ Donald J. Kelly
Donald J. Kelly dkelly@wyattfirm.com
Lisa C. DeJaco ldejaco@wyattfirm.com
WYATT, TARRANT & COMBS, LLP
500 West Jefferson Street, Suite 2800
Louisville, KY 40202-2898
502.589.5235

G. Brian Wells bwells@wyattfirm.com
Courtney Ross Samford csamford@wyattfirm.com
WYATT, TARRANT & COMBS, LLP
250 W. Main Street, Suite 1600
Lexington, Kentucky 40507-1746
859.233.2012

61157831.8