No. 13-6004

In the United States Court Of Appeals
For the Sixth Circuit

Donna W. Sherwood, et al,
Plaintiffs
v.

Tennessee Valley Authority
Defendants

Appeal from the Final Judgment of the United States District Court for the Eastern District of Tennessee

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Case Below:
Eastern District of Tennessee
No. 3:12-CV-00156
Honorable Thomas A. Varlan, Presiding

Corrected Main Brief of Plaintiffs/Appellants Donna W. Sherwood, Vance Sherwood, Jerome Pinn, Anthony Billingsley, Jennifer Peet, Richard Eugene Williams, Gerry M. Williams, Frank L. Oakberg, Bonnie E. Oakberg, Thomas R. Warren, Jr., Jeffrey G. See, Sheila D. Booe, Harold P. Sloves, and Felicitas K. Sloves

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Oral Argument Requested

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(With Motion to Certify Question to the Tennessee Supreme Court)

Oral Argument Requested

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Circuit Rule 26.1 Corporate Disclosure Statement

(1) The full name of every party that the attorney represents in the case (all are private individuals): Donna W. Sherwood, Vance Sherwood, Jerome Pinn, Anthony Billingsley, Jennifer Peet, Richard Eugene Williams, Gerry M. Williams, Frank L. Oakberg, Thomas R. Warren, Jr., Jeffrey G. See, Sheila D. Booe, Harold P. Sloves, and Felicitas K. Sloves

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

i) Vowell Law Firm, Knoxville Tennessee

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and
N/A

ii) List any publicly held company that owns 10% or more of the party's or amicus' stock:
N/A

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Reasons Why the Court Should Hear Oral Argument Under 6 Cir. R. 34(a)

Oral argument will help the Court by enabling the parties to clarify their arguments which will more fully inform the Court as to the issues generally. More specifically, oral argument will enable the Plaintiffs to effectively demonstrate the key issue in the case, that is, that the 13 Categorical Exclusion Checklists that TVA filed and unilaterally called the "administrative record" are actually not the administrative record of TVA's decision to implement the "15-foot rule," a new or revised practice or policy that would result in the removal of "virtually all" of the trees in its right-of-way for the first time in TVA history, because the 13 Categorical Exclusion Checklists do not discuss or even mention the 15-foot rule or the idea of removing "virtually all" of the trees in the right-of-way.

Jurisdictional Statement

1. The district court had jurisdiction pursuant to 28 U.S.C. §1331, Federal question jurisdiction, because the Defendant is a Federal agency, and because the action is brought under the National Environmental Protection Act (NEPA) 42 U.S.C. §4321 *et seq*.
2. The appeal is from a final order or judgment that disposes of all of the Plaintiffs' claims. Accordingly, the Court of Appeals has jurisdiction over this appeal pursuant to 28 U.S.C. §1291.
3. The final judgment was entered on July 23, 2013. The notice of appeal was filed on July 30, 2013.

Issues for Review

1. Whether, under Tennessee law, pursuant to the grants of easement by the plaintiffs' predecessors in interest, TVA has the right to cut down trees in its transmission line right-of-way that do not interfere with or endanger the transmission lines.
2. Whether there is evidence in the record that TVA implemented a "15-foot rule" or "massive widening initiative" in approximately 2010 that will result in the removal of "virtually all" of the trees in its 15,900 mile right-of-way for the first time in TVA history, including the elimination of the buffer zones of trees that it had historically maintained at the outer edges of the right-of-way.
3. Whether there is evidence in the record that the cost of the 15-foot rule or "massive widening initiative" would be approximately $10,000-12,000 per mile, or $159,000,000+ for the entire 15,900 mile right-of-way.

4. Whether there is evidence in the record that the implementation of the 15-foot rule or "massive widening initiative," that is, TVA's plan to remove "virtually all" of the trees in the right-of-way, was a "major federal action" with "significant environmental impact" under NEPA.
5. Whether there is evidence in the record that TVA did not conduct an environmental review of the likely effects of the 15-foot rule or "massive widening initiative" or plan to remove "virtually all" of the trees in the right-of-way before putting it into effect.
6. Whether the 13 Categorical Exclusion Checklists that TVA filed, and unilaterally characterized as the "Administrative Record," were in reality the Administrative Record of TVA's decision to implement the 15-foot rule or "massive widening initiative", or its removal of "virtually all" of the trees in the right-of-way, when these subjects were not discussed or even mentioned in the Categorical Exclusion Checklists.
7. Whether the trial court correctly found that TVA's cutting down large numbers of 50-100-year-old trees that had been

left standing when it initially installed the transmission lines many years ago, or TVA's reversal of its "historic practice" of maintaining buffer zones of trees at the outer edges of its rights-of way, for the first time in TVA history, could reasonably be considered "routine maintenance" or "minor upgrading" of its facilities, and therefore properly treated by categorical exclusion under NEPA.

Motion to Certify Question to the Tennessee Supreme Court

The Plaintiffs request the Court to certify the following question to the Tennessee Supreme Court pursuant to Circuit Rule 52 and Tennessee Supreme Court Rule 23:

> Whether, pursuant to the grants of easement by the plaintiffs' predecessors in interest, TVA has the right to cut trees in its right-of-way that do not interfere with or endanger the transmission lines.

Statement of the Case

The Plaintiffs filed the Complaint on April 3, 2012, seeking an injunction to stop TVA from cutting down 135 trees in the government-owned right-of-way at their condominium complex known as Westminster Place in Knoxville, Tennessee. The Complaint alleged that TVA was threatening to cut down these

trees pursuant to a "new policy" whereby it would cut down any and all trees in the right-of-way that were either 15 feet tall, or might grow to be 15 feet tall. The Complaint acknowledged that the grants of right-of-way allowed TVA to cut down trees in the right-of-way, but only for purposes of maintaining an electricity transmission line. The Complaint alleged that the trees TVA was proposing to cut down did not threaten or endanger the transmission lines, that many of the trees were not even under or near the transmission lines, that some of the trees were only two feet tall, and that others were dogwoods or redbuds that would never reach a height that would interfere with the transmission lines. [Complaint, Doc.1,¶10-15, PageID#3-5]

The Plaintiffs filed an Amended Complaint adding two plaintiffs and several additional claims, including the claim that TVA had implemented the new policy without preparing an environmental impact statement, as required by NEPA. The Amended Complaint alleged that the "new policy" would result in a clear-cut of all trees in the right-of-way, because there were very few trees in TVA's 7-state region that have a mature height of 15

feet or less. [Amended Complaint, Doc.8,¶32,37,38,42,44-45, PageID#51,53,55-56]

The Plaintiffs also sought a preliminary injunction that would require TVA to suspend its "new policy" pending the final hearing. [Motion, Doc.10, PageID#186-190] The court conducted a hearing and then denied the motion. [Transcript, Doc.90, PageID#2335; Order, Doc.67, PageID#1896]

The Plaintiffs filed a Second Amended Complaint adding several additional plaintiffs. [Doc.62] TVA moved to dismiss all claims in the Second Amended Complaint except those made under NEPA. [Doc.65]

The Plaintiffs filed a motion asking the trial court to certify to the Tennessee Supreme Court the question of whether, under Tennessee law, the grants of easement permitted TVA to remove trees that do not endanger the transmission lines. [Doc.81, PageID#2063-64]

TVA filed a group of thirteen 1,000+ page documents that it unilaterally called "Notice of Filing Administrative Record for ____ Sector." (This so-called "Administrative Record" is more fully

described in the Statement of Facts.) [Doc.101-113 and Doc.114-126] A week later, TVA filed a Motion for Summary Judgment asking the trial court to dismiss the Plaintiffs' NEPA claims (Count 2 of the Second Amended Complaint). [Doc.129]

The Plaintiffs filed a "Motion to Supplement the *Claimed* Administrative Record." (emphasis added) [Doc.142] The motion expressly did not recognize or accept the idea that the "claimed" administrative record really was the administrative record of TVA's environmental review of its new policy (15-foot rule). To the contrary, the Plaintiffs stated in the motion that the "claimed administrative record" did not discuss or even mention the new policy/15-foot rule, and therefore could not possibly be the administrative record of the environmental review of the new policy/15-foot rule. But, because TVA claimed that it was the administrative record, the Plaintiffs simply moved the court, "should it determine" that the 13 Categorical Exclusion Checklists were the administrative record, to supplement the claimed "administrative record" with all of the evidence that the Plaintiffs had filed in the case. The evidence was listed in a Table of

Documents that listed each document, with its respective "Doc." number. [Doc.142, PageID#24158-59]

The Plaintiffs served document requests on TVA, including requests that would demonstrate how many trees would be cut down by the 15-foot rule, the cost of implementing the 15-foot rule compared to TVA's previous expenditures for vegetation management, and the number of bird nests that would be destroyed by the 15-foot rule. [TVA Response to Document Requests, Doc.153-1,#8,11,13,22,23,29,39,56, PageID#24234-64] TVA objected to every item requested, claiming that discovery should not be allowed, because the court's review was limited to what it claimed was the "administrative record," and that any discovery would be "going outside the administrative record." [TVA Response to Document Requests, Doc.153-1, PageID#24228-68; TVA Response in Opposition to Motion, Doc.158, PageID#24282-84]

TVA filed the declarations of three TVA officials: John Hardyman, Doc.48; Aaron Nix, Doc.49; Jason Regg, Doc.50. The Plaintiffs attempted to take the depositions of these officials, but

TVA objected and filed a Motion for Protective Order, again arguing that the court's review was limited to the claimed "administrative record," that any discovery would be "going outside the administrative record," and that the court should "look no further for evidence than the AR on which the agency made its decision." [Notice of Deposition, Doc.159-1, PageID#24304-09; TVA Brief, Doc.161, PageID#24314-17; Order, Doc.181, PageID#24644]

With this discovery dispute pending, the trial court dismissed all claims made in the Second Amended Complaint except the NEPA claims. At the same time, the court denied the Plaintiffs' motion to certify the question of law to the Tennessee Supreme Court, allowed the Plaintiffs to add several additional plaintiffs, and allowed the Plaintiffs to restate their NEPA claims in a Third Amended Complaint, but denied the Plaintiffs' request to add additional causes of action. [Order, Doc.162, PageID#24368] The Plaintiffs filed their Third Amended Complaint, alleging that TVA's new policy is a major Federal action with a significant environmental impact under NEPA, and that as such, TVA was

required to prepare and publish an environmental impact statement prior to implementing the new policy, and that TVA did not do so. [Doc.170, incl. ¶13,138, PageID#24427,24433,24483]

The Court ruled on the Plaintiffs' motion to supplement the "claimed administrative record," and other related discovery motions, ordering TVA to produce any documents described in the Table of Documents that were "in existence at the time of TVA's decision." The court did not indicate what "TVA's decision" was or when it was made. [Order, Doc.181, PageID#24645-46] Each of the documents that the court ordered TVA to produce had already been produced and was already present in the record. [Motion and Table of Documents, Doc.142 and 142-1] The "Doc." number of each of these documents, indicating that each of the documents had already been filed, is listed in the Table of Documents, Doc.142-1. The court stated that "these materials may be part of the administrative record and the Plaintiffs should be allowed to review them." The court then denied any further documentary discovery. [Order, Doc.181, PageID#24646-47] (The effect of the

order, limiting "discovery" to documents that the plaintiffs had already filed, was to virtually deny all documentary discovery.)

The court found that TVA had "opened the door" to the deposition of one of the three TVA officials who filed declarations, John Hardyman, by filing his declaration, but did not allow the Plaintiffs to depose the other two officials. With regard to Mr. Hardyman's deposition, the court limited his deposition to "questions relating to the statements in his declaration." The court then disallowed the Plaintiffs any further discovery. [Order, Doc.181, PageID#24646-47]

TVA answered the Third Amended Complaint. [Doc.183]

The Plaintiffs took Mr. Hardyman's deposition and filed the transcript. [Deposition, Doc.191-1]

On July 23, 2013, the court dismissed the Plaintiffs' NEPA claims and directed the Clerk to close the case. [Order, Doc.212] The Plaintiffs timely filed their notice of appeal on July 30, 2013. [Doc.214]

Statement of Facts

1. Introduction

The Tennessee Valley Authority [TVA] is a Federal corporation, and is the nation's largest public power company, maintaining high-voltage transmission lines in a 7-state region, including Tennessee. [Third Amended Complaint, Doc.170,¶1,2,6, PageID#24428-24431; Answer, Doc.183,¶1,2,6,PageID#24654-55] The right-of-way for the transmission lines is generally 150-200 feet wide, and 15,900 miles long, a distance that would "span the United States more than six times." The right-of-way covers more than 406 square miles, approximately half the size of the Great Smoky Mountains National Park. [Regg Declaration, Doc.50, PageID#1451-53; King Declaration, Doc.25, PageID#421; TVA Website, Doc.29-1, PageID#494-95; GSMNP Website, Doc.29-3,PageID#504-05]

TVA was created in 1933 by the Tennessee Valley Authority Act. The Act states that TVA was formed to provide for "reforestation and the proper use of marginal lands in the Tennessee Valley" with the stated intention of being a "national leader in…environmental stewardship…." [Complaint, Doc.170,

¶81,PageID#24464, Answer, Doc.183,¶81, PageID#24663, TVA Act, 16 U.S.C.A. §§831a (b)(5), 831a (g)(1)(K)(ii),831v (1939)]

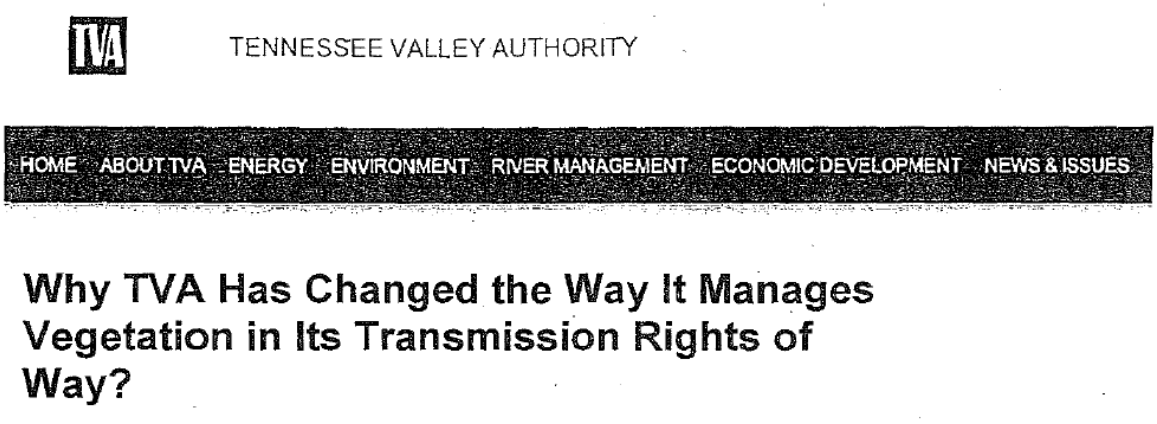
TVA's transmission lines are located on right-of-way acquired by the Federal government by condemnation or grants of easement from property owners at various times beginning in 1933. [TVA Website, Doc.29-1, PageID#494-95] The Plaintiffs are landowners in several communities in Tennessee who own property across which TVA maintains its transmission lines. [Complaint, Doc.170,¶7, PageID#24432] The grants of easement generally grant the United States an easement for the following purposes:

> …to erect, maintain, repair, rebuild, operate, and patrol one of more electric power transmission lines...; the further right to clear said right-of-way and keep the same clear of brush, timber, inflammable structures, and fire hazards; and the right to remove danger trees, if any located beyond the limits of the right-of-way…
>
> [Complaint, Doc.170, ¶7, PageID#24432; Ex. 1, Doc.170-1, PageID#24492; see also Doc.170-2 through 170-8, PageID#24495-24512]

2. TVA's New or Revised Policy (the 15-foot Rule)

In March 2012, a month before the Complaint was filed, TVA's official website stated that it had made certain changes to its

vegetation management policy. The webpage was headed as follows:


TENNESSEE VALLEY AUTHORITY

HOME ABOUT TVA ENERGY ENVIRONMENT RIVER MANAGEMENT ECONOMIC DEVELOPMENT NEWS & ISSUES

Why TVA Has Changed the Way It Manages Vegetation in Its Transmission Rights of Way?

[Doc.29-5, PageID#510-11]

The Plaintiffs believe that this was approximately the date when the webpage was first published, but cannot prove that because the trial court denied them the right of discovery. [Order, Doc.181, PageID#24646-47] In the text of the webpage, TVA announced that it "has implemented a more aggressive right-of-way vegetation management program" under which "TVA will no longer allow taller ... trees [capable of reaching 15 feet in height at full maturity] within [the] rights-of-way." [Webpage, Doc.29-5, PageID#511]

As TVA put the revised policy into effect, it would hand out a "Dear Landowner" letter to the affected landowners, stating that

it was "now exercising" its right to clear "virtually all" of the trees in the right-of-way:

> As a response to this, TVA and its contractors are now exercising TVA's right to clear virtually all trees located on TVA easements, and all danger trees located beyond the limits of the right of way. Hence, TVA long ago acquired the right to remove all of the trees located in the easement and several of the trees outside of the easement. We realize that the removal of trees or vegetation from the power lines is not always welcomed by some landowners. Included with this letter is additional information that will help explain the rules and reasoning behind our vegetation management policies.

[Doc.23-8, PageID#402; Complaint, Doc.170,¶25-26, PageID#24437; Answer, Doc.183, ¶25-26, PageID#24656-57]

TVA's spokesperson Travis Brickey announced to the media that the "new policy" was being exercised "valley-wide," affecting all seven states where TVA operates, and was "more aggressive now than in the past." [Article, Doc.21-27, PageID#357-58]

In a 12-11-2011 media article read in open court during the hearing on preliminary injunction, Brickey also stated that TVA had "tightened policies" in dealing with landowners:

> In the past, the utility cleared only parts of the rights-of-way, leaving about 25 feet on each side unmanaged. TVA now clears the entire width.
>
> [Transcript, Doc.90, PageID#2343-44; Article, Doc.21-4, PageID#316]

In a video clip of a 3-12-2012 media interview, played in open court, TVA executive Jason Regg discussed TVA's "widening

initiative," which he described as "essentially removing all trees" that have a mature height of 15 feet or more. He continued: "So, we have started this widening initiative on all our transmission system…to remove those threats, remove that buffer zone, and essentially reclaiming the full width of the easement." [Transcript, Doc.90, PageID#2339-2340; Notice of Filing Video Link, Doc.22, PageID#388]

In an article dated 3-5-2012, quoting Regg, it was reported that TVA was in the midst of a "massive widening initiative" in which the agency was removing all trees with a mature height of 15 feet or more. Regg stated that TVA "really went full-force into this initiative about a year and a half ago." Regg explained that this is "one of the largest [maintenance] projects TVA has done." The average cost of the project, said Regg, was $10,000-$12,000 per mile. [Article, Doc.21-6, PageID#319-20] ($159,000,000+ for the entire 15,900 mile right-of-way.) In the video clip, Regg added that TVA hoped to "complete this in about four or five more years….So it's not a short project. It's going to take time." [Transcript,

Doc.90, PageID#2339-2340; Notice of Filing Video Link, Doc.22, PageID#388]

Another TVA executive explained that, although TVA had been clearing the full width of the easements for a couple of years, the work "didn't get much attention" until crews started moving into urban areas. [Article, Doc.21-37, PageID#386]

In May 2012, a TVA executive wrote a letter to Knox County Commission attempting to explain the new policy. He stated that "TVA has adopted an aggressive vegetation management program" and that TVA "no longer allows taller, incompatible (species that exceed 15 feet mature height) trees within its rights-of-way…" [Letter, Doc.170-28, Page ID#24542-43]

The Commission responded with a Resolution recognizing that the policy was "recently adopted and aggressively enforced," that estimated costs would be "hundreds of millions of dollars," and that the removal of "many thousands of trees" in Knox County alone would have a "drastic reduction in property values" and "future harm to the environment and wildlife." The Resolution then noted that the negative impacts of the "excessive tree

removal" were expected to "increase dramatically in the near future due to this policy." The Resolution concluded by requesting TVA to "immediately suspend the clear-cutting removal of all trees fifteen feet or higher located within the easements containing transmission lines." [Doc.170-32, PageID#24594-97]

The Chattanooga City Council enacted a similar resolution on May 22, 2012, referencing the "serious negative impacts" of the policies. [Resolution, Doc.45-1, PageID#654-655]

Reacting to the controversy, TVA took out full-page ads defending its new policy in the principal Knoxville and Chattanooga newspapers. [Ads (5-22- 2012) Doc.39-1, 46-1, PageID#572,658]

During the hearing on the Plaintiffs' motion for a preliminary injunction on their NEPA claims, TVA's legal counsel admitted that TVA's guidelines had "specified a buffer zone system" that it was going to "leave" since "back in the 90s," [Transcript, Doc.90, PageID#2382], but that TVA had now "changed" the way it was implementing the guidelines so as to eliminate the buffer zones, and that it would take 4-6 years to get the buffer zones cleared.

Counsel attributed the change to "There just happens to be more money in the budget this year." [Transcript, Doc.90, PageID#2383] TVA official Jason Regg acknowledged that, beginning in fiscal year 2010, TVA "began providing ROW Specialists with additional funds to clear most of the taller trees within the full width of ROWs." [Regg Declaration, Doc.50, PageID#1457-58]

The Court then directly asked TVA counsel if TVA had changed its policy about the buffer zone, and TVA counsel answered as follows:

> The Court: What about the issue of the buffer zone? Has the buffer zone changed…?
>
> TVA Counsel: What has changed with respect to the buffer zone is this fifteen foot rule.

[Transcript, Doc.90, PageID#2386].

TVA counsel further explained that in the wire zone (the area under the wires) "we're not allowing any trees," and that in the border/buffer zones "we were allowing low-growing trees," but "Now…we've specified that those low-growing trees should be trees that do not exceed 15 feet at mature height." He added that "as Mr. Regg said in his video clip, it was going to take four to six

years to clear those border zones down to that level." [Transcript, Doc.90, PageID#2387]

The Court then questioned TVA counsel about the "stricter adherence to guidelines":

> The Court: I mean, you termed it as stricter adherence to guidelines. So, there, there is a different approach that TVA is implementing, whether you consider it a new policy or, stricter adherence to an existing policy.
>
> Mr. Marquand: The attempt is being made to take out more of the trees – of the taller trees in the buffer zones. And, and the rule of thumb is fifteen feet for trees that mature – the mature height of the trees.

[Transcript, Doc.90, PageID#2407-08]

TVA's "historic practice" had been to leave a buffer zone of trees along the outer edges of the easements. It also left vast numbers of trees in the wire zone. Under its previous policies, TVA had allowed millions of trees to remain in the 15,900 mile right-of-way, including both the wire zone and the buffer zones. But under the new policy, the "historic practice" of leaving a buffer zone was reversed, with "virtually all" of the trees in the right-of-way, whether in the wire zone or the buffer zone, being removed. [Memorandum, Doc.212, PageID#25049, see Billingsley drawings, Doc.36-1 through 36-11,37-1 through 37-10,40-1 through 40-7;

exhibits to Complaint, Doc.170-1 through 170-43, Williams Declaration with exhibits, Doc.23 through 23-8, PageID#391-405; Complaint, Doc.170,¶25-26, PageID#24437; Answer, Doc.183,¶25-26, PageID#24656-57; Webpage, Doc.29-5, PageID#511; Media Article, Doc.21-4, PageID#316]

TVA spokesperson Travis Brickey described the change in a media article, stating that "Our easement is 150 feet wide. In the past, we cleared 100 feet of that. As of now, 200 kV lines and above have to be cleared the full width of the easement – 150 feet.... [Media Article, Doc.21-1, PageID#306 (5-16-2011)]

In another video clip played during the hearing, the newscaster stated: "TVA said it has to keep the areas near the power lines clear and plans to do similar cuts in thousands of backyards over the next several months." [Transcript, Doc.90, PageID#2353; Video Link, Doc.22, PageID#388(4-11-2012)]

A March 2, 2012, article reported as follows:

> "Across the board, through the whole system, we are applying the same standard," Regg said. The agency has been notifying property owners about the new policy and letting them know that the clearing will take place.

[Article, Doc.21-5, PageID#317]

On May 10, 2012, the Plaintiffs filed their Amended Complaint alleging that TVA had implemented a "new policy" without complying with NEPA [Amended Complaint, Doc.8]. Eight days later, TVA counsel filed papers stating that that the various TVA officials had created a "misimpression" that TVA had adopted a new policy:

> Recently, media reports and public statements from some TVA officials have conveyed the misimpression that TVA has adopted a "new policy" with respect to ROW reclearing maintenance.
>
> [TVA's Response, Doc.18, PageID#240]

*****

TVA's new policy is controversial, with many citizens expressing concern about its environmental effects. For example, Victor Ashe, former mayor of Knoxville, and former United States Ambassador to Poland (appointed by President George W. Bush), published an article entitled: "TVA – Lost in the valley" in which he wrote as follows: "What causes TVA to behave in such an arrogant manner?....Clear cutting all trees under the power lines is not required and is harmful to the environment." [Doc.21-31,

PageID#376 (April 16, 2012)] Former Mayor and Ambassador Ashe published another article asking "Will TVA come to its senses and halt this needless destruction of trees in its headquarters city?" and stating "TVA's contempt for private property rights defies explanation." [Media Article, Doc.21-21, PageID#347 (4-2-2012)]

In another example, a letter to the editor in Chattanooga stated as follows:

> Having just read the article in your paper about TVA's new tree-cutting policy, I am shocked and horrified as, I am sure, is everyone else. What a backward, callous, ignorant, autocratic solution to a problem that's most likely not as severe as is supposed. At least in my yard, and in my neighbor's and most other yards in my development, to say the landscaping is a threat to the overhead power lines is laughable at best. Tell me how a peach tree or a large rhododendron is going to cause a power outage by fouling the lines that are at least 80 feet above them. The TVA is in my book now synonymous with Sherman, as they both seem to have taken the same approach to controlling the surrounding countryside! Surely there must be a better way than a "scorched earth" policy.
>
> [Letter (4-17-2012) Doc.21-28, PageID#359]

See other articles at Doc.21-1 through 21-37; Video links, Doc.22.

3. TVA Implements its New Policy on the Property of the Plaintiffs

The TVA crews began showing up at the properties of the Plaintiffs in early 2012. At Westminster Place, TVA representatives marked 135 trees for cutting, some in the wire zone and others in the buffer zone. TVA officials, including legal counsel, met with the property owners and discussed what the representatives referred to as TVA's "new policy" whereby it would clear all trees with a mature height of 15 feet or more located anywhere within the easement. The TVA representatives acknowledged that the trees had been there for many years but insisted that they would have to be cut down under the "new policy." [Declaration Jerome Pinn, Doc.24,¶3-7, PageID#406-408] Photos of the trees to be cut down at Westminster Place are attached as exhibits to the Complaint. [Doc.170-9 through 170-18, PageID#24513-24528]

At the Williams property, the TVA representatives stated that they were going to cut down all of the trees on the TVA easement, about 70 trees, including numerous trees 100-150 years old. TVA has never before attempted to cut down or even trim these trees in

the 21 years that the Williams have lived there. [Declaration, Doc.23, PageID#391-393] See pictures at Williams Declaration, Doc.23-1,2,3,4,5,6,7, PageID#395-401.

The TVA representatives gave Dr. Williams a "Dear Landowner" letter stating that "TVA and its contractors are now exercising TVA's right to clear virtually all trees located on the TVA easements." [Doc.23-8, PageID#402] The representatives also gave Dr. Williams a document headed as follows:

Why TVA Has Changed the Way It Manages Vegetation in Its Transmission Rights of Way

TVA

The document stated that "…TVA has implemented a more aggressive transmission right-of-way vegetation management policy involving removal of incompatible plants from the right-of-way." The article further stated that TVA will "no longer allow taller, incompatible trees within its rights-of-way when requested" and that "TVA is removing – sometimes extensively –

incompatible species from its rights-of-way." [Doc.23-8, PageID#403]

At the Oakberg farm near Morristown, Tennessee, the TVA crew cut down a beautiful stand of 20 trees before Mr. Oakberg could stop them. The trees included a 30-foot oak tree, a 30-40 foot mulberry tree, a 25-foot pine tree, and a number of cedar trees that provided shade for the cattle in the summer and protection from the elements in the winter. TVA had never done anything remotely like this since the Oakbergs came to the farm in 1974. [Declaration Oakberg, Doc.34, ¶5-7, PageID#528-29]

4. The Environmental Effect of the 15-Foot Rule

Tony King, a forester and birder retained by the Plaintiffs, surveyed a 4,300 foot segment in the West Hills neighborhood of Knoxville and counted 154 trees that would be felled by the 15-foot rule (46 in the wire zone and 108 in the border zone). [King Declaration, Doc.44, PageID#640-641; photos including numerous 45-60-foot trees, Doc.44-1 through 44-8, PageID#643-651] At Westminster Place, the "15-foot rule" would destroy 135 trees in a 750-foot segment. [Pinn Declaration, Doc.24, PageID#406;

Billingsley Declaration, Doc.37, PageID#553-54, Drawing, Doc.37-1, 37-2, 37-10 PageID#556-557,565] At the Williams property, the 15-foot rule would claim 70 trees in a 625-foot segment. [Declaration, Doc.23, PageID#391-393, Easement Deed, Doc.140-1, PageID#24145] [Transcript, Doc.90, PageID#2359] (These examples would extrapolate to 3,000,000-15,000,000 trees that would be felled in the entire 15,900-mile right-of-way.)

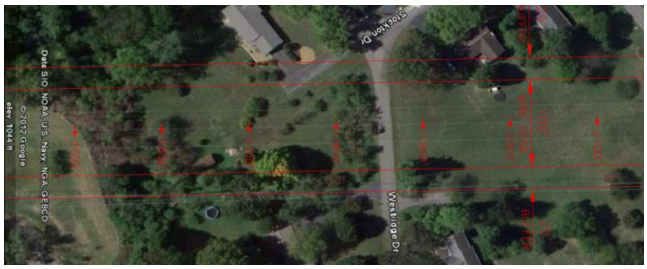
Plaintiff Anthony Billingsley, a professional draftsman, drew the footprint of three segments of the right-of-way in Knoxville onto Google Earth images. His drawings show both the wire zone (100 feet wide) and the buffer zone (25 feet wide on the outer edges of the wire zone). The first segment is the I-40 Buffer, a

dense stand of trees 3,300 foot long and 100 feet wide that serves as a visual/sound buffer between I-40 and the neighboring industrial/business park. [Images, Doc.36 through 36-11, PageID#539-552] A small part of the buffer is seen in the image

above. (snipped from Image, Doc.36-5, PageID#546).The overall effect can be seen in Doc.36-11, PageID#552, which is a composite view of all of the ten images which make up this segment. The 15-foot rule would remove all of the trees between the outermost red lines on the drawings, ruining the buffer. The record does not include a count of these trees, but it is obviously a very large number.

The second segment that Mr. Billingsley studied runs 4,000 feet between Westland Drive and Gleason Road, including

Westminster Place and the heavily wooded section shown here, which would be wiped out by the 15-foot rule. [snipped from Doc.37-6, PageID#561]



The third segment that Mr. Billingsley studied is the 4,300-foot West Hills segment discussed above, seen at Doc.40 through 40-7, PageID#574-583. The 15-foot rule would ruin every backyard in the segment shown here, destroying trees in both the wire zone and the border zone. [snipped from Doc.40-3, PageID#579] In just this small segment, two maples 45-60 feet tall, a cedar 45-60 feet tall, a cherry 45-60 feet tall, and numerous other trees would be destroyed. [King Declaration, Doc.44, PageID#640-41, Drawing, 44-1, PageID#643-644 (taken from Billingsley drawing, Doc.40-3, PageID#579]

Forester King also surveyed two areas around the Ft. Loudoun Dam near Lenoir City, Tennessee, where he observed 3,000 linear feet of right-of-way where TVA had implemented the 15-foot rule, leaving long strips of bare ground 50-75 feet wide on either side of the wires. [Declaration, Doc.25, PageID#415-425; Photos, Doc.25-1 through 25-11, PageID#426-436] See picture below (Doc.25-1, PageID#426):

Mr. King also observed a segment in Knoxville where TVA had cleared virtually all of the trees leaving strips of bare ground on either side of the wires approximately 50-75 feet wide. [Declaration, Doc.25, PageID#415-425; Photos, Doc.25-12 through 25-28, PageID#437-453]

Mr. King found a number of stumps between 1-3 feet in diameter at both locations, indicating that the trees were many years old, and had been present in the right-of-way for a long time. [King Declaration, Doc.25, PageID#419; Stump photos, e.g., Doc.25-21, PageID#446]

Mr. King also found a number of felled trunks that had not yet been hauled away. [Image, Doc.25-28, PageID#453. (snipped below)]

While the case was pending, TVA cut down 11 of the 70 trees in question at the Williams property, leaving the stumps. [Motion, Doc.127, PageID#24029-24030; Order, Doc.131, PageID#24066; Declaration, Doc.140, PageID#24143] Forester King measured 8 of the stumps and counted the growth rings. He documented a 105-year-old maple, a 100-year-old maple, a 95-year-old oak, an 85-year-old hickory, and an 85-year-old tulip poplar, among others. [Doc.141, PageID#24147-24148] See photos of the stumps at Doc.141-1, PageID#24149-24157]

TVA acquired the right-of-way over the Williams property at some point after 1981. At that time, the trees on their property,

now represented by stumps, were mature trees, as many as 73 years old. These trees had been left standing when TVA initially installed the transmission lines. [Williams Declarations, Doc.23, PageID#391; Doc.140, PageID#24143, Easement Grant, Doc.140-1, PageID#24145]

The environmental effect of the 15-foot rule on the Williams property and the Oakberg property, including a horrible erosion problem on the Williams property, and the destruction of numerous active bird nests on the Oakberg property, is detailed in the Declarations of Mr. Williams and Mr. Oakberg. [Williams Declaration, Doc.23, PageID#391-393; Oakberg Declaration, Doc.34, PageID#529-534] Mr. Oakberg, who has a master's degree in ecology from the University of Tennessee, also stated that, assuming that the TVA crews had done the same thing at the other locations where they cut trees in the spring of 2012, it was perfectly obvious that TVA had destroyed a huge number of active bird nests and killed a huge number of baby birds. [*Id.*]

The TVA right-of-way is excellent habitat for birds. Species that live and nest in similar habitat include bald eagles, red-tailed

hawks, great horned owls, bluebirds, and mockingbirds. Birds are nesting, with eggs and chicks present in the nests, all along the TVA right-of-way throughout the spring and summer, with some species producing multiple broods. During nesting season, a large number of the trees in the right-of-way contain bird nests and baby birds. [King Declaration, Doc.25, PageID#415-417]

Mr. King noted that clearing virtually all of the trees in the 15,900-mile right-of-way would destroy a vast number of bird nests. He also noted that the tree clearing that he observed had occurred during the 2012 nesting season, and that clearing trees during nesting season added an ugly dimension to the environmental effect. He stated his opinion that the TVA crews destroyed a huge number of active bird nests and killed a huge number of baby birds of numerous species in the 2012 nesting season. [King Declaration, Doc.25, PageID#424-425]

Mr. King further noted that the adverse environmental effects of cutting down "virtually all" of the trees in TVA's 15,900-mile right-of-way would be massive and horrendous in many ways, including the loss of a vast number of trees, some of them 100-150

years old, stating that that simply taking that many trees out of the ecosystem is a significant event, standing alone. He also noted that the removal of these trees would result in horrendous soil erosion, especially on slopes, and that land clearing in the manner that TVA is doing it is a notorious cause of horrendous soil erosion. [King Declaration, Doc.25, PageID#420-423, Photos, Doc. 25, incl. Doc. 25-30 and 31, PageID#458-459]

5. TVA Acknowledges That It Did Not Conduct an Environmental Review of the 15-foot Rule

At the June 27, 2013, hearing (about a month before the trial court dismissed the NEPA claims and ended the case), TVA counsel acknowledged, for the first time, that TVA did not conduct an environmental review of the "15-foot rule":

> TVA Counsel: There was not an environmental review of a change to a 15-foot rule….
>
> TVA Counsel: TVA didn't do an environmental review of its decision to change to a 15-foot rule. We did an environmental review of the annual vegetation maintenance program.
>
> [Transcript of 6-27-2013, Motion Hearing, Doc.208, p. 20-22, PageID#25001-03]

TVA then filed a pleading reiterating the point:

> Second, the Court is well aware that TVA has not asserted in this case that it performed an environmental review of changing from a subjective "low-growing tree" guideline to an objective 15-foot guideline.

[TVA's Response, Doc.203, PageID#24888]

6. The So-Called "Administrative Record"

About three months after the Court denied the Plaintiffs' motion for preliminary injunction, TVA filed a group of 13 Categorical Exclusion Checklists (CECs), and unilaterally designated them as the "Administrative Record." These CECs did not mention or refer to the 15-foot rule. TVA acknowledged this: "…the 15-foot rule is not referenced in any of the Administrative Records on file in this case." [TVA Response, Doc.203, PageID#24888] Nor did the CECs mention or refer to the fact that TVA was cutting down "virtually all" of the trees in the right-of-way for the first time in its history, nor did they mention that TVA was reversing its "historic practice" of maintaining a buffer zone of trees at the edge of the right-of-way. Each of the CECs was accompanied by a "certification" of a TVA official stating that it was the "administrative record" of TVA's environmental review of the "following project": "Fiscal Year 2012 Mechanical Mowing and

Hand Clearing, Herbicide Application, and Reclaiming Existing ROW for the ___ Sector." [See, *e.g.* (so called) Administrative Record, Doc.122, PageID#19134, Doc.122-1 PageID#19136] Each of the CECs consisted of an identical three-page check-box form with about 1,000 pages of attached documents. [See *e.g.*, (so-called) Administrative Record, Knoxville Sector, Doc.122-2, PageID#19138-19141; see also Doc.114-126, with exhibits, PageID#10902-24028]

John Hardyman, the TVA employee in charge of completing the CECs, testified that as he was completing the CECs, he had not even been aware that TVA had made a decision to cut down "virtually all" of the trees in the right-of-way. [Hardyman Dep., Doc.191-1, p.53-55,91-92 PageID#24764,24773.] He testified that he had no idea how many trees that TVA was going to cut down in 2012 ("we have no idea the number of trees"), and no idea how the number of trees to be cut down in 2012 compared to the number that had been cut down in previous years, explaining "It's not an issue." [*Id.*, 77-78, 88; PageID#24770,24772] He testified that he did not talk to TVA's man in charge of tree cutting about the

number of trees to be cut down at any time during the process. [*Id.*,p.112; PageID#24778] He refused to answer as to whether he knew that in 2012 TVA was going to attempt to cut down all of the trees that were 15 feet tall or had the potential of growing to be 15 feet tall. [*Id.*,102-106, PageID#24776-77] Before refusing to answer, he stated that the question had "no bearing," that it was a "non-issue," and that it was "irrelevant." [*Id.*,103-104, PageID#24776] (The trial court later ruled that he did not have to answer this question, stating that the subject was outside the scope of his declaration. [Order, Doc.201, PageID#24880]

Mr. Hardyman testified that he approached his job in 2012 no differently in 2012 than he had in previous years, and that he approached the job for 2012 in "exactly the same way" that he did in 2011. [Deposition, Doc.191-1,pp. 70-71;PageID#24768] He said that he considered the 2012 work to be "routine" because it would be done "the same way it had always been done." [*Id.*] He testified that he gave no consideration whatsoever to the age of the trees to be cut down. He said that it would make no difference to him whether the trees were 100 years old or one year old because "that

just wasn't something that he considered." [*Id.*,101-102;PageID#24776] He also testified that he did not consider the cost of the 2012 project compared to previous years. [*Id*,p.78; PageID#24770]

Each of the CECs included the following questions, checked as follows:

Part 1. Project Characteristics. Is there evidence that the proposed action…

1 Is major in scope?	NO
2 Is part of a larger project proposal involving other TVA actions?	NO
4 Is opposed by another federal, state, or local government agency?	NO
5 Has environmental effects which are controversial?	NO
7 Involves more than minor amount of land?	NO

Part 2. Would the proposed action…

10 Potentially affect migratory bird populations?	NO

Part 3. Would the proposed action potentially…

4 Cause soil erosion	NO

Part 4. Would the proposed action…

7 Produce visual contrast or visual discord?	NO

Each of the CECs concluded as follows:

> …I have determined that the above action does not have a significant impact on the quality of the human environment and that no extraordinary circumstances

> exist. Therefore, this proposal qualifies for a categorical exclusion…

[See, *e.g.*, (so-called) Administrative Record, Doc.122-2, PageID#19138-19141]

In his Declaration, Mr. Hardyman explained that he had marked "No" as to whether the "proposed action is major in scope" based on his consideration that maintenance of existing ROW is "recurring, routine maintenance…" [Declaration, Doc.48, PageID#679-80]

He testified that he checked the box indicating that the project was *not* "part of a larger project proposal involving other TVA actions or other federal agencies" because "Each plot or plots are worked independently." [Hardyman Depo., p. 73;Doc.191-1, PageID#24769]

He testified that he checked "no" for whether the project had environmental effects that were controversial because he had not known of any controversial environmental effects. [*Id.*,p.74; PageID#24769]

He said that he checked "No" as to whether the "proposed action" involved more than a minor amount of land, as to the

Knoxville Sector, because the amount of land in the Knoxville Sector to be maintained was "comparatively small in relation to the total ROW area in the Knoxville Sector and within the TVA system." [Declaration, Doc.48, PageID#679-80] He explained that the Knoxville Sector was an "extremely minor amount of land compared to the whole right-of-way system," and that an individual plot was only a "small section of the Knoxville area." He was asked if he considered the cumulative effect of all of the plats in all of the sectors, and he stated that "Even if you did, it would still be a minor amount, so no," explaining that in each sector "they only do some of the plots every year." [Depo., Doc.191-1,p. 75-76, PageID#24769]

He also checked the box stating that the project did not involve more than a minor amount of land because the land involved had been "previously acquired and cleared at the time TVA initially installed the lines…" [Declaration, Doc.48, PageID#679-80] At his deposition, however, Mr. Hardyman admitted that that he had no information that TVA cleared the entire width of the right-of-way in the 1930's, 40's or 50's. [Depo.,p.95-101 (Doc.191-1,

PageID#24774-76)] Mr. Hardyman further explained that when he stated in his Declaration that the right-of-way had been previously cleared, that he had only meant that it had been cleared "sufficiently enough to allow construction of the lines," and that when he said "cleared" he meant that "It's just that vegetation has been removed to the extent necessary to build the line." [*Id.*,132; Doc.191-1, PageID#24783]

In the comment section of the CEC, Mr. Hardyman stated that he marked "No" as to "cause soil erosion" because the activities would have "no impact" since it "will not involve road construction, excavation, or soil disturbance…" [CEC, Doc.122-2, PageID#19145]

Mr. Hardyman explained that he checked "no" as to whether the project would potentially affect migratory bird populations because "what impact it may have on the bird species is so minor, that it's not considered an issue with the media specialist that review this information." [Hardyman Depo., Doc.191-1, p. 84, PageID#24771]

Mr. Hardyman was asked whether he had any idea that TVA was going to cut down a large number of trees during nesting season in 2012, and he answered that "if there are nesting birds, the impact would be minor and considered insignificant." He further testified that he would not consider the impact to be significant "no matter how many trees they cut down during nesting season" and that he did not even know if TVA usually cut down trees during nesting season. [*Id.*,85, 92;Doc.191-1, PageID#24772-73] He further testified that none of the signers of the CECs ever talked to him about any issues having to do with the destruction of bird nests. [*Id.*,114;Doc.191-1,PageID#24779]

7. TVA's "Reclearing Guidelines"

TVA filed what it calls its "Reclearing Guidelines." [Doc.18-1 and 18-2] These guidelines are part of TVA's "Line Maintenance Manual" that its line crews carry with them for guidance in the field. [Hardyman Deposition, Doc.191-1, PageID#24781] The use of the term "Reclearing Guidelines" could be somewhat misleading, because it implies that the entire right-of-way has been cleared before, and that it is now being "re-cleared," when it

had only cleared the right-of-way to the extent necessary to install the lines, and it's "historic practice" had been to leave buffer zones of trees at the edges of the right-of-way. [See discussion just above.]

The 1997 "Reclearing Guidelines" stated that TVA would leave a 25-foot buffer zone on each side of the right-of-way, that "Tall-growing trees on TVA ROW will be cut," and that "Low-growing trees, shrubs, hedges, etc., may be allowed to remain on the ROW provided they are not hazardous or detrimental to maintenance." [1997 Guidelines, Doc.18-2, PageID#264] TVA also filed its 2008 "Re-Clearing Guidelines" which stated the same thing. [2008 Guidelines, Doc.18-1, PageID#261]

The cover page for the 1997 "Reclearing Guidelines" states as follows:

> This is an internal publication of Transmission Support of the Tennessee Valley Authority and the contents must not be reproduced or quoted for publication without permission.
>
> [Doc.18-2, PageID#263]

The "Level of Use" of the "Reclearing Guidelines" is stated as "Reference Use." [Doc.18-1, PageID#260] There is nothing in the

record to indicate that the Line Maintenance Manual with Reclearing Guidelines was ever published or made available to the public prior to being filed in this case.

Summary of Argument

Breach of Easement Claims. Under Tennessee law, the use of an easement is strictly confined to the purposes for which the easement was created. The easements here in question were created for the purpose of allowing the government to maintain electrical transmission lines. For that reason, Tennessee law does not permit TVA to remove trees from the right-of-way on the Plaintiffs' property unless the trees endanger or interfere with the transmission lines.

NEPA Claims. The issue stated in the Complaint is whether TVA performed an environmental review of the 15-foot rule, that is, TVA's new policy of cutting down "virtually all" of the trees in the right-of-way for the first time in TVA history, a policy that TVA itself called a "massive widening initiative," including the unprecedented clear-cutting of its border zones. During the course of the case, TVA admitted that it had implemented the 15-foot

rule, and that it did not perform any environmental review of the 15-foot rule. The Plaintiffs filed ample proof that the 15-foot rule would remove millions of trees from an area ½ the size of the Great Smoky Mountains National Park, at a cost of $10,000-$12,000 per mile, or more than $159,000,000 for the entire 15,900-mile right-of-way, a project so massive that it would take 4-6 years to complete. Under this state of the record, the trial court should have simply found that the Plaintiffs had filed material evidence that the new policy was a "major federal action" with "significant environmental effects" under NEPA, and should have denied TVA's motion for summary judgment.

But the trial court erroneously disregarded the issue stated in the complaint, and ruled that the 13 Categorical Exclusion Checklists somehow constituted the "administrative record" of TVA's environmental review of "the project," even though the CEC's do not discuss or even mention the 15-foot rule or the idea that TVA was removing "virtually all" of the trees in the right-of-way or the fact that TVA had embarked upon a "massive widening initiative" or was eliminating its previously untouched buffer

zones. In short, the CECs did not mention or refer to the issue framed in the Complaint, not even one time. Since the CECs do not discuss or even mention the 15-foot rule, or the fact that TVA had embarked on a "massive widening initiative" to remove "virtually all" of the trees in the right-of-way, the CECs could not possibly amount to an the environmental review of TVA's new policy. Under this state of the record, we think it is obvious that TVA did not take any look at all at the environmental consequences of the 15-foot rule, much less the "hard look" required by NEPA. Accordingly, with ample proof in the record, including TVA's own admissions, that TVA implemented the 15-foot rule, that it did not perform any environmental review of the 15-foot rule, and that the 15-foot rule was a "major federal action" with "significant environmental impact," the trial court should not have dismissed the NEPA claims on summary judgment.

Argument

1. The Breach of Easement Claims – TVA's Tree Clearing Exceeds the Scope of the Easement

Standard of Review: This issue presents a question of law (contract interpretation) that this Court reviews *de novo*. *Boyer v. Douglas Components Corp.*, 986 F.2d 999, 1003 (6th Cir. 1993).

The trial court granted TVA's Rule 12(b)(6) motion to dismiss the Plaintiffs' breach of easement claims, holding that the grants of easement are "unambiguous," and that "Each grant allows TVA the right to clear, or remove, brush, timber, and trees…." [Doc.162,PageID#24384-85] Therefore, said the court, in effect, TVA has the unfettered right to clear all trees in the easement even if the trees do not interfere with or endanger the transmission lines. The trial court ruled, in effect, that the government holds an easement just for the sake of clearing trees.

In relying upon only one phrase of the grant of easement, the trial court is disregarding the principle that easement documents must be construed as a whole, under Tennessee law. *See Southern Ry. Co. v. Griffitts*, 304 S.W.2d 508, 510 (Tenn. App. 1957). Consequently, the court overlooked the fact that the easement was granted for the purpose of operating an electric transmission line. There is no reason why the government would have acquired the

right-of-way to clear land just for the sake of clearing land. The purpose was to maintain electrical transmission lines, not to create deforested areas along thousands of miles of easements.

The Plaintiffs moved the trial court (and moves this Court) to certify the question to the Tennessee Supreme Court pursuant to Tennessee Supreme Court Rule 23, which permits the Tennessee Supreme Court to answer questions of Tennessee law that would be "determinative" and as to which there is "no controlling precedent in the decisions of the Supreme Court of Tennessee." The trial court declined to certify for two reasons. First, the trial court said that it was required to apply "federal common law" as the rule of decision, but could "borrow" state law so long as the state law was not hostile to federal interests. Actually, the more correct statement of the rule is that property law questions, including breach of easement questions, are ordinarily decided by state law. See *U.S. v. Park*, 536 F.3d 1058, 1061 (9th Cir. 2008) ("[w]e generally follow state law to resolve property disputes, such as this issue of interpretation of an easement"); *Coos County Sheep Co. v. United States*, 331 F.2d 456, 460 (9th Cir. 1964) ("the

real property law of the State of Oregon controls in determining the nature and extent of the rights of the United States acquired under the easement"). But the difference in these two views of what is the correct rule of law turns out to be of little importance, because the trial court seems to borrow Tennessee law in making the decision. That being the case, it is clear that the trial court attempted to apply Tennessee law, and the question of whether Tennessee law is applied outright in the first instance, or whether it is borrowed, is of little practical importance.

The trial court began the borrowing process by correctly observing that there was no controlling precedent in the decisions of the Tennessee Supreme Court. This would seem to make the case well suited to certify the question to the Supreme Court, but the trial court chose not to do so, instead looking to an unpublished decision of the Tennessee Court of Appeals as the law to "borrow," noting that "TVA has identified a decision of the Court of Appeals of Tennessee that is on point," referring to *Columbia Gulf Transmission Co. v. The Governors Club*, 2006 WL 2449909 (Tenn. App. 2006). In that case, which had nothing at all

to do with trees or the scope of any easement, the defendant country club sought an injunction to keep a pipeline company from doing maintenance work on the easement during the peak golf season. The trial court held that the country club did not have the right to make this objection because the easement document specified that the easement holder could do the work "at any time [it] determines that it is necessary." The trial court noted that the easement language was clear and unambiguous on this point, holding that "we do not have the latitude to balance the burdens that may be imposed upon the parties." Interestingly, the trial court specifically noted that the pipeline company "did not attempt to impose a new or additional burden on the defendant's property," with the clear implication that a balancing test would be appropriate in cases where the easement holder *was* attempting to impose a "new or additional burden," as the Plaintiffs contend TVA is doing in the case at bar. 2006 WL 2449909,*2-5.

The trial court noted that its decision was "bolstered" by this Court's decision in *Evans v. Tennessee Valley Authority*, 922 F.2d

841 (6th Cir. 1991). Actually, the *Evans* case seems to undermine the trial court's decision rather than bolster it. In *Evans,* this Court ruled that the easement language there at issue, which gave TVA the "right to remove brush, timber, and danger trees" did allow TVA, as the language clearly indicates, to remove trees rather than merely trim them. This Court said "It is a tortured construction indeed that interprets the word "remove" to be limited to trimming." *Evans v. TVA*, 922 F.2d 841, 1991 WL 1113,*1-2.

We do not disagree with this Court's statement, but it has little or nothing to do with the case at bar. What does have to do with the case at bar is what this Court said thereafter, in its discussion of a previous decision involving TVA, *United States ex rel TVA v. An Easement*, 182 F.Supp. 899 (M. D. Tenn. 1960). In that previous decision, the court construed an electrical transmission line easement used by TVA, worded virtually identically to the easements in the case at bar ["together with the right to clear said right-of-way and keep the same clear of brush, trees…" (182 F.Supp. at 901)], and held that the landowner had the right to

grow trees within the easement, provided that they were trimmed/pruned/topped if they reached a height which would threaten the transmission lines:

> The defendants have the right to use their land for growing crops and fruit trees so long as they do not interfere with the paramount right of the Government to erect and maintain its line. If the fruit trees grow to such a height that they become a hazard to the line, the Government would have the right to keep them topped at a safe height. The landowner may grow peach trees on the right-of-way, cultivate them, and gather the fruit. (citations omitted)
>
> *United States ex rel TVA v. An Easement,* 182 F. Supp. at 904

The court also noted that "The rights remaining in the landowner are very substantial where only a power line easement in taken." [182 F.Supp. at 903]

In *Evans*, the trial court also recognized the landowner's right to trim his trees to keep them from interfering with the transmission lines: "the property owner can achieve the result he seeks here simply by trimming the trees himself." The court noted that "TVA gave him ample time to do so". *Id*. at *3. But TVA's new policy in the case at bar does *not* allow Plaintiffs to trim their trees. [Transcript, Doc.90,p.78, PageID#2409]

The *Evans* court added this comment about the earlier decision in *United States ex rel TVA v. An Easement, etc.*:

> It is clear in context the court was telling the commissioners that the landowner could grow fruit trees in the easement but that his right was not unfettered, and if the trees became a hazard, TVA could take action.
>
> *Evans v. TVA*, 922 F.2d 841,*2

It seems clear that this Court would similarly tell the landowners in the case at bar that they too have the right to grow trees in the easement, but that "the right is not unfettered, and if the trees became a hazard, TVA could take action."

*****

Under Tennessee law, "[t]he range of permissible uses of any particular easement is in the first instance defined by the circumstances surrounding the creation of that easement; its use is limited to the purposes for which it was created." 10 *Tennessee Jurisprudence*, Easements, §3 (2011). *See also Sellick v. Miller*, 301 S.W.3d 636, 640 (Tenn. App. 2009) ("[t]he use of an easement must be confined strictly to the purposes for which it was granted or reserved") (quoting *Adams v. Winnett*, 156 S.W.2d 353, 357 (Tenn. App. 1941). See also *Gammo v. Rolen*, 2010 WL

2812631, *2 (Tenn. App. 2010). Under Tennessee law, "[t]he holder of an easement has the right to use or alter the affected premises only as reasonably necessary for the use of the easement." *Yates v. Metropolitan Government of Nashville*, 451 S.W.2d 437, 441 (Tenn. App. 1969).

By not allowing property owners to have trees on their properties, even though such trees do not pose a threat to the transmission lines, TVA is being unduly restrictive of the property owners' rights to reasonably use and enjoy their properties. See *Carroll v. Belcher,* 1999 WL 58597, at *1 (Tenn.Ct.App.1999), quoting 10 Tennessee Jurisprudence, *Easements,* §6 (1994) ("[T]he rights of the easement owner and of the landowner are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, that there may be a due and reasonable enjoyment of both the easement and the servient estate.") *See also CJS*, Easements, §222 (2008) ("[t]he owner of the servient estate and the owner of the dominant estate enjoy correlative rights to use the subject property, and the owners must have due regard for each other, and should exercise that degree of care and use which

a just consideration for the rights of the other demands"). In the easement grants at issue in this case, the second-listed "right to clear said right-of-way and keep the same clear of brush [and] timber [or trees]" must be interpreted in connection with the first listed "right...to erect, maintain, repair [and] operate ... electrical power transmission lines". TVA has acknowledged on its website that the rights to clear the right-of-way were acquired "only to allow for the construction, operation, maintenance, and rebuilding of transmission lines." [TVA website, FAQ, Doc.29-1, PageID#495]

Any doubt in the construction of the grants of easement must be resolved against TVA, since it was the drafter of the documents. *See Beck v. U.S.*, 16 Cl. Ct. 655, 659 (Cl. Ct. 1989) ("the easement grant should be construed most strongly against the drafter, which in this case is the government").

Numerous cases outside Tennessee, similarly recognizing that easement holders must act reasonably and not unnecessarily damage the value of the property over which their easements lie, are detailed in the Plaintiffs' Response to Defendant's Motion to Dismiss. [Doc.78, PageID#1967-1972]

2. The NEPA Claims

Standard of Review: The trial court dismissed the NEPA claims on summary judgment, noting that summary judgment is a "particularly useful method of reviewing federal agency decisions…because…the underlying material facts are contained in the administrative record." The trial court then stated that a trial court would uphold the agency's decision so long as the agency determination was not "arbitrary, capricious, or an abuse of discretion" or "otherwise not in accordance with law." The court further noted that "in other words, an agency's decision must be 'reasonable under the circumstances' when viewed 'in the light of the mandatory requirements and the standard set by NEPA." The court then noted that the court "must, however, 'determine whether the agency has, in fact, adequately studied the issue and taken a hard look at the environmental consequences of its decision.'" [Doc.212, PageID#25033-37]

The standard of review in a NEPA case is also stated to include "whether the [agency's] decision was based on a consideration of the relevant factors and whether there has been a clear error of

judgment." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, 109 S. Ct. 1861, 1858, 104 L. Ed. 2d 377 (1989). This court has held that an agency's decision is also arbitrary and capricious under NEPA when the agency has "entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Kentucky Riverkeeper, Inc. v. Rowlette*, 714 F.3d 402, 407 (6th Cir. 2013).

This Court reviews the district court's summary judgment decision *de novo*, while applying the appropriate standard of review to the agency's decision. *Schuck v. Frank*, 27 F.3d 194,197 (6th Cir. 1994)

The plaintiffs do not disagree with any of these statements of the standard of review in the ordinary NEPA case dismissed on summary judgment, but the case at bar involves a threshold issue that does not seem to be covered by the above statements. The threshold issue is whether the trial court correctly determined, by summary judgment, that the supposed "administrative record"

really is the administrative record of the agency decision in question. This threshold issue is governed by the ordinary standard of review for a case that is decided on summary judgment, that is, this Court makes a de novo review of the trial court's decision, and must reverse if there is any genuine issue of material fact as to whether the claimed or so-called administrative record really is the administrative record of TVA's environmental review of the 15-foot rule, when the record is viewed in the light most favorable to the Plaintiffs. *Daddy's Junky Music Stores v. Big Daddy's Family Music Ctr.*, 109 F.3d 275, 280 (6th Cir. 1997). That being the case, the question for this Court is whether there is a genuine issue of fact in the record, when viewed in the light most favorable to the Plaintiffs, as to whether the so-called administrative record really is the administrative record of TVA's implementation of the 15-foot rule, its "massive widening initiative" to remove "virtually all" of the trees in its right-of-way for the first time in TVA history.

At any rate, whether the trial court's decision is reviewed directly under the "any evidence" standard of summary judgment,

or by *de novo* review of the trial court's decision, while applying the appropriate standard of review to the agency decision, that is, either the "arbitrary and capricious" standard, or one of the other variations or reiterations of that standard, as discussed above, the Plaintiffs argue that the trial court's decision should be overturned.

Argument: Under NEPA, Federal agencies are required to prepare and publish an "environmental impact statement" for any "major federal action" that has "significant environmental impact." 42 U.S.C. §4321 *et seq*. Under NEPA, "major federal actions" include "new and continuing activities, including projects and programs ... financed [or] conducted ... or approved by federal agencies; new or revised agency rules...plans, policies or procedures." 40 C.F.R. §1508.18(a). *See In re Polar Bear Endangered Species Act Listing*, 818 F. Supp.2d 214, 234 (D. D. C. 2011); *Oregon Natural Resources Council Fund v. Forsgren*, 252 F. Supp.2d 1088, 1104 (D. Or. 2003).

The trial court granted TVA's motion for summary judgment on the Plaintiffs' NEPA claims, first finding that the 13 Categorical

Exclusion Checklists constituted the "administrative record" of "the project," which the court defined as TVA's "2012 vegetation management project," and then finding that TVA had given proper environmental review to "the project" by treating it as a "categorical exclusion" [CE] and then finding that "[i]n sum…the Court cannot find that TVA's decision that implementation of the 2012 vegetation management project falls within the CE for routine operation, maintenance and minor upgrading of existing TVA facilities was arbitrary and capricious." The court then concluded that "[i]ndeed, it appears to the Court that TVA took the requisite 'hard look' at the environmental consequences of the project before taking action." [Doc.212, PageID#25046,25056] The fundamental errors in the court's ruling are discussed below.

a. The So-Called Administrative Record

The trial court's most fundamental error is its erroneous determination that the 13 CECs were the "administrative record" of "the project," combined with the court's consideration that "the project" consisted of TVA's overall vegetation management project for the year 2012. In so ruling, the court has discarded the issue

framed in the Complaint, and substituted the straw-man issue put forward by TVA:

> Moreover, the issue is not whether TVA performed an environmental review of the fifteen-foot rule; rather, the issue is whether TVA's determination that the 2012 vegetation management project qualified for the CE for routine maintenance was arbitrary or capricious.
>
> [Memorandum, Doc.212, PageID 25044]

The issue stated in the Complaint is whether TVA performed an environmental review of the 15-foot rule, that is, TVA's new policy of cutting down "virtually all" of the trees in the right-of-way for the first time in TVA history, including the unprecedented clear-cutting of its border zones. TVA has acknowledged since the early days of the case that it recently implemented the 15-foot rule, and it acknowledged, a month before the trial court ended the case, that it did not perform any environmental review whatsoever of the 15-foot rule:

> TVA Counsel: There was not an environmental review of a change to a 15-foot rule….
>
> T.V.A. didn't do an environmental review of its decision to change to a 15-foot rule. We did an environmental review of the annual vegetation maintenance program.

> [Transcript of June 27, 2013, Motion Hearing, Doc.208, p. 20-22, PageID#25001-03]

With TVA's admissions that it recently implemented the 15-foot rule, and that it did not perform an environmental review of the 15-foot rule, the only remaining questions should be whether the implementation of the 15-foot rule was a major federal action and whether it has had or will have significant environmental impact. In the simplest terms, the question should be how many trees will the 15-foot rule claim, and how much will it cost. If the 15-foot rule claims a significant number of trees at significant cost, that would seem to constitute a major federal action with significant environmental impact. The Plaintiffs have alleged, and have filed substantial evidence that the 15-foot rule will claim a vast number of trees, numbering in the millions, including many 50-100-year old trees that were left standing when TVA initially installed its transmission lines. The proof in the record establishes that TVA is clear-cutting its border zones for the first time in its history at immense cost. There is proof in the record that the adverse environmental effect will be immense, as discussed in the Statement of Facts. This substantial body of evidence has at least

established genuine issues of fact as to whether TVA has implemented a 15-foot rule, whether it conducted an environmental review of the 15-foot rule, whether the 15-foot rule is a major action, and whether it has had or will have significant environmental effect. Accordingly, the case was inappropriate for summary judgment.

But TVA argued that the trial court should ignore the issue framed in the Complaint, and somehow switch its review to what it called "the project." The project, according to TVA, was its overall vegetation management plan for 2012, as described in the CECs that it filed and characterized as the "administrative record." The problem with this definition of "the project" is that the CECs do not mention or even refer to the 15-foot rule, not even one time. Not one word about the 15-foot rule in 13,000 pages. Not one word about a "massive widening initiative" that would cut down "virtually all" of the trees in the right-of-way for the first time in TVA history. Not one word about an "aggressive" plan to eliminate the buffer zones and clear the entire right-of-way on a system-wide basis for the first time ever. Not one word about the

reversal of TVA's "historic practice" of maintaining a buffer zone of trees at the edges of the right-of-way. The result is that TVA did not take a "hard look" at the environmental effects of TVA's plan to cut down "virtually all" of the trees in the right-of-way. To the contrary, it took no look at all.

How could the CECs possibly be the administrative record of TVA's decision to implement the 15-foot rule, when they do not mention or even refer to the 15-foot rule? The "administrative record," although it may be the administrative record of something, is not the administrative record of TVA's decision to implement the 15-foot rule. As TVA has acknowledged, "…the 15-foot rule is not referenced in any of the Administrative Records on file in this case." [Response, Doc.203,PageID#24888]

Another impossibility associated with the so-called "administrative record" is that the issue framed by the complaint was not limited to the year 2012 or to any particular calendar year. To the contrary, the complaint alleges that it will take TVA several years to complete the project ("expected duration of 4-6 years and a cost of about $10,000 to $12,000 per mile, for a total

cost of $159,000 to $190,800."). [Third Amended Complaint, Doc.170, PageID#24470]

The declarations of the TVA executives, and their media statements, confirm that the new policy will take several years to complete, as discussed in the Statement of Facts. That leaves the question of how can the so-called "administrative record" for the vegetation management plan for one year possibly be the environmental review of something that will take 4-6 years to complete.

Another question associated with the so-called "administrative record" is how did it supposedly get to be the administrative record? That is easy to explain, at least initially. The Court's ECF system permits filers to name the filed documents whatever they want to. TVA filed the 13 CECs and took the liberty of calling them the "Administrative Record." This is an "administrative record" of some 13,000 pages, with none of the 13,000 pages mentioning the 15-foot rule or the idea of clearing "virtually all" of the trees in the right-of-way, or clear-cutting the border zones for the first time in TVA history. As TVA envisages the case, it first

directs the Court to disregard the issue stated in the Complaint, it then announces a new issue, it then announces that it has filed the "administrative record" of the new issue, the Court accepts TVA's issue and its "administrative record" without questioning it, the Court prohibits the plaintiffs from questioning it, essentially prohibits discovery beyond the "administrative record," and the adjudicative process is over.

The trial court stated that an agency need not prepare an environmental impact statement or make an environmental assessment if the agency "determines that the proposed action falls within an established categorical exclusion ("CE")." [Memorandum, Doc.212, PageID#25035] This statement presupposes that the agency has actually made a determination that the proposed action falls within the categorical exclusion. But here there is no evidence or indication that TVA ever made a determination that the 15-foot rule would somehow fall within the 2012 CECs. If TVA had actually or somehow made such a decision, there should at least be a memo or some document to that effect. But TVA has produced absolutely nothing to document

any such decision. All it has produced is after-the-fact argument by counsel that the 15-foot rule is somehow encompassed within the CECs (even though not mentioned). It is a remarkable argument that was accepted *in toto* by the trial court.

As mentioned, TVA acknowledges that the 15-foot rule is not mentioned in the CECs. [Response, Doc.203, PageID#24888] The deposition of Mr. Hardyman, TVA's employee in charge of the CECs, specifically establishes that he did not give any consideration whatsoever to the 15-foot rule. As stated by the trial court:

> Mr. Hardyman does not discuss the 15-foot rule and he does not reference it as a parameter for completing the tasks he was assigned in the 2012 Knoxville right-of-way maintenance project.
>
> [Order, Doc.201, PageID#24880]

As laid out in more detail in the Statement of Facts, Hardyman acknowledges that he was not even aware that TVA had made a decision to cut down virtually all of the trees in the right-of-way, and no idea how many trees TVA was going to cut down in 2012:

> That [is] no issue with us as far as number of trees.... [W]e have no idea the number of trees..... It wouldn't have no bearing.

[Depo., Doc.191-1,p. 77, PageID#24770]

It may not have had any bearing for Mr. Hardyman and TVA, but the number of trees to be cut down has a great deal of bearing under NEPA. *See Kettle Range Conservation Group v. U.S. Forest Service*, 148 F. Supp.2d 1107, 1135 (E. D. Wash. 2001) (entering injunction under NEPA against Forest Service project that "would mean the permanent removal of thousands of trees"). *Compare League of Wilderness Defenders v. U.S. Forest Service*, 2011 WL 1871224, *8-9 (D. Or. 2011), *aff'd.* 689 F.3d 1060 (9th Cir. 2012) (U.S. Forest Service properly prepared an EIS, "analyz[ing] the number of trees proposed to be removed", noting that "the project has a significant impact on trees in that it removes a large number of trees in the project area").

Since Mr. Hardyman had no idea that TVA was embarking on a "massive widening initiative" to cut down "virtually all" of the trees in the right-of-way for the first time in TVA history, reversing its "historic practice" of maintaining a buffer zone of trees at the edge of the right-of-way, at a cost of $10,000-$12,000 per mile, or a total cost of $159,000,000 for the entire 15,900 mile

right-of-way, it is not surprising that he checked the box that the "proposed action" was not "major in scope." To him, and as far as he knew, it was not major in scope. As far as he knew, it was "recurring, routine maintenance" to be done the same way that TVA had always done it. Obviously, as TVA has admitted, Hardyman was making no attempt to review the environmental consequences of the 15-foot rule. Hardyman made no look at the environmental impact of the 15-foot rule, much less the NEPA required "hard look."

TVA should have to explain how it can be "recurring, routine maintenance" to cut down massive numbers of 50-100 year old trees that were standing when TVA initially installed the lines and have remained standing throughout TVA's 76 year history. If it had been routine, these 50-100 year old trees would have been cut down long ago.

In sum Mr. Hardyman's deposition leaves two questions: first, how could the CECs that he prepared, considered, reviewed, concurred in, and closed, be the administrative record of TVA's decision to cut down virtually all of the trees in its right-of-way,

when he didn't even know they were doing it? And second, if this somehow *was* the administrative record, that is, if Mr. Hardyman was subconsciously considering something that he didn't even know about, how could it be "routine maintenance" to cut down virtually all of the trees in the right-of-way, for the first time in TVA history, including 100-year-old trees that had been standing since TVA initially installed the transmission lines?

The trial court acknowledged the Plaintiffs' argument that clearing right-of-way that had never been previously cleared could not amount to "routine maintenance," but did not refute it, except to mention that TVA had "discretion" to allow trees in the buffer zone and "at times" only cleared a portion of the rights-of-way due to "budget constraints." In the three sentences that the court devoted to the subject, the court admitted that the "entirety" of the right-of-way "may not have been cleared at the time the transmission lines were installed," and acknowledged that "TVA does not assert that they were entirely cleared," and even acknowledged that TVA's "historic practice" had been to leave a buffer zone. The court then explained, as mentioned above, that

TVA retained the "discretion" to allow or disallow trees in the buffer zones, and stated that TVA "at times" cleared only a portion of the right-of-ways due to "budget constraints." [Memorandum, Doc.212, PageID#25049]

As explained by TVA counsel, "There just happens to be more money in the budget this year." [Transcript, Doc.90, PageID#2383] Although TVA counsel pitched it as a happenstance, TVA executive Jason Regg admitted in his declaration that it was a conscious decision by TVA. "Beginning in fiscal year 2010," said Regg, "TVA began providing ROW Specialists with additional funds to clear most of the taller trees within the full width of ROWs." [Declaration, Doc.50, PageID#1457-58]

There are several remarkable points here. First, the fact that the funding decision was made in 2010 and that the expense would be $10,000-$12,000 per mile or more than $159,000, should be enough evidence, standing alone, to at least create a genuine issue of material fact as to whether it was a "major federal action" with "significant environmental impact." Of course, because the trial court denied discovery, the Plaintiffs can't establish the

details at the moment, for example, which TVA officials made the funding decision and how it was documented, and whether it was approved by the Board of Directors, or was just an act of upper management. But there is unmistakable evidence in the record that the funding decision was made, and that it was made in 2010.

Second, with regard to the trial court's statement that "at times" TVA had cleared less than the full right-of-way due to "budget constraints," it appears that "at times" would have to mean "at any and all times since TVA was created in 1933." Otherwise, how could we explain all the 50-100-year-old trees in the right-of-way, and the "historic practice" of maintaining vast buffer zones? It would certainly be a remarkable and long-standing "budget constraint" that would exist throughout the entire 76-year history of the agency!

At any rate, the fact that TVA has now made a funding decision to remove "virtually all" trees from an area half the size of the Great Smoky Mountains National Park is evidence that is a major Federal action, because budget and funding decisions have always been held to amount to major actions under NEPA. See *United*

States v. S. Florida Water Mgmt. Dist., 28 F.3d 1563, 1573 (11th Cir. 1994) ("A federal agency may undertake a major federal action in the form of funding as a part of…a change of operations over which the federal agency has authority.")

The upshot is that there is evidence in the record that beginning in 2010, TVA implemented and funded a "massive widening initiative" whereby it would reverse its historic practice of leaving a buffer zone at the edge of the right-of-way, and that the "massive widening initiative" amounts to a "major federal action" that has "significant environmental impact." For that reason the trial court should not have dismissed the case on summary judgment.

The trial court noted that pursuant to TVA's 2008 "Reclearing Guidelines," TVA's right-of-way specialists have the authority to make "discretionary operating decisions, and that "as TVA concedes, the exercise of a right-of-way specialist's discretion may "in some cases" result in more trees being cut down than in previous years. "Nevertheless," said the court, "it appears to the Court that TVA's right-of-way re-clearing for 2012 is consistent

with TVA's right-of-way maintenance guidelines over the last fifteen years." The court cited Mr. Regg's (un-cross-examined) declaration as the source for these findings. [Order, Doc.212, PageID#25044]

The trial court seems to be implying that the driving force in the "massive widening initiative" that would remove "virtually all" of the trees in the right-of-way, at the cost of $10,000-$12,000 per mile, was the individual discretion of the right-of-way specialists as they are making their decisions in the field! Coincidentally, all of the right-of-way specialists all over the 7-state region decided to cut down "virtually all" of the trees in their segment of the right-of-way at exactly the same time. In reality, this is not the case. Mr. Regg's declaration makes it clear that it was a budgeting decision made centrally at TVA headquarters. He states that each ROW Specialist was given a "yearly budget" for ROW maintenance, that "[a]lthough TVA's ROW maintenance guidelines have not changed for fiscal year 2012, more money has been budgeted to allow for reclearing the width of the ROWs," and finally as follows:

> ...beginning in fiscal year 2010, TVA began providing ROW Specialists with additional funds to clear most of the taller trees within the full width of ROWs.
>
> [Declaration, Doc.50, PageID#1457]

Mr. Regg's declaration makes it clear, or at least creates a question of fact, that the "massive widening initiative," instead of being a remarkable coincidental simultaneous exercise of discretion by TVA's right-of-way specialists, was actually an institutional budget decision made centrally by executives at TVA headquarters. Mr. Regg not only tells who made the decision but when it was made. It was made in fiscal year 2010. With Mr. Regg admitting that it was a "massive widening initiative" that began in 2010, this seems to at least create a fact question as to whether it really is a new or revised policy, and as to whether it is a "major federal action" with "significant environmental impact."

The trial court took note of the Plaintiffs' argument that the (so-called) administrative record makes no mention of the 15-foot rule, stating that "[w]hile this lack of mention may be true, it is of no consequence in the context of plaintiffs' NEPA claim," explaining that TVA had "considered every segment" of the right-of-way and that…

> Moreover,…the 2012 vegetation maintenance project was consistent with right-of-way maintenance guidelines that had been in place for over fifteen years, which allowed "low-growing" trees to remain in the buffer zones of the right-of-ways at TVA's discretion.
>
> [Memorandum, Doc.212, PageID#25049, citing Mr. Regg's declaration]

The fact that TVA may have "considered every segment" does not help TVA, because if it is true, it is also true that in considering every segment, TVA never considered the 15-foot rule, or the fact that it had implemented a "massive widening initiative" that would remove "virtually all" of the trees in the right-of-way.

As for the "guidelines that had been in place for over 15 years," the court was referring to TVA's "Reclearing Guidelines," the "internal publication" that it provided for its workers to use in the field, not to be reproduced or quoted for publication without permission, apparently beginning in 1997. The trial court emphasized that TVA's 2012 vegetation management project was "consistent with" these guidelines, as if that somehow resolved the question. As background for the court's observation, it is helpful to realize that TVA has been acquiring right-of-way since 1933, and

has historically maintained buffer zones of trees at the edges of the right-of-way, including large numbers of trees that are now 50-100 years old. The right-of-way now spans 15,900 miles. According to TVA, it has had the right to clear-cut the right-of-way from the beginning. In 1997, without any environmental assessment, and without making it public, TVA printed an internal, non-public document (the "guidelines" referred to by the trial court) and provided copies to its right-of-way specialists for their reference use in the field, but prohibited the reproduction or publication of this document. The document said that TVA would maintain a 25-foot buffer zone of trees on each edge of the right-of-way, that "tall-growing trees on TVA ROW will be cut," and that "low-growing trees…may be allowed to remain on the ROW." Whatever this 1997 internal document may have said, TVA did not make any effort to clear-cut the right-of-way at that time, instead leaving vast numbers of trees growing in the right-of-way. In 2008, TVA printed a new document that said the same thing, still not making any effort to clear-cut the right-of-way. Then, beginning in fiscal year 2010, TVA made a funding decision to

implement a "massive widening initiative" to remove "virtually all" of the trees in the right-of-way, reversing the "historic practice" of maintaining a buffer zone at the edges of the right-of-way, at a cost of $10,000-$12,000 per mile.

There has never been any environmental review of this "massive widening initiative," either today or 15 years ago. The idea of making sweeping environmental policy decisions out of the public eye is not in keeping with NEPA. The Supreme Court has plainly stated that NEPA promotes its "sweeping commitment" to protect the environment by "focusing Government and public attention on the environmental effects of proposed agency action." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 371, 109 S. Ct. 1851, 1858, 104 L. Ed. 2d 377 (1989). Similarly, the broad dissemination of information mandated by NEPA "permits the public and other government agencies to react to the effects of a proposed action at a meaningful time." *Id*. There was no public attention on the 1997 or 2008 Reclearing Guidelines, and no environmental review. If the trial court was relying on the internal, non-published, Reclearing Guidelines, as having some

role in TVA's compliance with NEPA, we think that it has made a serious mistake.

At any rate, if it all happened 15 years ago, that is, if the 15-year-old guidelines were somehow intended to implement the removal of "virtually all" of the trees in the right-of-way, TVA still has to answer this question: Where is the 15-year-old environmental impact statement discussing the environmental effects of cutting down "virtually all" of the trees in the right-of-way? Where is the 15-year-old environmental impact statement discussing the environmental effects of reversing the "historic practice" of maintaining a buffer zone at the edge of the 15,900-mile right-of-way? Where is the 15-year-old environmental impact statement discussing the environmental effects of cutting down millions of trees at a cost of $159,000,000? The truth is that TVA's decision to eliminate the historic border zone, to cut down "virtually all" of the trees in the right-of-way, or to implement the 15-foot rule, has never been environmentally reviewed, either 15 years ago or recently. It simply has never been done.

b. There is Evidence in the Record that the 15-Foot Rule Really Is a New Policy

The trial court referred to the new policy as the "allegedly new vegetation management policy" which "plaintiffs submit" requires the removal of all trees that have a mature height of 15 feet or taller within TVA's 15,900 mile transmission line right-of-way. [Memorandum, Doc.212, PageID#25029] The trial court then stated that "Plaintiffs assert that this fifteen-foot rule is a new policy. The Court disagrees that TVA instituted a new policy." [Memorandum, Doc.212, PageID#25043-44] The problem with the court's finding, and with its entry of summary judgment, is that there is a substantial body of evidence in the record that it *really is* a new policy, as detailed in the Statement of Facts, including so many statements by TVA officials that it *was* a new policy, that TVA counsel felt compelled to explain that these officials had "conveyed the misimpression that TVA has adopted a "new policy…." [TVA's Response, Doc.18, PageID#240]

The trial court's rationale for concluding that there was no new policy is the same as discussed above, that the right-of-way specialists in the field were making "discretionary operating decisions" on a "tract-by-tract" basis, with the result that the

exercise of discretion "may in some cases" result in more trees being cut than in previous years, and that the 2012 right-of-way clearing was "consistent with TVA's right-of-way maintenance guidelines over the last fifteen years. [Memorandum, Doc.212, PageID#25044] Without repeating our argument from above in detail, the problem with the trial court's reasoning is that there is evidence in the record that, rather than being a matter of a coincidental simultaneous exercise of discretion of the far-flung right-of-way specialists in the field, it was really a central decision made at TVA headquarters. And the "guidelines" that the trial court speaks of were merely the internal, non-public "Reclearing Guidelines" that TVA issued to its right-of-way specialists, guidelines that were never made public and were never subjected to any environmental review. According to the trial court's logic, an agency would be free to make a secret policy change with vast environmental impact, put it on paper somewhere in a non-public way, wait 15 years and then put the policy into effect without having to bother with an environmental review.

c. The Checked Boxes in the CECs

As discussed above, when Mr. Hardyman checked the box stating that the "proposed action" was not "major in scope," he did not realize that TVA had decided to cut down "virtually all" of the trees in the right-of-way in a "massive widening initiative" that would cost $10,000-$12,000 per mile. As also discussed above, TVA has acknowledged that "TVA didn't do an environmental review of its decision to change to a 15-foot rule." [Transcript, Doc.208,p.22, PageID#25003] We think it is clear that the checked box stating that "the project" was not "major in scope" simply was not intended to apply to or refer to the 15-foot rule. It is thus very clear that the CECs were never intended to be the environmental review of the 15-foot rule. If they had been somehow intended to be a review the 15-foot rule, there is ample evidence that it was never considered, and it would be obvious that TVA had not considered all the "relevant factors" or had "entirely failed to consider an important aspect of the problem." There is clear evidence in the record the effect of the 15-foot rule – cutting down millions of trees at a cost of $10,000-$12,000 per mile, one of the largest maintenance projects that TVA has ever done – is

obviously "major in scope." It would have been "arbitrary and capricious" or otherwise in violation of law, for Mr. Hardyman to have concluded that the 15-foot rule was not major in scope. But it is clear, regardless of what TVA counsel may say today, that he did not really do so, because Mr. Hardyman was not making any effort to review the 15-foot rule.

Mr. Hardyman also checked the box stating that the "proposed action" was not controversial. Being unaware that TVA was attempting to cut down "virtually all" of the trees in the right-of-way for the first time in TVA history, he had no reason to believe that anything controversial was afoot.

Had he been referring to the 15-foot rule, or the idea of cutting down "virtually all" of the trees in the right-of-way, or the reversal of TVA's "historic practice" of maintaining buffer zones of trees at the edge of the right-of-way, Mr. Hardyman's answer would have clearly been remarkably false, arbitrary and capricious. Cutting down "virtually all" of the trees in the right-of-way has been hugely controversial, as discussed in the Statement of Facts, with intense and repeated media coverage, including former Mayor and

Ambassador Victor Ashe publishing an article entitled "TVA – Lost in the valley" and stating as follows: "What causes TVA to behave in such an arrogant manner?....Clear cutting all trees under the power lines is not required and is harmful to the environment." [Article, Doc.21-31,PageID#376]

Mr. Hardyman also checked the box indicating that the "proposed action" only involved a "minor amount of land," and that it was not part of a "larger project proposal," explaining that each plot was worked separately, that the Knoxville Sector was an "extremely minor amount of land compared to the whole right-of-way system that TVA created," and that an individual plot was only a "small section of the Knoxville area." When he was asked specifically whether he had considered the cumulative effect of all of the plots he said it would still be a minor amount because "they only do some of the plots every year."

Mr. Hardyman also declared that he had marked NO as to "minor amount of land" because the right-of-way was "previously acquired and cleared at the time TVA initially installed the lines…", but he and TVA counsel recanted from this explanation,

acknowledging that the right-of-way had only been cleared enough to install the transmission lines.

Again, Mr. Hardyman was not making any effort to assess the effect of the 15-foot rule. He was simply reviewing the ordinary and routine maintenance that TVA does every year. Had he been commenting on the 15-foot rule, or the idea of cutting down "virtually all" of the trees in the right-of-way over a 4-6 year period, he would have been in obvious violation of the NEPA prohibition of dividing a project into small units and then arguing that each unit is so small that it is not significant.

Segmentation of a project merely to avoid federal jurisdiction is unlawful. *McGehee v. U.S. Army Corps of Engineers*, 2011 WL 2009969, at *3 (W. D .Ky. 2011) [citing *Historic Pres. Guild v. Burnley*, 896 F.2d 985, 986 (6th Cir. 1989)]. "Agencies may not evade their responsibilities under NEPA by artificially dividing a major federal action into smaller components, each [allegedly] without 'significant' impact.'" *Coalition on Sensible Transportation v. Dole*, 826 F.2d 60, 68 (D. C. Cir. 1987). See also 40 C.F.R. §§1502.4(a),1508.4,1508.7,1508.25; *Earth Island Inst. v. U.S.*

Forest Service, 351 F.3d 1291, 1305 (9th Cir. 2003); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 893-94 (9th Cir. 2002) (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410, 96 S.Ct. 2718 (1976).

Mr. Hardyman also checked the box NO as to whether the "proposed action" would cause soil erosion, explaining that the activities would have "no impact" since it "will not involve road construction, excavation, or soil disturbance…" Again, Mr. Hardyman was not attempting to comment on the 15-foot rule or the idea of cutting down "virtually all" of the trees in the right-of-way. Had he been referring to the 15-foot rule, his checkbox would have been arbitrary and capricious as demonstrated by the body of evidence in the record that cutting down "virtually all" of the trees in the right-of-way would result in horrendous soil erosion for years to come, especially where the tree removal takes place on slopes, throughout the 15,900 mile right-of-way, including a "horrible erosion problem" on the Williams property. See this brief, Statement of Facts, §4, The Environmental Effect of TVA'

New Policy (15-foot Rule). The photo at Doc.25-1, PageID#426 is not road construction but it vividly demonstrates soil erosion.

Mr. Hardyman also checked the box NO as to whether the "proposed action" would potentially affect migratory bird populations. Again, he was not attempting to comment on the 15-foot rule, or the idea of removing "virtually all" of the trees in the right-of-way. Had he been commenting on those ideas, his answer would have been remarkably false, arbitrary and capricious, because you cannot cut down "virtually all" of the trees in a 15,900-mile, millions of trees, including large numbers of big trees 50-100 years old, especially during nesting season, without "affecting" migratory bird populations, as discussed in the Statement of Facts.

In summary, Mr. Hardyman, in his CECs, was not attempting to review the 15-foot rule or the idea of cutting down "virtually all" of the trees in the right-of-way. As mentioned, TVA has finally admitted that it has not conducted an environmental review of the 15-foot rule. The idea of attempting to use the 2012 CECs as "cover" for the 15-foot rule, or for TVA's "massive widening

initiative" to cut down "virtually all" of the trees in the right-of-way was not Mr. Hardyman's idea. It was an after-the-fact idea created by TVA counsel especially for purposes of this litigation.

d. Extraordinary Circumstances

The trial court correctly noted that a CE may not be used where "extraordinary circumstances" cause a "normally excluded action" to have a significant environmental effect. [Memorandum, Doc.212, PageID#25035-36,25044-45; 40 CFR 1508.4] If we assume, for the sake of argument, that right-of-way maintenance is a "normally excluded action," we have to consider whether there is anything extraordinary in TVA's "massive widening initiative" and reversal of its "historic practice" of maintaining buffer zones, that might have a significant environmental effect. Given the background already discussed, the question really answers itself. The current "massive widening initiative," with the removal of "virtually all" of the trees in the right-of-way for the first time in TVA history, certainly seems to be an "extraordinary circumstance" that would result in this "normally excluded action"

having a significant environmental effect, with the clear implication that a CE may not be used.

e. A "Major Federal Action" With "Significant Environmental Impact"

Any argument that the clear-cutting of an area half the size of the Great Smoky Mountains National Park would not be a "major federal action" with "significant environmental impact" would seem to be untenable.

f. NEPA Conclusion

In *Lichterman v. Pickwick Pines Marina, Inc.*, 2007 WL 4287586, *6 (N. D. Miss. 2007), *aff'd.* 2009 WL 221280 (5th Cir. 2009), the district court entered an injunction under NEPA ordering that "no work is to be performed" on TVA's clearing of trees within a 100-foot buffer area until TVA first evaluated and investigated the environmental effects of such tree clearing under NEPA. The court found that "TVA did not take the requisite 'hard look' at the environmental consequences and/or concerns as to the cutting of trees in the 100-foot buffer." *Id.* The amount of land (31 acres) and trees involved in the *Lichterman* case are infinitesimally smaller than in this case.

As far as Plaintiffs have been able to determine, there has never been an instance since NEPA became law in 1970 when a government agency has cleared millions of trees pursuant to a new agency "rule of thumb" through the use of a categorical exclusion. The case presents a massive, unprecedented, system-wide, aggressive cutting and removal of millions of trees, with no "environmental review" and no taking into account the number of trees being cut down, the most relevant factor for purposes of NEPA.

The Plaintiffs submit that there is evidence in the record that TVA recently implemented a 15-foot rule that would result in the removal of "virtually all" of the trees in its right-of-way for the first time in TVA history, including substantial numbers of 50-100-year-old trees that had been left standing when TVA initially installed the transmission lines, that this "massive widening initiative" would reverse its "historic practice" of leaving a buffer zone of trees at the outer edges of its right-of-way, that this initiative was implemented by a central budget decision for the year 2010, and that this was one of the "largest [maintenance]

projects that TVA has done, at a cost of $10-12,000 per mile, or more than $159,000,000 for the entire 15,900 mile right-of-way. Accordingly, the Plaintiffs submit that there is evidence in the record that TVA has implemented a "major federal action" with "significant environmental effect" under NEPA, without performing an environmental review, and that the trial court should not have dismissed the case on summary judgment.

The Plaintiffs further submit that there is evidence in the record that the 13 CECs that TVA filed, and unilaterally called the "administrative record" of "the project" were not the "administrative record" of TVA's environmental review of the 15-foot rule or of its "massive widening initiative" to remove "virtually all" of the trees in the right-of-way, because these ideas are not discussed or even referred to in the CECs, and because the official responsible for the CECs did not even know that TVA had made a decision to cut down "virtually all" of the trees in the right-of-way and had "no idea" the number of trees that TVA would cut down in 2012. And if the Court determines that the CECs do somehow constitute the administrative record of the 15-

foot rule, even though those ideas are not mentioned in the CECs, there is evidence in the record that TVA's determination that the new policy was "routine maintenance" or "minor upgrading," and therefore appropriately treated by CEC, was incorrect, arbitrary, capricious, and/or in bad faith, or that TVA did not consider all the "relevant factors," or has made a clear error of judgment, or has "entirely failed to consider an important aspect of the problem," or has "offered an explanation for its decision that runs counter to the evidence before the agency," or was not reasonable under the circumstances, and that accordingly its treatment of the new policy by categorical exclusion was impermissible under NEPA. See *Marsh v. Oregon Natural Res. Council*, *supra*, and *Kentucky Riverkeeper, Inc. v. Rowlette*, *supra*., and Memorandum, Doc.212, PageID#25033-37.

Conclusion

Wherefore, the Plaintiffs/Appellants respectfully request the Court to grant relief as follows:

1. To reverse the trial court's dismissal of Count 1 of the Second Amended Complaint, and remand for trial or other proceedings.
2. To reverse the trial court's dismissal of the Third Amended Complaint, and remand the case for discovery and trial or other proceedings.

Respectfully submitted,

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Counsel hereby certifies that on Nov. 12, 2013, a copy of the foregoing **pleading** was filed electronically. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt. Parties may access this filing through the Court's electronic filing system.

s/Donald K. Vowell
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