No. 15-6161

In the United States Court Of Appeals
For the Sixth Circuit

Donna W. Sherwood, et al,
Plaintiffs
v.

Tennessee Valley Authority
Defendant

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

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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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, Bonnie E. 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 issues in the case: 1) that TVA has not really suspended the 15-foot rule and that, to the contrary, it has continued to clear-cut the right-of-way, including both the wire zone and the buffer zones, just as it did before it supposedly suspended the 15-foot rule, 2) that TVA is continuing to destroy its historic buffer zones, just as it did before it supposedly suspended the 15-foot rule, and 3) that TVA is continuing to destroy every tree in the wire zone, just as it was doing before it supposedly suspended the 15-foot rule, and that, contrary to the trial court's finding, the wire zone is actually replete with millions of trees.

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 judgment that disposes of all of the Plaintiffs' claims. [28 U.S.C. §1291]
3. The final judgment was entered on August 24, 2015. The notice of appeal was filed on October 19, 2015 [Doc.286], within the 60 days allowed to appeal in an action in which a United States governmental agency is a party.

Issues for Review

1. Whether the trial court erred in holding that the case was moot, based on its finding that TVA had "suspended" the 15-foot rule, when there was ample or overwhelming evidence in the record, or at least a disputed question of fact, that TVA in fact *has not* suspended the 15-foot rule.

2. Whether the trial court should have granted the Plaintiffs' motion for summary judgment seeking an injunction prohibiting TVA from further implementing or re-implementing the 15-foot rule until it completes an environmental impact statement.

3. Whether the trial court erred in unquestioningly accepting TVA's bare assertion that it has suspended the 15-foot rule, when there was ample or overwhelming evidence in the record that TVA *has not* suspended the 15-foot rule, and where TVA's "evidence" was a conclusory and legally insufficient bare assertion.

4. Whether the trial court appropriately treated the declaration of a TVA vice president as that of a "government official" entitled to "more solicitude" [see *Mosley v. Hairston*, 920 F.2d 409, 415 (6th Cir. 1990)], particularly where TVA has a history of making

disingenuous misrepresentations in the case at bar, and where ample or overwhelming evidence, or at least a disputed question of fact, that TVA's claim that it has suspended the 15-foot rule is simply not true.

5. Whether the trial court erred in finding that TVA has already removed all of the trees in the wire zone of the right-of-way, or whether, in reality, the wire zone is replete with millions of trees.

6. Whether there is any evidence in the record to support the (supposed) fact that "[h]istorically, TVA has removed all trees directly under its power lines….", and, if so, whether there is countervailing evidence in the record, creating a disputed question of fact.

7. Whether the trial court correctly found that the Plaintiffs' NEPA claims were moot where TVA, although announcing that it has suspended the 15-foot rule, and further announcing that it would initiate a de novo NEPA review prior to implementing any new tree clearing practices in the *buffer zones*, has not announced that it will initiate any NEPA review prior to implementing any

new tree clearing practices in the *wire zone*, where the wire zone makes up between 2/3 and 3/4 of the right-of-way, and is replete with millions of trees.

8. Whether TVA should be allowed to redefine the decision challenged in the Complaint, and the 15-foot rule, as if it only applied to the buffer zones rather than to the entire right-of-way, including both the buffer zones and the wire zones.

9. Whether there is evidence in the record that a jury might find believable that TVA is continuing to implement the 15-foot rule.

10. Whether the record establishes that TVA's implementation of the 15-foot rule was a major federal action with significant environmental impact, and accordingly, whether the Court should enjoin TVA from further implementing or re-implementing the 15-foot rule, including the buffer zones and the wire zone, until such time as it may prepare an adequate environmental impact statement.

11. Whether the trial court should have entered a declaratory judgment that TVA has committed a flagrant and

massive violation of NEPA by clear-cutting thousands of miles of right-of-way and millions of trees and continuing the activity straight through three nesting seasons, destroying an untold number of active bird nests in the process, without first making the required environmental impact statement.

12. Whether the trial court erred in denying the Plaintiffs any and all discovery.

a. Specifically, whether the trial court should have allowed discovery that would have more fully demonstrated that TVA has not in reality suspended the 15-foot rule, and would have more fully demonstrated that the wire zone is replete with millions of trees.

b. Specifically, whether the trial court should have at least allowed the Plaintiffs to take the deposition of the TVA vice-president whose conclusory, self-serving, and un-cross-examined declaration formed the basis for the trial court's decision.

c. Specifically, whether the trial court should have allowed discovery that would have allowed the Plaintiffs to compare TVA's expenditures for tree clearing for the period before the 15-foot rule, for the period during which TVA admits that it implemented the 15-foot rule, and for the period after TVA supposedly suspended the 15-foot rule. (If TVA really has suspended the 15-foot rule, this discovery should demonstrate that its expenditures for tree-clearing rose dramatically with the implementation of the 15-foot rule, and then fell to the previous level after it was supposedly suspended.)

13. Whether the trial court erred in denying the Plaintiffs' (unopposed) Motion to File TVA's FOIA Responses [Doc.255], which would have established that TVA admits or claims that it does not have any records of its consideration of the decision to implement the 15-foot rule, or any records that would even identify the TVA officials who decided to implement it.

Statement of the Case

This is the second appeal in this action. This Statement of the Case will be divided into two sections, the first describing action through the first appeal, and the second describing action after the first appeal.

Action through the first appeal. Two of the Plaintiffs commenced the action by filing a Complaint on April 3, 2012, seeking an injunction to stop TVA from cutting down trees on the government-owned right-of-way that crosses their property. The Plaintiffs then filed an Amended Complaint, a Second Amended Complaint, and a Third Amended Complaint [hereinafter referred to as "The Complaint], adding several additional plaintiffs and causes of action, including the NEPA claims presently before the Court for the second time. (All claims other than the NEPA claims have been dismissed.) The Complaint alleged that TVA had illegally implemented a new policy sometimes known as the "15-foot rule," whereby it was going to 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, which would result in the removal of "virtually all" of

the trees in the right-of-way for the first time in TVA's then 76 year history. [Doc.1,8,62,170,¶11-40]

The Complaint alleged that the 15-foot rule was a major federal action with significant environmental impact, and that as such NEPA prohibited its implementation without an environmental impact statement, and that TVA had made no environmental impact statement, and thus had not taken a "hard look" at the environmental consequences of the 15-foot rule as was required by NEPA. [Doc.170,¶138,154] The Complaint alleged that TVA's implementation of the 15-foot rule was a massive, blatant and flagrant violation of NEPA, and asked the court to so declare and to enjoin TVA from further implementing the 15-foot rule until it made an appropriate environmental impact statement. [Doc.170,¶13, Prayers for Relief,1-6]

TVA responded by filing its thirteen annual "categorical exclusion checklists" for the year 2012, each one being 1,000+ pages long, claiming that these checklists were the "Administrative Record" of its decision to implement the 15-foot rule. [Doc.101-113 and Doc.114-126; this Court's opinion in the

first appeal: *Sherwood v. TVA*, 2014 WL 5368863, *5-6] The checklists did not mention or refer to the 15-foot rule in any way nor did they mention the fact that TVA was embarking upon a massive project to remove all of the trees in the right-of-way.[1]

The Plaintiffs filed a Motion for Preliminary Injunction, asking the Court to order TVA to suspend the 15-foot rule pending a final hearing. [Doc.10] The trial court denied the Plaintiffs' motion for a preliminary injunction, and subsequently dismissed the NEPA claims altogether. In its Memorandum Opinion denying the preliminary injunction, the trial court took specific note of the Plaintiffs' claims that "every day, hundreds of trees are cut down, more and more birds' nests are destroyed, and more and more baby birds are killed, and none of such can be brought back to life" and that "three million to fifteen million trees will be destroyed" as a result of the "reclearing project." [Doc.67,PageID#1914] Although the trial court was "cognizant" of these environmental concerns, and recognized that "there could be some irreparable harm to the environment in the absence of an injunction if

[1] As discussed in more detail below, TVA has, in the meantime, admitted that at that time nobody at TVA believed that these checklists really were the environmental review of the 15-foot rule.

plaintiffs ultimately succeed in the action," it nonetheless denied the preliminary injunction because of its finding that the plaintiffs are "not likely to succeed on the merits of their NEPA claim." [Doc.67,PageID#1914]. In the final order dismissing the NEPA claims, the trial court stated "The Court disagrees that TVA instituted a new policy" and concluded that TVA's 15-foot rule, which would remove "virtually all" of the trees in TVA's 15,900 mile right-of-way for the first time in TVA's then 76 year history, at a cost of some $15,900,000, was "routine maintenance." [Doc.212 PageID#25044,25049,25056] As for TVA's environmental review of the 15-foot rule, the trial court concluded that the fact that the claimed administrative record did not mention the 15-foot rule was of "no consequence." [Doc.212, PageID#25049] The trial court further concluded that "TVA took the requisite 'hard look' at the environmental consequences of the project before taking action." [Doc.212,PageID#25056]

On appeal, this Court reversed the trial court, disagreeing with the trial court on virtually all of the points mentioned just above.

This Court found that the 15-foot rule definitely was a new policy, stating as follows:

> Faced with public statements made by TVA spokespersons, and in light of the decision to remove dozens of trees from plaintiffs' properties, TVA was *unpersuasive* and when it argued to the district court that "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." (Emphasis added) [2014 WL 5368863, *8]

This Court then stated that although TVA "convinced the district court" to the effect that its policies were unchanged, the statements made by TVA's various spokespersons "contradict this conclusion." This Court also reversed the trial court's determination that TVA had submitted the administrative record of its decision to implement the 15-foot rule, plainly stating that the administrative record that TVA submitted "is not the record for TVA's 15-foot rule," [2014 WL 5368863, *7] and that the 2012 CEs "do not reflect consideration of the environmental consequences of changes in TVA's vegetation-management practices, in particular the 15-foot rule." [2014 WL 5368863, *7]. This Court plainly stated, supplying its own emphasis, that TVA

had not submitted "*any*" documentation showing that it had studied the possible environmental effects of the 15-foot rule:

> TVA has not submitted *any* documentation showing that it studied the possible environmental effects of imposing a 15-foot rule on its 260,000 acres of easements." (Emphasis in original) [2014 WL 5368863, *8]

This Court then reversed the trial court's ruling and remanded, with an order requiring TVA to "compile the administrative record for the decision that is challenged by the plaintiffs":

> Because the administrative record submitted by TVA did not consider the environmental consequences of the 15-foot rule, this matter must be remanded to the district court…. The TVA must compile the administrative record for the decision that is challenged by the plaintiffs…." [2014 WL 5368863, *10]

Action since the first appeal. On remand, the trial court ordered TVA to compile the administrative record for the decision challenged by the Plaintiffs, as ordered by this Court. [Doc.230] However, TVA did not file any such administrative record. Instead, it filed a document entitled "TVA's Motion to Dismiss on the Ground That the Plaintiffs' NEPA Claim is Moot" in which it admitted that it had no such administrative record. [Doc.232] In the same Motion, TVA purported to re-define the "challenged

decision," and the 15-foot rule, as being "TVA's adoption of a 15-foot rule for tree clearing in right-of-way *buffer zones*" and asserted that it had "suspended" the 15-foot rule (as so defined), and that it had "reverted to the right-of-way maintenance practices that were utilized prior to the introduction of the 15-foot rule." (emphasis added) [Doc.232,PageID#25162] TVA further stated that it "will initiate a de novo NEPA review of any new *buffer zone* clearing practices before adopting them." (emphasis added) The Motion did *not* state that TVA would initiate a review of any new *wire zone* practices before implementing them.

TVA filed the declaration of one of its vice-presidents in support of its "Motion to Dismiss." In her declaration, the vice-president asserted that she had "suspended" the 15-foot rule (as she defined it) and "reverted to the right-of-way maintenance practices that were utilized prior to the introduction of the 15-foot rule." She added the following statement:

> TVA is reviewing its practices for the clearing of trees in *buffer zones* of TVA rights-of-way, and will initiate a de novo NEPA review of any new *buffer zone* maintenance practices before adopting them. (emphasis added)

[Doc.233-1,PageID#25171]

Like the Motion, the Declaration did not state that TVA would initiate a review of any new *wire zone* practices before implementing them. The vice-president later submitted a second Declaration which also stated that TVA would initiate a NEPA review of any new "buffer zone" practices before adopting them, but did not state that TVA would initiate a NEPA review of any new "wire zone" practices before adopting them. The wording of the two declarations is as follows, in a side-by-side comparison:

Original Declaration [Doc. 233-1]

introduction of the 15-foot rule. TVA is reviewing its practices for the clearing of trees in buffer zones of TVA rights-of-way, and will initiate a de novo NEPA review of any new buffer zone maintenance practices before adopting them.

Supplemental Declaration [Doc. 240-1]

3. As I stated previously, TVA is reviewing its practices for the clearing of trees in buffer zones of TVA rights-of-way, and will initiate a de novo NEPA review of any new buffer zone maintenance practices before adopting them.

The vice-president did not state in either her original or supplemental declarations that the "de novo NEPA review" would be an environmental impact statement if the new practice turns

out to be the removal of all or "virtually all" trees in the right-of-way. [Doc.233-1, Doc.240-1]

In its Motion, TVA proffered the following explanation for the fact that it did not have an administrative record:

> Because TVA ***considered*** that the extensive 2012 maintenance-sector environmental review it filed as the administrative record (the Categorical Exclusion Checklists, Docs. 114-126) ***did address*** the environmental impacts of the decision challenged by the Plaintiffs, TVA did not create in 2012 a separate administrative record for the challenged decision (TVA's adoption of a 15-foot rule for tree clearing in right of way buffer zones) that can now be filed as TVA's NEPA documentation for the challenged decision. [Doc.232,PageID#25162] (emphasis added)

In its Brief accompanying the Motion, TVA repeated the claim that TVA had "considered" that the Categorical Exclusion Checklists "did address" the environmental impacts of the decision challenged by the Plaintiffs. [Doc.233,PageID#25165-25166] In its Reply Brief on the same Motion, TVA similarly argued that it "believed" that the sector environmental reviews that it submitted *did* consider the environmental consequences of the 15-foot rule…." [Doc.240,PageID#25232 (*emphasis in original*)] TVA similarly argued that "As TVA has stated, because it thought that

those sector reviews *did* address the environmental effects of reclearing the full widths of the rights-of-way, it did not create a separate administrative record for adopting the 15-foot rule." [TVA Reply Brief, Doc.240,PageID#25230 (*emphasis in original*)]

The Plaintiffs then filed a motion to strike TVA's claims that it "considered" or "thought" that the 2012 categorical exclusion checklists addressed the decision challenged by the Plaintiffs, because there was nothing in the record stating that any TVA official had any such belief at the time the checklists were prepared. [Doc.241]

The Plaintiffs further sought immediate discovery as to whether any TVA official had any such "thought," "belief," or "consideration," alleging that if any TVA official had such a "thought," "belief" or "consideration," TVA should be able to identify the official and provide documentation of his "thought," "belief" or "consideration." [Motion to Permit Discovery and Brief, Doc.245, Doc.246]

TVA then filed a Brief in Opposition to Plaintiffs' Motion to Permit Discovery admitting that no TVA official had any such

"thought," "belief" or "consideration," stating in particular that "TVA does not dispute the factual point that Plaintiffs seek to establish through this discovery," that TVA "does not contend that any TVA employee in 2012 authored an email, memorandum, or other document affirmatively expressing the reasoning as to why no separate environmental review of the 15-foot rule was performed when it was adopted in 2012," and further stating "Nor does TVA contend that any TVA official has a current recollection of having affirmatively engaged in that specific mental reasoning in 2012 prior to the adoption of the 15-foot rule." [Doc.249, PageID#25271]

The Plaintiffs then asked court permission to file TVA's FOIA Responses, in which TVA admitted or claimed that it did not have any records whatsoever of its decision to implement the 15-foot rule, or any records that would even identify the TVA officials who decided to implement it. [Doc.255,255-1,255-2] TVA filed a Response stating that it did not object to the filing of the FOIA documents "because they merely illustrate what TVA has already

represented to the Court." [TVA Response re FOIA, Doc.257,PageID#25349]

The Plaintiffs filed their Response to TVA's Motion to Dismiss [Doc.235] as well as their own Motion for Summary Judgment [MSJ] [Doc.237], in which they asked the Court to declare that TVA's implementation of the 15-foot rule was a major federal action with significant environmental impact, and that TVA had violated NEPA by implementing the 15-foot rule without making an environmental impact statement. The MSJ also asked the Court to enjoin TVA from re-instituting the 15-foot rule until it made an adequate environmental impact statement, and to enjoin TVA to fully suspend the 15-foot rule, that is, to enjoin TVA to suspend the 15-foot rule in the wire zone *and* the buffer zones, until it had made an adequate environmental impact statement, and that the Court specify that the injunction was conditioned on TVA's making an environmental impact statement, and not a mere environmental assessment or categorical exclusion treatment. [Doc.237] In addition to the material already on file, the Plaintiffs further supported their MSJ with the declaration of

water resources/hydrologist engineer Stephen C. Sanborn. [Doc.238]

The Court heard oral argument on July 9, 2015. [Doc.258] The Plaintiffs subsequently filed motions seeking permission to file the declaration of Billy Anderson of Paducah, Kentucky. In this declaration Mr. Anderson stated that he had tended a fruit and nut tree orchard in the TVA right-of-way crossing his wife's property in Paducah for more than 30 years, and that TVA had destroyed the orchard on June 1, 2015, (six months after TVA had assured the court that it had suspended the 15-foot rule), cutting down every tree in the right-of-way, including trees in the wire zone and buffer zones. The Plaintiffs also sought permission to file the declarations of Shiras Michael Walker and Anthony King establishing by aerial video, ground observation and photographs that TVA had clear-cut its 31-mile-long right-of-way through the Land Between the Lakes National Recreation Area [sometimes referred to in this brief as LBL], virtually eliminating the historic buffer zones from one end of the 31-mile right-of-way to the other, including large numbers of trees 40-100 years old, with this

activity likewise taking place after TVA had assured the trial court that it had suspended the 15-foot rule. [Docs. 260,263,267,268] The court allowed these declarations to be filed and directed TVA to file its responses to same. [Doc.262, Doc.270] TVA responded by filing declarations of various tree-cutting personnel and security officers acknowledging the tree-cutting and tendering explanations. [Doc.266,266-1 through 266-5, Doc.275,275-1] The trial court then filed its Memorandum Opinion and Order dismissing the case as moot, without mentioning the evidence that TVA had continued implementing the 15-foot rule at LBL and the Anderson property. The trial court's Memorandum and Order denied all other pending motions, including the Plaintiffs' motion for discovery and their unopposed motion to file TVA's FOIA responses [Doc.245, Doc.255], without explanation. [Doc.276, Doc.277]

Statement of Facts

1. TVA's 15,900 Mile Right-of-Way

The Tennessee Valley Authority [TVA] is a Federal corporation and is the nation's largest public power company, maintaining transmission lines in a 7-state region, including Tennessee.

[Complaint, Doc.170,¶1,2,6, PageID#24428-24431; Answer, Doc.183,¶1,2,6,PageID#24654-55] TVA has an easement or right-of-way for the transmission lines that 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 Response, Doc.18,PageID#239, TVA Website, Doc.29-1, PageID#494-95; GSMNP Website, Doc.29-3,PageID#504-05] The Federal government acquired the right-of-way by condemnation or grants of easement from property owners at various times beginning in 1933. Other parts of the right-of-way are located on public property. [TVA Website, Doc.29-1, PageID#494-95]

2. TVA Implements a New Policy (the 15-Foot Rule) That Would Remove "Virtually All" of the Trees In Its Right-of-way for the First Time In Its History, Including the Removal of Its Historic Buffer Zones

As this Court held in the opinion in the first appeal, in approximately 2012 TVA implemented a new policy that it referred to as the "15-foot rule," which would, according to TVA's

own documentation, remove "virtually all" of the trees in the right-of-way. [*Sherwood v. TVA*, 2114 WL 5368863] As TVA put the new 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.

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

A 12-11-2011 media article, with a TVA spokesperson as the source, read in open court during the hearing on preliminary injunction, stated as follows:

> 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, which is 200 feet for 500-kilovolt lines, and 100-150 feet for most others.
>
> [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, a TVA executive 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] (emphasis added)

In an article dated 3-5-2012, quoting the same executive, 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. The executive explained that this is "one of the largest [maintenance] projects TVA has done." The average cost of the project, said the executive, was $10,000-$12,000 per mile. [Article, Doc.21-6, PageID#319-20] ($159,000,000+ cost for the entire 15,900 mile right-of-way.) In the video clip, the executive 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]

The Knox County Commission enacted a Resolution recognizing that the 15-foot rule 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 calling on 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] On the same day that the Chattanooga City Council made its resolution opposing TVA's new policy, TVA took out full-page ads defending its new

policy in the principal Knoxville and Chattanooga newspapers. [2] [Doc.39-1, Doc.46-1, PageID#572,658]

TVA's "historic practice" had been to leave a 25-foot-wide buffer zone of trees along the outer edges of the easements. It also left vast numbers of trees in the wire zone. Where the right-of-way is 150 feet wide, the wire zone makes up 2/3 of the right-of-way. Where the right-of-way is 200 feet wide, the wire zone makes up ¾ of the right-of-way. 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; Williams Declaration with exhibits, Doc.23 through 23-8, PageID#391-405; Complaint, Doc.170,¶25-26, PageID#24437, and exhibits, Doc.170-1 through 170-43; Answer, Doc.183,¶25-26,

[2] It was noteworthy that TVA would take out full-page ads defending the policy, yet today cannot identify the officials who had decided to implement the policy. [FOIA Responses, Doc.255,255-1,255-2]

PageID#24656-57; Webpage, Doc.29-5, PageID#511; Media Article, Doc.21-4, PageID#316, TVA Guidelines, Doc.18-1,PageID#261, Doc.18-2,PageID#264]

An official TVA spokesperson 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)]

3. TVA Was Unable to Comply With This Court's Remand Order Because It Had No Administrative Record of Its Decision to Implement the 15-foot Rule

On remand, TVA admitted that it had no administrative record of its decision to implement the 15-foot rule. In the words of the trial court, the order to submit the appropriate administrative record was "an order TVA could not comply with." [Doc.276, PageID#25713]

4. TVA's Assertions That It Has Suspended the 15-Foot Rule and the Substantial Evidence that It *Has Not*

As discussed above, a TVA vice-president filed declarations in December, 2014, stating that TVA has "suspended" or "completely suspended" the 15-foot rule and "reverted to the right-of-way

maintenance practices that were utilized prior to the introduction of the 15-foot rule." [Doc.233-1,240-1] The Plaintiffs filed substantial evidence demonstrating that this assertion simply is not true, including TVA's clear-cutting of the right-of-way in the Land Between the Lakes National Recreation Area and at the Anderson property in Paducah, Kentucky. Before considering this evidence, it should be recognized that this is simply what the Plaintiffs were able to put together on their own, without benefit of discovery, and is thought to represent only a tiny fraction of the right-of-way that TVA has clear-cut since announcing that it has supposedly suspended the 15-foot rule. The trial court denied any and all discovery. The Plaintiffs' evidence is summarized below, with one section dealing with LBL and another dealing with the Anderson property.

a. The Land Between the Lakes National Recreation Area.

Beginning in approximately February of 2015, two months after TVA assured the trial court that it had "fully suspended" the 15-foot rule, and reverted to its prior practices, which included leaving a buffer zone of trees at the edges of its right-of-way, TVA

clear-cut its entire 31-mile right-of-way through the Land Between the Lakes National Recreation Area located in Tennessee and Kentucky, eliminating the historic buffer zone from one end of the 31-mile right-of-way to the other, including the destruction of any number of trees ranging from 40 to more than 100 years old. [Declaration of Shiras M. Walker, Doc.271 and 271-1-271-5; Declaration of Anthony King, Doc.272 and 272-1-271-3] This destruction took place between February and July 2015, according to the U.S. Government website [Doc.271-3, PageID25612, Doc.271-4]

At the request of Plaintiffs' counsel, Shiras Michael Walker, Jr., hired a private plane and pilot and flew over the LBL on July 23, 2015, making a video recording of the entire length of the right-of-way. The entire 50 minute video is seen in this clip: https://youtu.be/ZQe27uD9f-Q [Doc.271,PageID#25603-25604,¶5] Mr. Walker also made a three-minute compilation of 13 selected segments of the aerial video which can be seen in this clip: https://youtu.be/VwZgOpEYlbM [Doc.271,PageID#25605,¶9] Mr. Walker attached to his declaration a collection 13 "before and

after" comparisons, which correspond to the 13 segments in the three-minute video clip. [Land Between the Lakes Before and After Images, Doc.271,PageID25605,¶8, Doc.271-5] The "before" images are Google Earth images made before TVA clear-cut the right-of-way, and the "after" images were taken from Mr. Walker's aerial video made after TVA clear-cut the right-of-way. The images show that the cleared area of the right-of-way before the clear-cutting ranged from 84 feet to 131 feet, with an average width of 97 feet. After the buffer zones were eliminated, the cleared area of the right-of-way was a uniform 150 feet as seen in the images and as stated in the government website. ("When completed, approximately 75 feet from the center on each side will be cleared….") [Doc.271-3,Doc.271-4]

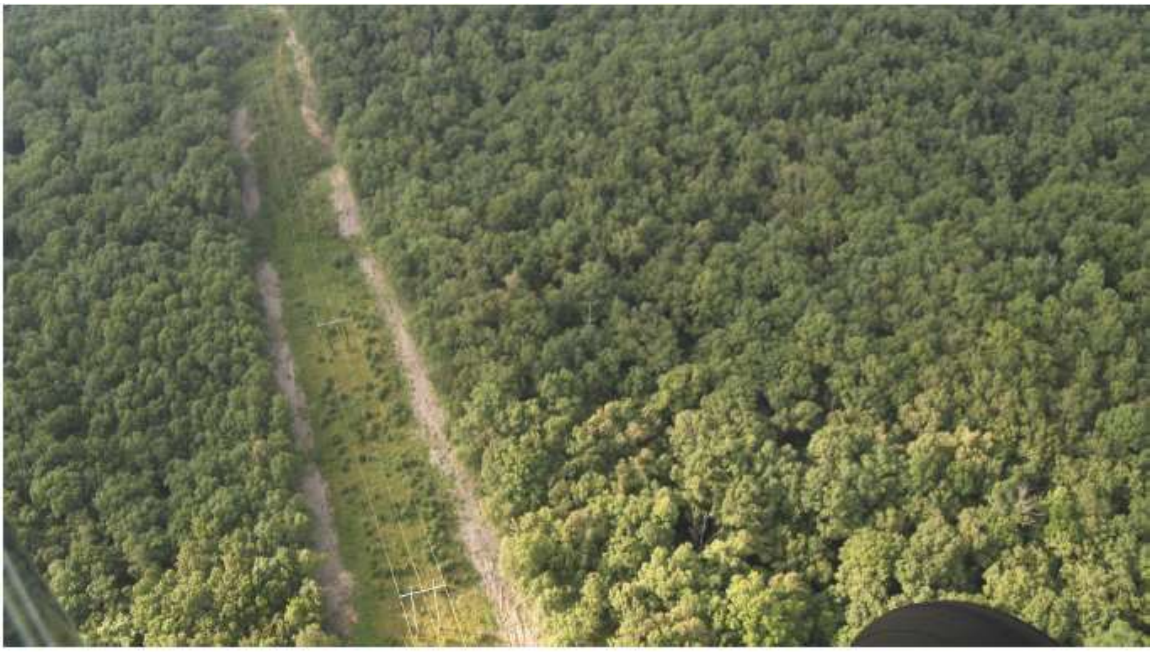
The buffer zones are seen as green on the edges of the right-of-way in the "before" images, and as a grayish-brown ribbon on the edges of the right-of-way in the "after" images. The video and the "before and after" images clearly depict the total destruction of the buffer zones from one end of the 31-mile right-of-way to the other. [Doc.271, Doc.271-1-271-5]

One example of the "after" images, clearly showing the elimination of the buffer zone, is shown below:

10-After: Aerial Video July 23, 2015 Minute 30:39

[Doc.271-5, PageID#25645]

Another example of the "after" images is shown below:



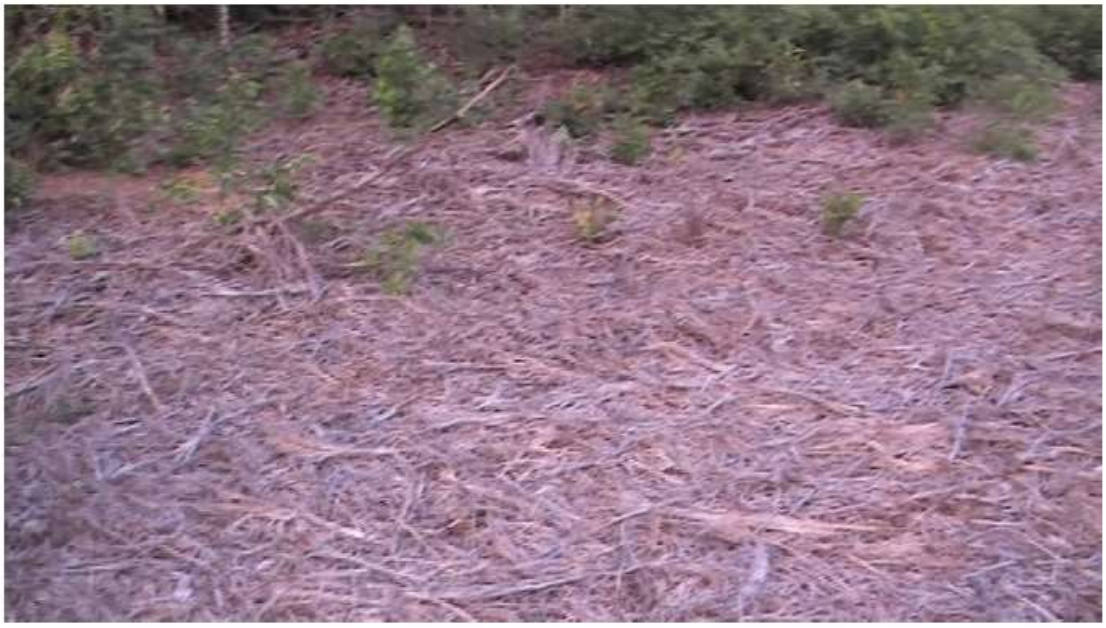
13-After: Aerial Video July 23, 2015 Minute 38:17 (above)

[Doc.271-5,PageID#25648]

Forester Anthony King made on-the-ground observations (on July 31 and Aug. 1, 2015) and confirmed that the grayish-brown ribbon seen in the aerial video is a layer of mulch or shredded timber generally 25 feet wide on each side of the right-of-way, and 6-14 inches deep, or more, where the buffer zones used to be. Mr. King confirms that TVA has thus virtually eliminated the buffer zones on both sides of the right-of-way, leaving in its place the referenced layer of mulch or shredded timber. [Doc.272, Doc.272-1-Doc.272-3] One of Mr. King's on-the-ground photos is shown below:

Collective Exhibit 3 to Anthony King 5th Declaration

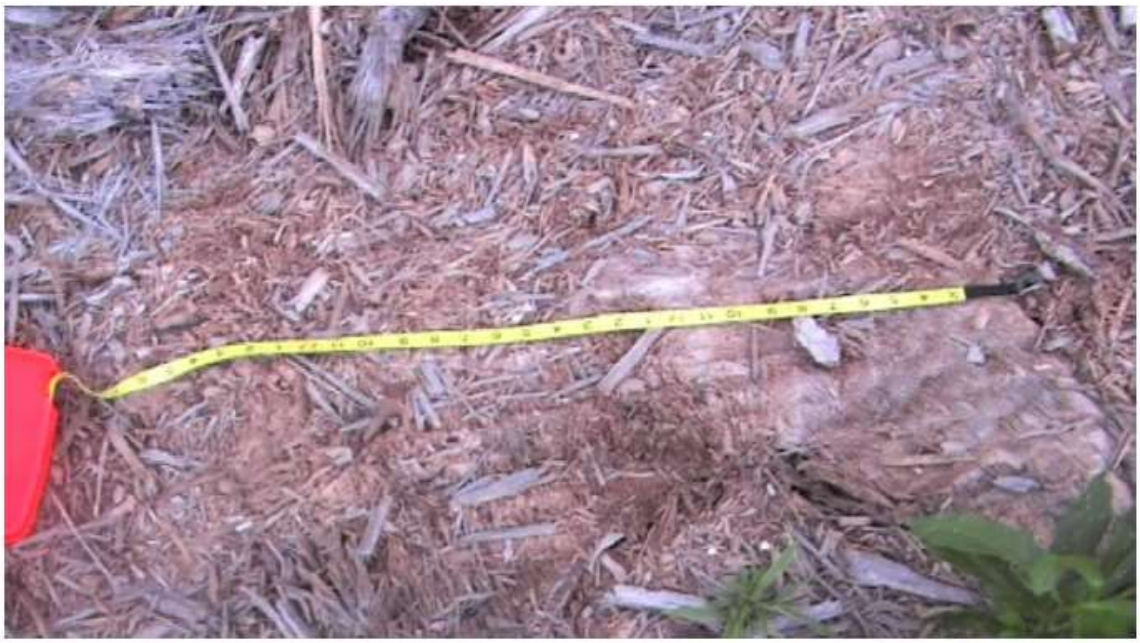
Picture No. 1



[Doc.272-3,PageID#25674]

The remnants of one 24"+ stump that Mr. King observed is shown below, partially hidden in the "mulch"/shredded tree remains:

Picture No. 11 (20.jpg)



[Doc.272-2,PageID#25673 (Picture 11)]

Mr. King surveyed 9 locations on the right-of-way, taking approximately 30 minutes at each location, walking short distances on the right-of-way and observing what was there to be observed. Mr. King found that the stumps were difficult to locate because they were covered or camouflaged by the layer of "mulch" or shredded timber. He did not attempt to walk the entire areas surveyed, he did not make any effort to pull back or remove the layer of mulch, he did not make a comprehensive or dedicated effort to find all of the stumps that were there, nor did he make any effort to document every stump that he observed.

Nonetheless, he documented a large number of stumps, including innumerable stumps in the range of 2-6 inches and 11 large stumps ranging from ten to 24 inches in diameter, ranging from 40 years old to more than 100 years old. He stated his opinion that there are "many, many more stumps concealed or camouflaged by the layer of mulch, likely a vast number of stumps, with many of them being large stumps equivalent to the ones documented just above." [Doc.272, 272-1-3]

This destruction took place between February and July of 2015, according to the U.S. Government website. Mr. King stated that this would constitute the bulk of the 2015 nesting season for the birds and other wildlife living in the trees that were cut down. With that assumption, Mr. King, who is also a birder, stated that the clearing operation at Land Between the Lakes destroyed a "vast number" of active nests of birds and other animals. [Doc.272,PageID#25653,¶13]

b. The Anderson Property in Paducah, Kentucky.

On June 1, 2015, some six months after TVA claimed that it had "suspended" or "completely suspended" the 15-foot rule, TVA

contractors, accompanied by armed guards, clear-cut the right-of-way on property owned by Linda Anderson in Paducah, Kentucky, cutting down all of the trees in the right-of-way, including 21 fruit trees no more than 17 feet tall, about half of the trees being in the wire zone and half in the buffer zones. TVA's contractors, accompanied by armed guards, showed up with no advance warning, and stated that they were going to cut down each one of the trees, and then they proceeded, over the strenuous objections of Mrs. Anderson's husband, Billy J. Anderson, to do so. Mr. Anderson had tended and pruned the fruit trees on the property for more than 30 years with no complaint from TVA. He kept the trees pruned at or below 17 feet "because that is the way a good orchard is kept, to keep the fruit accessible and to make it easier to apply pesticides and fungicides." Numerous of the fruit trees that TVA cut down were only 12 feet tall and some were only 7 feet tall. No matter the height, TVA cut them all down on June 1, 2015. [Doc.263,PageID#25387-25393,¶1-24]

Mr. Anderson began tending these trees as a hobby and then became heavily involved in studying fruit and pecan trees. Every

year that he did it he got more involved. He started selling the fruit in 1988 as a way of making a living, continuing until TVA cut them down. He did not start selling pecans until about 1999 because it takes about 19 years for pecan trees to bear fruit. Although he made money selling the fruit and pecans, the main reason he kept the orchard was not to make money but for the sheer enjoyment of keeping the orchard. After Linda, his wife, tending these trees was the main thing that gave him joy in life. He explained that it broke his heart when the orchard was destroyed. [Doc.263,PageID#25390,¶12]

The operation took all morning, with a crew of approximately five men using chainsaws, not including the right-of-way specialist and the marshals. When the crew was nearly finished, one of the marshals told Mr. Anderson that they had decided that they could leave ten trees in the buffer zone. Of these ten trees, only two were bearing fruit, with the others being only two inches in diameter. Mr. Anderson, who by that time was extremely angry, told them words to the effect of "Just do whatever it is that you have to do," and he may have added "go ahead and cut them all

down if you want to." At that point, Mr. Anderson explained that "I had just witnessed 30+ years of my life go down the drain" and that "[t]hey had just cut down, before my very eyes, virtually my entire orchard of fruit trees and pecan trees for absolutely no reason, just because they had the power to do so." [Doc.263,PageID#25388,25392,¶6,18, Doc.274,PageID#25685-25686,¶10]

Mr. Anderson further explained as follows:

> The orchard was already destroyed. They had security officers present as if I supposedly presented some law enforcement issue. The security officer told me that they could save the last row of trees on the northern side of the right-of-way. This consisted of 8 fruit trees approximately 2 inches in diameter and maybe 6 feet tall, that were not producing fruit, and two other small fruit trees that produced very little fruit. At that point they had already destroyed my orchard, an orchard that I had spent more than 30 years tending and an orchard that I had spent a great deal of money on insecticide and other materials.

[Doc.263,PageID#25685-25686,¶10]

Mr. Anderson explained that for the TVA representatives to tell him that they could leave those few trees was "insulting and like throwing salt in the wound, not to mention the fact that I knew that they would just come back and cut them down as soon as they

grew a little more." He told the TVA agents that he never wanted to see them or anybody else from TVA ever again. At that point the TVA agents proceeded to cut down the last ten trees. [Doc.263,PageID#25685-25686,¶10]

At one point in the operation, Mr. Anderson stated that "I did appropriately cuss Cletus [the TVA right-of-way specialist] out" and told him to "get out of my yard" referring to property that was not in the right-of-way. Mr. Anderson explained that he had the right to tell Cletus to get out of his yard, and that he did not threaten him and did not do anything threatening to him or to the crew. He further explained that one of the officers threatened to arrest him for cussing Cletus out and that "I didn't know and do not believe that was against the law." [Doc.274,PageID#25687-25689,¶14-16]

It would take 8-10 years for newly planted fruit trees to bear fruit if Mr. Anderson planted them today, and 19 years for newly planted pecan trees. Mr. Anderson stated that by that time at his age he might not have much time left to enjoy them. [Doc.263,PageID#25390,25392,¶12,19]

Mr. Anderson stated that the TVA agents never gave any reason or justification for cutting down the trees other than the fact that "the trees were located in the right-of-way and it was their right-of-way." They never said that the trees were hazardous or posed any threat to the transmission lines. When they cut down the trees the agents did not give Mr. Anderson the option of pruning the trees himself, as he had done for the past 30 years. [Doc.263,PageID#25392-25393,¶20-22]

Some of the fruit trees that TVA cut down on the Anderson property are shown below, including some in the wire zone and some in the buffer zones:

28
Before

[Doc.263-3,PageID#25411 (Picture 28)]

One of the trees that TVA cut down was a red oak located approximately 62 feet from the center-line. TVA had pruned that tree once in the 1980s and again in 1998. One of the men that did the pruning in 1998 bought a half bushel of apples from Mr. Anderson (Grimes Golden Delicious). Other than pruning the red oak, no TVA official or agent has ever told Mr. Anderson that any of the trees posed a risk or hazard to the transmission lines. Mr. Anderson stated in his declaration that the fact that the trees, or similar trees, had been present in the right-of-way since the 1970s with no problems and with no complaint by TVA, makes it very clear that the trees in fact posed no risk or danger to the transmission lines. If the trees posed any danger or risk to the transmission lines, said Mr. Anderson, he was sure that TVA would have let him know and would have done something about it. [Doc.263, PageID25389-25393,¶9,12-14,17, Doc.274, PageID#25685,¶9]

The stump of each of the 27 trees is shown in the photographs attached to Mr. Anderson's Declaration, as are several before and

after pictures. [Doc.263, Doc.263-2, Doc.263-3] One of the stumps is shown below:

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TVA had threatened to cut down the Anderson trees in May 2014 (a month before the oral argument before this Court in the first appeal). When he heard about it, Mr. Anderson asked, "What did I do wrong?" The TVA representative told him "You didn't do anything wrong, they just have to come down," without giving a reason. [Doc.263,PageID#25390-5391, Doc.274, PageID#25683,¶3,15]

A TVA spokesperson explained at that time (May 2014) that the trees were being cut down because "Any tree or vegetation more than 15 feet in maturity (in the easement) will have to be removed." The spokesperson explained that "We apply a consistent and fair policy in every service area… The same standards apply to everybody." [Doc.263-1,PageID#25394-25395]

But for some reason that is not explained in the record, TVA did not cut down his orchard in 2014. It did not cut down the orchard until June 1, 2015. [Doc.263,PageID#25391-25392,¶15-17, Doc.274,PageID#25683,¶3]

Mr. Anderson stated that there had never been any incident of any of their trees touching or endangering the TVA transmission lines since he began living there in 1973. He has lived in Paducah all of his life (except for four years in the Navy), regularly reading the newspaper (he was a printer employed at the local newspaper prior to retirement), and he had never heard of any incidents involving trees in or around Paducah touching or endangering the TVA transmission lines. [Doc.274,PageID#25690,¶20]

Note: As discussed just below, while TVA claims that it has "suspended" or "completely suspended" the 15-foot rule, it has, at the same time, attempted to redefine the 15-foot rule as if it only pertains to the buffer zones, and not to the wire zone. And, although the TVA executive has stated that she would make a "de novo NEPA review of any new buffer zone maintenance practices before adopting them," she has made no such assurance about the wire zone, which as mentioned, makes up 2/3 to ¾ of the right-of-way.

5. The Wire Zone Is Replete With Millions of Trees

Forester Tony King documented 46 trees in the wire zone in a 4,300-foot segment of the right-of-way in Knoxville known as the West Hills neighborhood. Although this is a lightly wooded section, it would still extrapolate to more than 1,000,000 trees in the wire zone for the entire length of the right-of-way. [King Declaration (3rd), Ex. 1, Doc.44,PageID#643-644]

Mr. King provided a table of the trees that he found in the wire zone in one small stretch of the West Hills segment, listing the species and height of each tree, many of them being 45-60 feet tall:

Exhibit 1
Trees Located in the Wire Zone
West Hills Segment – Sheet #3

Reference #	Species/Description	Height Range (15's)
1	Group of 10 Magnolias & Redbuds	15'-30'
2	2 Maples	45'-60'
3	Eastern Red Cedar	45'-60'
4	Apple	15'-30'
5	Group of 9 Fruit Trees	< 15'
6,7	Cherry	45'-60'

[Doc.44-1,PageID#644]

Mr. King included an aerial view of this stretch of the wire zone, with the trees in the wire zone circled, clearly demonstrating that they are indeed located in the wire zone:

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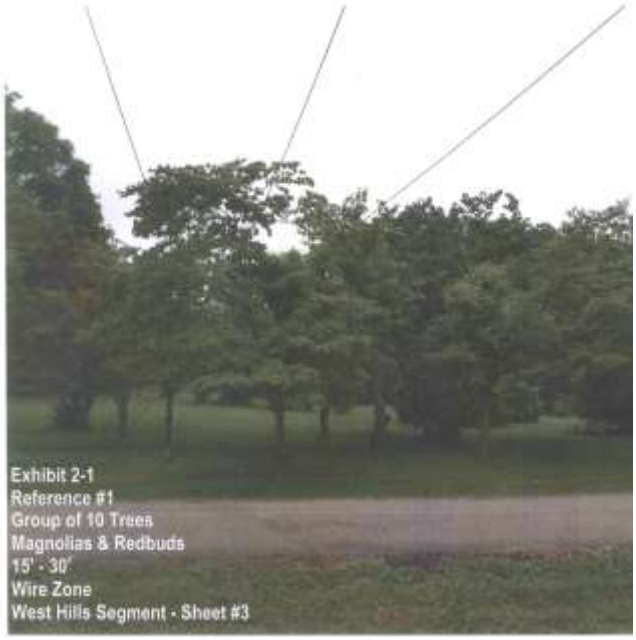
[Doc.44-1, PageID#643]

Mr. King also attached on-the-ground photos of these wire zone trees, some of which are pictured below:

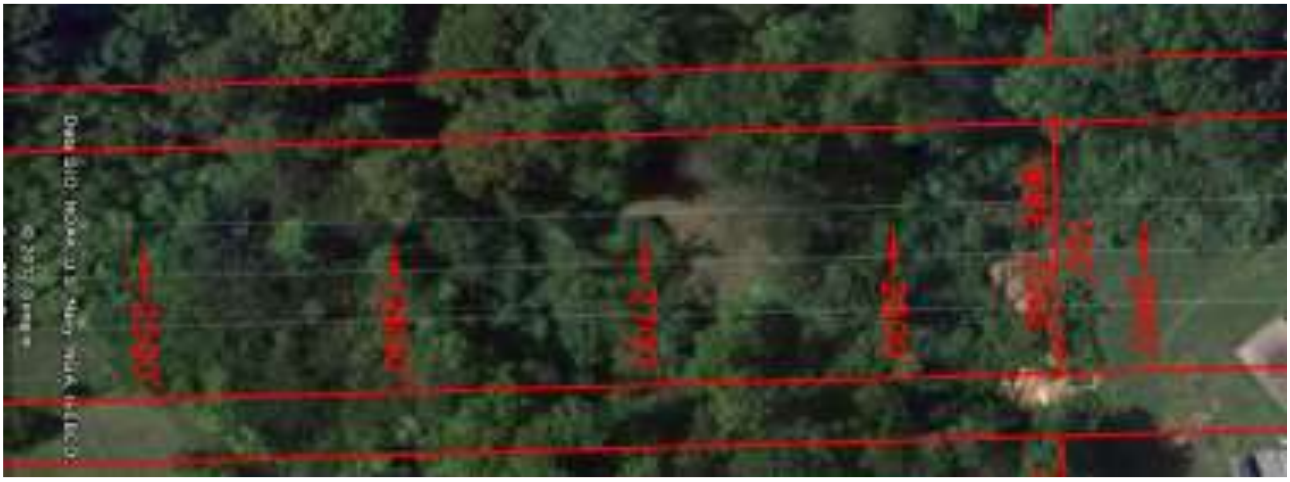
[Doc.44-4, PageID647 (45-60 foot western red cedar)]

[Doc.44-3, PageID646 (Two 45-60 foot maples)]

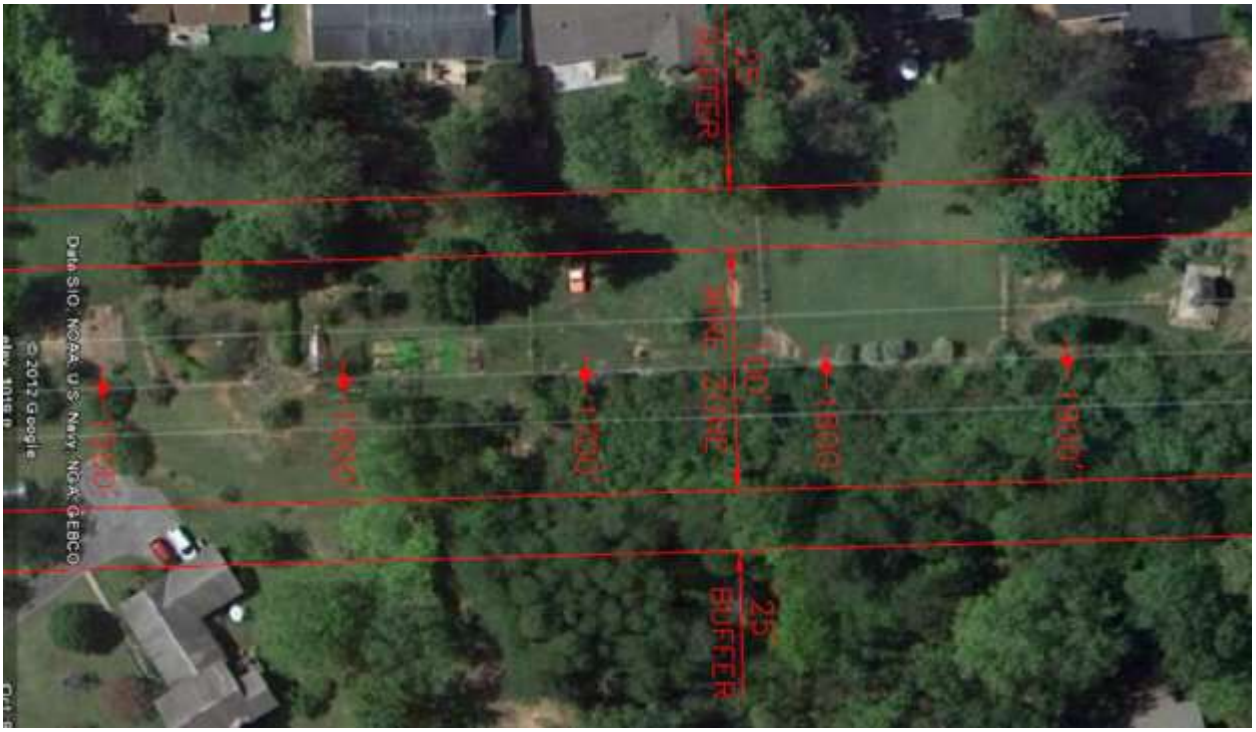


[Doc.44-2, PageID#645 (group of 10 magnolia and redbud trees)]

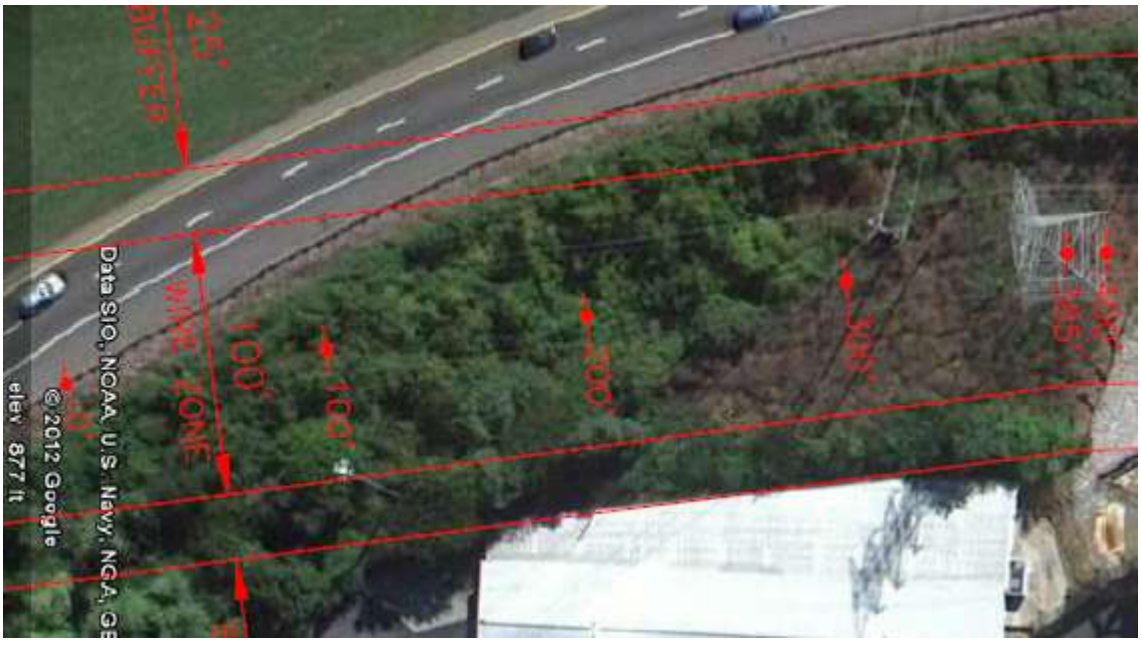
The record contains numerous aerial views of large sections of the right-of-way with a vast number of trees in the wire zone, for example, the following views near Westminster Place and in the I-40 Buffer:



[Doc.37-6, PageID561 – near Westminster Place]



[Doc.37-4, PageID559 – near Westminster Place]



[Doc.36-1,PageID#542 – I-40 Buffer]

The record does not contain a count of the trees in the wire zone of these densely forested segments of the in the wire zone, but they are obviously innumerable, a vast number of trees.

Another example of trees in the wire zone is seen at the Anderson property Paducah, Kentucky:

28
Before

[Doc.263-3,PageID#25411 (Picture 28)]

6. TVA's Attempt to Redefine the "Challenged Decision"

In its Motion claiming that the case is moot, TVA purported to re-define the "challenged decision" as being "TVA's adoption of a 15-foot rule for tree clearing *in right-of-way buffer zones*…." (emphasis added) [Doc.232,PageID#25162] TVA's vice-president attempted to do the same thing, characterizing (as a layperson)

this Court's opinion as supposedly holding that the "administrative record filed in support of TVA's decision to adopt a '15-foot rule' for selecting trees to be removed from the *buffer zones* of TVA's transmission line rights-of-way to be inadequate." [Doc.233-1,PageID#25171] (emphasis added)

This Court's decision was actually stated as follows, with no limitation as to the buffer zones:

> The complaint alleged that TVA's alteration of its vegetation-maintenance practice—the removal of all trees over 15 feet, as well as those trees that will grow to a height over fifteen feet—constitutes a major federal action under NEPA. The TVA must compile the administrative record for the decision made that is challenged by the plaintiffs, in order for the court to evaluate the decision's propriety under NEPA.

[*Sherwood v. TVA*, 2114 WL 5368863,*10]

The Complaint itself describes the "challenged decision" in numerous places to be TVA's removal of "virtually all" of the trees in the right-of-way, with no limitation to the buffer zones. For example, the Third Amended Complaint states as follows:

> 10. TVA has recently implemented a new practice or policy whereby it is going to cut down, clear and/or remove virtually all of the trees in its right-of-way. [Doc.170]

The Complaint then describes the right-of-way as being 150-200 feet in width, and states that TVA, pursuant to the new policy, is going to remove "virtually all trees in its right-of-way." [Doc.170, §11-12] The Complaint then states that TVA agents had communicated that TVA was going to remove all trees 15 feet or taller, or that might grow to 15 feet, throughout the 7-state region. [Doc.170, ¶15] These descriptions of the challenged action are not limited to the buffer zone. The Third Amended Complaint then states that "[t]he area that TVA plans to effectively clear-cut is approximately 280,000 acres, or more than 437 square miles," with this area being "approximately half the size of the Great Smoky Mountains National Park." [¶11] The stated area is the area of the entire right-of-way, not just the buffer zones. The buffer zones, considered alone, would be a much smaller number of acres and square miles, approximately ¼ or 1/3 of the stated amount. The Complaint throughout refers to removing "virtually all of the trees in the right-of-way" with no mention of the challenged policy being limited to the buffer zones. For example, the Complaint states that "TVA's new practice or policy,

sometimes referred to as the 15 foot rule, will effectively result in a clear-cut of virtually all of the trees in the TVA right-of-way…", with no limitation to the buffer zones. [¶56]

7. The Environmental Effects of the 15-Foot Rule

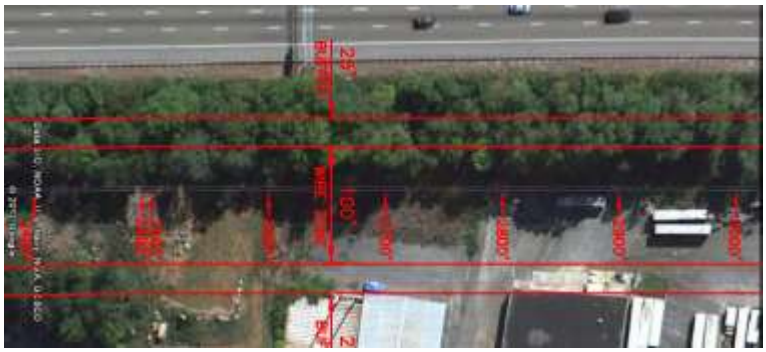
In the West Hills neighborhood of Knoxville surveyed by forester King, and discussed in Section 5 above, under the heading "The Wire Zone Is Replete With Millions of Trees," the 15-foot rule would destroy 154 trees in a 4,300 foot segment (46 in the wire zone and 108 in the border zone, including numerous 45-60-foot trees), and would ruin numerous backyards, for example the ones pictured in Section 5, above. [King Declaration, Doc.44, PageID#640-641; Doc.44-1 through 44-8,PageID#643-651, Billingsley Drawings, Doc.40 through 40-7]

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, Deed, Doc.140-

1,PageID#24145, Transcript, Doc.90, PageID#2359]

These examples, which do not include any densely wooded sections, would extrapolate to 3,000,000-15,000,000 trees that would be felled in the entire 15,900-mile right-of-way, including both the wire zone and the buffer zones. The record does not include a count of the trees in the more densely wooded segments of the right-of-way, such as the ones pictured above, but if segments like that were included in the extrapolation the total would be many multiples of 15,000,000 trees.

Plaintiff Anthony Billingsley, a professional draftsman, drew the footprint of three segments of the right-of-way in Knoxville onto Google Earth images, including the West Hills segment discussed and pictured above. 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 second 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. [Doc.36 through 36-11, PageID#539-552] A small part of the buffer is seen in the image snipped above. (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 third segment that Mr. Billingsley studied runs 4,000 feet between Westland Drive and Gleason Road, including Westminster Place and the two heavily wooded sections shown pictured earlier in this brief, which would be wiped out by the 15-foot rule, including many trees in the wire zone and many in the buffer zones. [Doc.37-4,PageID#559, Doc.37-6,PageID#561]

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] One example is pictured 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. [King 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 very 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, including the ones pictured below.

[Doc.25-28, PageID#453]

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 [See photos of the stumps at Doc.141-1, PageID#24149-24157] 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]

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. TVA had left these trees standing when it 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 cleared the right-of-way 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. [Doc.34, PageID#529-534]

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, many of them being 100-150 years old, stating that simply taking that many trees out of the ecosystem is a significant event, standing alone. [It is widely known that by absorbing carbon dioxide and trapping carbon, forests play a vital role in reducing greenhouse emissions.] 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, Doc.25-30, Doc.25-31, PageID#458-459]

The environmental effect of the 15-foot rule on the Williams property and on the right-of-way as a whole are further described in the letter-report attached to the Declaration of Stephen C. Sanborn, a water resources engineer and hydrologist. Mr. Sanborn, with a master's degree in Civil Engineering, Eco-Hydraulics, both from Colorado State University, described the

Williams property as "approximately 2.66 acres of forested land with moderate to steep slopes." He stated that the trees on the property enhanced the stability of the slopes, and that the removal of trees from the property pursuant to TVA's new policy presented concerns for "slope stability" and would "likely increase the creep rate of the soil regolith and increase the chances for mass wasting events…" [A mass wasting event is a large-scale movement of earth, usually down a slope, including landslides.] Mr. Sanborn also stated that the removal of the trees would degrade the stability of the soils and increase runoff from the property. [Doc.238-1]

Mr. Sanborn also stated that the clearing of "virtually all" of the trees in the 15,900 mile TVA right-of-way would have numerous and adverse hydrologic and environmental effects, including soil erosion, degradation of stream habitat due to increased sediment and nutrient loads, changes in the flow regime for streams, including larger runoff volumes, increases in stream temperature, and destruction of wildlife habitat. [Doc.238-1]

Summary of Argument

The trial court erroneously accepted the bare conclusory assertion of a TVA vice-president that she had "suspended" the 15-foot rule, and found the case to be moot, when there was ample or overwhelming evidence in the record, or at least a contested issue of fact, that TVA has *not* suspended the 15-foot rule. The evidence includes aerial video, photographic evidence, and on-the-ground observations that TVA has, beginning two months after it advised the court that it had suspended the 15-foot rule, clear-cut its entire 31-mile right-of-way through the Land Between the Lakes National Recreation Area, eliminating the historic buffer zones, including vast numbers of 40-100-year old trees, just as it was doing before it supposedly suspended the 15-foot rule. The evidence also includes the declaration of Billy Anderson that six months after TVA advised the court that it had suspended the 15-foot rule, it cut down every tree in the right-of-way on his wife's property, destroying an orchard that he had been tending for more than 30 years. There is thus strong evidence that TVA has *not* suspended the 15-foot rule, but is continuing to remove "virtually all" of the trees in the right-of-way, including eliminating the

historic buffer zones, and cutting down every tree in the wire zone, just as it did before it supposedly suspended the 15-foot rule. TVA has thus not carried the "formidable burden" of showing that it is "absolutely clear" that it has suspended the 15-foot rule, thus supposedly rendering the case moot, nor do its assurances that it has done so "appear genuine." For that reason the trial court's conclusion that the case was moot, without even mentioning the mass of evidence to the contrary, must be reversed.

At the same time that she declared that she had suspended the 15-foot rule, the vice-president purported to redefine the "challenged decision" as if it was the implementation of the 15-foot rule in the *buffer zones* of the right-of-way, when the "challenged decision" was, in reality, the implementation of the 15-foot rule in the entire right-of-way, both buffer and wire zones. After claiming that she had suspended the 15-foot rule, as she defined it, the vice-president also stated that TVA would initiate a "de novo NEPA review" of any new tree-clearing practices in the *buffer zones* before implementing them, but she has refused to give any assurances that it would do so for any new tree-clearing practices

in the *wire zone*, which makes up 2/3 to ¾ of the right-of-way. The trial court erroneously held that this failure was "not material" because TVA had already (supposedly) cleared virtually all of the trees in the wire zone. This finding is simply not true. In reality, the wire zone is replete with millions of trees in the wire zone, as amply demonstrated by the evidence in the record, including aerial and on-the-ground photographs. There is no evidence whatsoever in the record, not even a scintilla, that TVA has already cleared all of the trees in the wire zone. That being the case, the trial court's ruling must be reversed.

The trial court erroneously made these rulings without allowing *any* discovery.

Argument

1. The Trial Court Incorrectly Found the Case to Be Moot Due to Its Erroneous Finding That TVA Has Suspended the 15-Foot Rule, Where There Was Ample or Overwhelming Evidence in the Record, Or at Least a Disputed Question of Fact, That TVA In Fact *Has Not* Suspended the 15-Foot Rule

Standard of Review: The ordinary NEPA case is apparently reviewed on an "administrative record." That is not possible here, where there is no administrative record. That being the case it

would appear that the Court should consider the case according to the ordinary rules of procedure.

The trial court dismissed the case by granting TVA's motion claiming that the case was moot. TVA's motion was supported by the declarations of a TVA vice-president that she had "suspended" the 15-foot rule. [Docs. 232,233-1,240-1] TVA did not specify which rule of procedure its motion may have been filed under, but since it was supported by matters outside the pleadings, i.e., the vice-president's declarations, it was in effect a motion for summary judgment. [See F.R.C.P. 12(d)] At the same time, the trial court denied the Plaintiffs' motion for summary judgment. [Doc.237] The case was therefore before the trial court in effect on cross-motions for summary judgment. In that posture, the case should not have been dismissed if there was any genuine issue of material fact as to whether TVA has suspended 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). The question is

reviewed *de novo* by this Court. See *Bench Billboard Co. v. City of Cincinnati*, 675 F.3d 974, 980 (6th Cir. 2012).

Argument: The word "suspension" is defined as "the act of stopping or delaying something for a *usually short period of time*." http://www.merriam-webster.com/dictionary/suspension (emphasis added) That being the case, at best, the plain meaning of the vice-president's declaration that she has "suspended" the 15-foot rule is that she has stopped or delayed it "for a usually short period of time." The trial court simply accepted the TVA vice-president's bare assertion that she had "suspended" the 15-foot rule, without even mentioning the ample and overwhelming evidence submitted by the Plaintiffs that the bare assertion simply is not true, and at the same time without allowing discovery on the subject. The trial court accepted the assertion without question, first stating that the TVA vice-president "suspended use of the fifteen-foot rule and reverted to the right-of-way maintenance practices that were utilized prior to the introduction of the 15-foot rule" and then stating that "[a]dmittedly having no other record to submit for review of the adoption of the 15-foot rule, TVA suspended its use."

[Doc.276, PageID#25709 and PageID#25713] The court correctly took note that the burden of demonstrating mootness is a "*heavy one*" and that a defendant claiming mootness bears "the *formidable burden* of showing that it is *absolutely clear* the allegedly wrongful behavior could not reasonably be expected to recur" (emphasis added), but the court then noted as follows:

> Despite this *high burden*, the Sixth Circuit has noted that "cessation of the allegedly illegal conduct by government officials has been treated with *more solicitude* by the courts than similar action by private parties" and that "such self-correction provides a *secure foundation* for a dismissal based on mootness so long as it *appears genuine*." [Doc.276, PageID#25711] (emphasis added)

The trial court then noted that TVA had "acknowledged the wrongfulness of its conduct in not creating an administrative record"[3] and then stated "[i]t is unreasonable to think that [TVA] would return to conduct it has admitted to this court is constitutionally deficient." [Doc.276, PageID#25714]

Stacked against TVA's bare and un-cross-examined assertion is ample and overwhelming evidence to the contrary. Some two

[3] The trial court's statement minimizes TVA's wrongful action. Actually, the wrongful conduct was not the mere failure to create an administrative record, but the clear-cutting of thousands of miles of right-of-way without making an environmental impact statement.

months after TVA made the bare assertion, it clear-cut 31 miles of right-of-way in LBL, eliminating the historic buffer zone from one end to the other, including any number of 40-100-year-old trees. In the media article read in open court prior to the first appeal, spokesperson Travis Brickey described TVA's new policy (the 15-foot rule) as follows:

> 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]

The evidence from Land Between the Lakes, as laid out in detail in our Statement of Facts, is that TVA is continuing to eliminate the historic buffer zones and continuing to "clear the entire width of the right-of-way", just as it did before it supposedly suspended the 15-foot rule. In a video clip of a media interview, played in open court prior to the first appeal, a TVA executive described TVA's new policy (the 15-foot rule) as a "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*." (emphasis added) [Transcript, Doc.90, PageID#2339-2340; Notice of Filing Video Link, Doc.22, PageID#388] The executive elsewhere described the project as a "massive widening initiative." [Article, Doc.21-6, PageID#319-20] The evidence from LBL is that TVA is continuing with the "massive widening initiative" to "remove that buffer zone" and "essentially reclaiming the full width of the easement" just as it did before it supposedly suspended the 15-foot rule. As mentioned, this includes removing vast numbers of 40-100-year-old trees.

A TVA spokesperson further described the new policy as follows: "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)] The evidence from LBL is that TVA is continuing to "clear the full width of the easement", just as it did before it supposedly suspended the 15-foot rule.

While the trial court stated that it would be "unreasonable" to think that TVA would "return to conduct it has admitted to this court is constitutionally deficient," the Plaintiffs have presented a mass of evidence that it has done just that. It does not at all appear that we have a "secure foundation" for any finding that TVA has suspended the 15-foot rule. Nor does it appear that the bare and un-cross-examined assertion of the TVA vice-president should be given any special "solicitude." Nor does it appear that TVA has discharged the "heavy" or "formidable" burden of showing that it is "absolutely clear" that it has suspended the 15-foot rule. And we want to mention once again that the trial court did not allow *any* discovery, and in particular did not allow the deposition of the TVA vice-president who made the bare assertion.

Shifting to Mr. Anderson's 30-year old orchard in Paducah, Kentucky, we see the same pattern of activity. Under TVA's previous policy, Mr. Anderson had maintained the orchard for more than 30 years, always keeping the fruit trees trimmed to no more than 17 feet. Then, six months after it announced that it had "supposedly" suspended the 15-foot rule, TVA swept in with

armed guards and cut down every single tree in the right-of-way, wire zone and buffer zones. The reason? As stated by the TVA spokesperson in 2014, it was because the trees were more than 15 feet tall, or had "mature height" of more than 15 feet. In 2015, when the trees were cut down, the 15-foot rule was not mentioned by name, but no reason or justification was given, other than the fact that "the trees were located in the right-of-way and it was their right-of-way." The evidence from the Anderson property in Paducah, Kentucky, is that TVA has not suspended the 15-foot rule, but is simply continuing to remove "virtually all" of the trees in the right-of-way, whether in the wire zone or the buffer zones, just as it did before it supposedly suspended the 15-foot rule. The Court is also asked to observe that Mr. Anderson's practice of pruning the trees himself, allowed for more than 30 years prior to the 15-foot rule, as well as TVA's own pruning of the red oak tree, were eliminated or discontinued. As this Court noted in the first appeal, "[u]nder the new rule, specialists can no longer avoid removing a tree when the land owner promises to bear the cost of trimming and pruning the tree." [*Sherwood v. TVA*, 2014 WL

5368863, *8] The evidence from the Anderson property is that TVA is continuing to enforce the "new rule" by not pruning trees that it had always pruned under the old rule, and by not allowing Mr. Anderson to prune trees that he had always pruned himself under the old rule. All in all, the evidence from both the Anderson property and LBL is that TVA is simply continuing the "zero tolerance policy" that this Court noted in the first appeal. [*Sherwood v. TVA*, 2014 WL 5368863,*4]

The Court is asked to observe that the trial court did not even mention any of this evidence in its opinion. *Did not even mention it.* The Court is also asked to observe that the trial court did not allow discovery, *not even one question*. Despite these constraints, the Plaintiffs have nonetheless presented a compelling if not conclusive case that TVA has not suspended the 15-foot rule, and at a minimum they have created a disputed question of fact as to whether TVA has suspended the 15-foot rule. That being the case, the judgment of the trial court dismissing the case as moot should be reversed, with the case being remanded for trial or other

proceedings as to whether TVA really has suspended the 15-foot rule.

2. The Trial Court Erroneously Failed to Grant the Plaintiffs' Motion for Summary Judgment Where TVA's Opposing "Evidence" Was a Conclusory, Legally Insufficient Bare Assertion

Standard of Review: The case is before the Court in effect on cross-motions for summary judgment, with the standard of review as stated in Section 1 of the argument.

After the Court takes note of the Plaintiffs' ample if not overwhelming evidence that TVA has not suspended the 15-foot rule, but is continuing to clear the full width of the right-of-way just, eliminating the historic buffer zones, just as it was doing before it supposedly suspended the rule, the question becomes whether the vice-president's bare assertion that she has suspended the 15-foot rule is sufficient to withstand the Plaintiffs' motion for summary judgment. This Court has explained as follows:

> Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment. *Lewis v. Philip Morris Inc.,* 355 F.3d 515, 533 (6th Cir.2004) (finding that "conclusory statements" unsupported by specific facts

> will not permit a party to survive summary judgment); *Doren v. Battle Creek Health System,* 187 F.3d 595, 598-599 (6th Cir.1999) (holding that affidavits that contained no "specific facts" but "are merely conclusory, restating the requirements of the law ... therefore cannot create a genuine issue of material fact sufficient to defeat summary judgment.")
>
> *Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009)

The vice-president's bare assertion had no "supporting facts" or "specific facts" whatsoever: no evidence of directions given to field personnel, no resolution made by the board of directors, no directive to the head of the right-of-way maintenance department, no minutes of meetings of any committee, no documentation whatsoever. If she really had suspended the rule, she would have had to give somebody some directions. Most likely, for the nation's largest public power company, to suspend a $159,000,000 project, "one of the largest [maintenance] projects TVA has done," there would have to be something in writing. Yet the vice-president offers no such writing. She offers nothing more than her bare assertion that she has "suspended" the rule, which is obviously simply not true, or at least has been impeached in a major way, as can be seen at LBL and the Anderson property.

Under these circumstances, the vice-president's bare assertion is not sufficient to establish a factual dispute. That being the case, the Plaintiffs request the Court to grant their motion for summary judgment, and enter an injunction ordering TVA to suspend the 15-foot rule, or the practice of clear-cutting the entire width of the right-of-way, by some other name, until it has completed an environmental impact statement.

* * * * *

Leading in to subsequent sections of the argument, the Court is asked to observe that the above arguments are made without referring to TVA's attempt to re-define the "challenged decision" and the 15-foot rule as if it only applied to the buffer zones. The Court is also asked to observe that half of the trees that TVA destroyed on the Anderson property were located in the wire zone, although, according to TVA and the trial court, TVA somehow cleared all of the trees in the wire zone long ago.

3. The Trial Court Erred in Finding That TVA Has Already Cleared All of the Trees In the "Wire Zone"

Standard of Review: The case is before the Court in effect on cross-motions for summary judgment, with the standard of review as stated in Section 1 of this argument.

Argument: The "challenged decision" in this case is TVA's decision to implement the 15-foot rule, whereby it was going to cut down "virtually all" of the trees in the right-of-way for the first time in its history. But TVA and its vice-president have attempted to re-define the "challenged decision" as "TVA's adoption of a 15-foot rule for tree clearing *in right-of-way buffer zones*…." (emphasis added) [Doc.232,PageID#25162] The vice-president went on to state that she was suspending the 15-foot rule, as she defined it, and that she would initiate a de novo NEPA review prior to implementing any new tree clearing practices in the *buffer zones*. Unfortunately for TVA, that does not solve the problem. The vice-president has made absolutely no commitment that she would initiate an environmental review of new tree clearing practices in the *wire zone*. This is a huge problem because the wire zone makes up 2/3 to ¾ of the right-of-way and is replete with

millions of trees, as amply demonstrated in the Statement of Facts.

The Plaintiffs pointed this problem out to the trial court, but the trial court brushed it off by finding that this failure was "not material," because TVA had (supposedly) already cleared all of the trees in the wire zone:

> To understand why promising to review any new buffer zone maintenance practices and not wire zone practices is *not material*, one must understand the vegetation-management practices that were in place prior to the adoption of the 15-foot rule. [Trial Court's Opinion, Doc.276,PageID#25715] (emphasis added)

The trial court then went on to conclude – without pointing to any evidence in the record to support the conclusion, and without mentioning the overwhelming evidence to the contrary – that TVA had already cleared virtually all of the trees in the wire zone:

> Because under previous vegetation-management practices and policies – which are not challenged in this action – *TVA could and did clear virtually all of the trees in the wire zone*…the fact that TVA would conduct a de novo NEPA review for only new buffer zone maintenance practices, and not wire zone maintenance practices, is immaterial. [Trial Court's Opinion, Doc.276,PageID#25715] (emphasis added)

In other words, the trial court is saying that it doesn't matter that TVA didn't commit not to cut down the trees in the wire zone

because there aren't any trees in the wire zone. Interestingly, the trial court attributed this remarkable finding to dicta contained in this Court's decision in the first appeal:

> *As stated by the Sixth Circuit*, "[h]istorically, TVA has removed all trees directly under its power lines, but did not cut down all of the trees in what TVA called the buffer or border zones, the edges of the easements TVA possess." [Trial Court's Opinion, Doc.276,PageID25715] (emphasis added)

This seemingly harmless inaccuracy by this Court, which was made as an effort to provide historical context, and (we think) was not intended as a factual finding, thus somehow becomes the center-piece, or more accurately, the sum-total, of TVA's argument in the current appeal, at least as to this issue. John Hardyman, the TVA official that this Court discussed at length in the first appeal, stated that although he had seen that under "new construction" TVA had, for the most part, cleared the entire width of the right-of-way, he admitted that he had no information that TVA had cleared the entire width of the right-of-way in the 1930's, 40's or 50's [when TVA initially installed most of its lines], and as to that right-of-way he "just [didn't] know" because it was "before

my time." [Hardyman Depo.,p.95-101, Doc.191-1,PageID#24774-76)] In one excerpt, Mr. Hardyman testified as follows:

> Q: Now, going back to some of these right-of-ways were built in the 1930s, weren't they, and the 40s and 50s?
>
> A: (nodding)
>
> Q: Do you have any information as to whether they cleared the entire width of the right-of-way back then?
>
> A: No.

[Hardyman Depo.,p.98, Doc.191-1,PageID#24775)]

In another excerpt, he "corrected" his declaration, as follows:

> Q: So really what you – to make your affidavit a little more accurate, you would have to say what you have seen was previously cleared, but what may have been cleared in the 30s you just don't know.
>
> A: That's be correct.
>
> Q: Okay. That's fine. Or the 40s or whatever, anything other than your time?
>
> A: That's before my time.
>
> Q: Yeah. Okay. So like me, you don't know what happened in the 30s?
>
> A: (Shaking head)

[Hardyman Depo.,p.100-101, Doc.191-1,PageID#24775-76]

Mr. Hardyman further explained that although he had 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." [Hardyman Depo. 95-101,132; Doc.191-1, PageID#24774-76, 24783]

At the time this Court made the statement that "historically, TVA has removed all trees directly under its power lines," there was not one scintilla of evidence in the record to that effect. Nor is there a scintilla of evidence to that effect in the record today. The only thing that we have been able to find in the record to that effect is an unsupported statement that TVA counsel made from the podium during argument one day in the trial court that "[a]nd in the area that we call the wire zone, which would be the area from here to here, we're not allowing any trees." [Transcript of Argument, Doc.90, PageID#2387] TVA counsel was not a witness in the first place, and all he said was that "we're not allowing any trees." We think that is considered present progressive tense, that is, what TVA is doing right now. He doesn't say "we have never

allowed any trees in the wire zone" and he doesn't say "we have already cleared all of the trees in the wire zone" or "there aren't any trees in the wire zone." And again, whatever he said, it was not evidence.

The evidence that there are vast numbers of trees in the wire zone was overwhelming, as we pointed out in our Main Brief filed in this Court in the first appeal:

> 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 zones.* Under its previous practices, 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. *** [extensive citations to the record omitted] [Plaintiffs' Brief on Appeal, Statement of Facts, Document:006111880596] (emphasis added)

We reiterated the point in our Reply Brief on the first appeal:

> At the same time, the Plaintiffs filed voluminous evidence that there were *vast numbers of trees in the wire zone (directly under the wires).* [Plaintiffs' Reply Brief, Document:006111972060,p.17] (emphasis added)

At any rate, this Court's decision was not hinged on the question of whether TVA had or had not removed all of the trees

in the wire zone, but instead on the fact that TVA had not submitted an administrative record for its decision to implement the 15-foot rule, with the result that this Court's statement was mere dicta. Thus, the uncontradicted and overwhelming evidence in the record is that the right-of-way is replete with millions of trees in the wire zone. That being the case, the trial court committed major error in holding that it was "not material" that TVA had made no commitment that it would make a NEPA review of any new tree clearing practices in the wire zone.

As mentioned, the case is before the Court at least in effect on cross-motions for summary judgment. That leaves the Court with a simple determination. There is overwhelming evidence in the record that the wire zone is replete with millions of trees. There is *no* evidence in the record to the contrary. The trial court's decision must therefore be reversed, with a ruling by this Court enjoining TVA from re-implementing or further implementing the 15-foot rule in the wire zone.

4. The Injunction Should Specify That the "De Novo Environmental Review" Prior to Re-implementing or Further Implementing the 15-Foot Rule Must Be an Environmental Impact Statement

Standard of Review: The trial court did not even reach this issue, because it declined to enter an injunction. For that reason the issue is considered *de novo* by this Court.

Argument: The declarations of TVA's vice-president, besides being deficient because they do not commit that TVA will perform a NEPA review of any changes in its tree-clearing practices in the wire zone, have a second glaring deficiency, which is that they give no assurance that the promised "de novo NEPA review", whether wire or buffer zones, will be an environmental impact statement if the new maintenance practice is a return to the 15-foot rule, or the practice of removing "virtually all" of the trees in the right-of-way, by some other name. The "de novo NEPA review" could be a cursory environmental assessment or it could be another attempt at categorical exclusion treatment. The result is that after announcing that it has (temporarily) suspended the 15-foot rule, TVA has refused to acknowledge that it will prepare an environmental impact statement before re-implementing it.

The Plaintiffs – and the court system – have put a tremendous amount of time and energy into establishing that the 15-foot rule

– TVA's new policy of clear-cutting its right-of-way for the first time in its history – was a major federal action with significant environmental impact, that it was implemented with no environmental impact statement, and that an environmental impact statement was required. And the Plaintiffs have supposedly been successful in forcing TVA to suspend it. In doing so, the Plaintiffs have overcome the dodges and subterfuges that TVA has thrown up, which required an appeal to this Court. For TVA to escape from this predicament by simply claiming that it "will initiate a de novo NEPA review" of any new tree clearing practices before adopting them rings a bit hollow. The Plaintiffs have proved and established every element of the case, and they request the Court to take action that will prevent this problem from happening again, that is, an injunction that would require TVA to make an environmental impact statement prior to re-implementing or further implementing the 15-foot rule or the practice of removing "virtually all" of the trees in the right-of-way, by some other name. [Doc.240-1, PageID 25238]

Note: The Court should grant the relief requested in this section even if it affirms the trial court's finding that TVA has suspended the 15-foot rule and/or finds that TVA has already cut down all of the trees in the wire zone.

5. The Court Should Enter a Declaratory Judgment That TVA Has Committed a Massive and Flagrant Violation of NEPA

Standard of Review: The case is before the Court in effect on cross-motions for summary judgment, with the standard of review as stated in Section 1 of this argument.

Argument: A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Powell v. McCormack*, 395 U.S. 486, 496, 89 S.Ct. 1944, 1951, 23 L.Ed.2d 491 (1969). The United States Supreme Court has recognized that as a general rule "voluntary cessation of allegedly illegal conduct does not deprive the tribunal of power to hear and determine the case, i.e., does not make the case moot." *United States v. W. T. Grant Co.*, 345 U.S. 629, 632, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953). A case can only be mooted where "it can be said with assurance that 'there is no reasonable expectation…'

that the alleged violation will recur…" *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979). The question on mootness is whether it is "absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *United States v. Concentrated Phosphate Exp. Ass'n*, 393 U.S. 199, 203, 89 S. Ct. 361, 364, 21 L. Ed. 2d 344 (1968) (Emphasis added) The United States Supreme Court has made it clear that "[t]he burden of demonstrating mootness is a heavy one." *Los Angeles Cnty. v. Davis*, 440 U.S. 625, 631, 99 S. Ct. 1379, 1383, 59 L. Ed. 2d 642 (1979).

When the Complaint was filed, TVA was in the early stages of beginning to clear-cut its right-of-way, having done no environmental impact statement, in flagrant violation of NEPA, our "basic national charter for protection of the environment" that was enacted because of the "growing public concern about the quality of our natural environment" and was "designed to curb the accelerating destruction of our country's natural beauty." *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 404, 91 S. Ct. 814, 817, 28 L. Ed. 2d 136 (1971).

As the unprecedented clear-cutting of the right-of-way was getting underway, there was not a single person at TVA who entertained the belief that the annual categorical exclusion checklists constituted the environmental review of the policy,[4] yet after the Complaint was filed, the TVA legal department put this idea forward as being the supposed environmental review of the policy. The policy, which would cost more than $159,000,000 and would have horrendous environmental impact, (in the words of the Knox County Commission, the cost would be "hundreds of millions of dollars" with the removal of "many thousands of trees" in Knox County alone with a "drastic reduction in property values" and "future harm to the environment and wildlife"), was implemented with no environmental review whatsoever, a flagrant and massive violation of NEPA, which was, as far as the Plaintiffs can tell, the worst violation of NEPA in our nation's history. The destruction of trees continued, with the ruination of the property of thousands of citizens, for some 2½ years, until this Court issued the order that appeared to put an end to it. TVA estimated that the project would

[4] TVA did not disclose this fact to the Court in the earlier proceedings, and the Plaintiffs were unable to discover it at that time because they were permitted only minimal discovery.

take "four or five more years to complete" at a cost of $10,000-$12,000 per mile. [Transcript, Doc.90, PageID#2339-2340; Notice of Filing Video Link, Doc.22, PageID#388] Assuming that TVA kept to its planned timetable, the project was roughly 50% completed when the policy was supposedly suspended. That would mean that TVA had clear-cut roughly 50% of its right-of-way, about 8,000 miles, before the policy was supposedly suspended, an area about ¼ the size of the Great Smoky Mountains National Park, affecting untold thousands of property owners, continuing straight through the spring nesting season for three years in a row, destroying countless numbers of active bird nests and baby birds in the process, in addition to destroying millions of trees. We do not know the exact extent of the violation, that is, the exact number of miles of right-of-way affected, or the exact number of acres or the number of trees, because we were not permitted discovery, but the proof is that the scope was massive. One example from the spring of 2012 in West Knoxville is snipped below:

[Image, Doc.25-28, PageID#453]

The trees seen in this picture, along with millions of others, were wrongfully cut down by TVA in violation of NEPA before the policy was supposedly suspended. If this were the ordinary case of a proposed governmental action being suspended *before it was put into effect*, we might have be an entirely different case, and a good reason to simply declare the case to be moot once the policy was suspended. But here we have more than a *proposed policy*. We have a policy that TVA actually put into effect, and in a massive way, clear-cutting thousands of miles of right-of-way before supposedly suspending the policy. To make matters worse for TVA, it was an intentional law-breaker. It was well aware that it had done absolutely no environmental review of the policy. As discussed above, at the time it put the policy into effect, there was

not even one person at TVA who believed that the checklists were the environmental review of the 15-foot rule. That was simply an attempted dodge created by TVA counsel after the fact. Yet TVA proceeded to clear-cut thousands of miles of right-of-way, destroying millions of trees, killing vast amounts of wildlife, and ruining the property of thousands of people, knowing that there had been *no environmental review whatsoever* of the massive new policy.

The question is whether the Plaintiffs have a "cognizable legal interest" in having this vast destruction of trees and wildlife, and ruination of property, declared illegal. To answer this question, it is helpful to look at the "twin aims" of NEPA. The first aim is to ensure that federal agencies such as TVA consider the environmental impact of proposed action, and the second is to "ensure[s] that the agency will inform the public that it has indeed considered environmental concerns in the decision-making process." [*Conservation Northwest v. Rey*, 674 F.Supp.2d 1232, 1241 (WD Wash. 2009)]

Under TVA's view of things, there would be absolutely no consequence to TVA for its vast unlawful action. As far as Plaintiffs' counsel has determined at the present time, NEPA may not provide for damages or even the imposition of a civil penalty. But it does allow for a declaratory judgment that a government agency has violated the law, and this, standing alone, can be a strong deterrent, (perhaps the only deterrent available), and the only means of holding TVA accountable, and give it an incentive to abide by NEPA in the future, and is also the only effective means of informing the public that TVA did not consider the environmental effects before cutting down this vast number of trees, affecting thousands of landowners. As the United States Supreme Court has noted, a judgment is a more effective deterrent than a mere "remedy on the books." ["A would-be polluter may or may not be dissuaded by the existence of a remedy on the books, but a defendant once hit in its pocketbook will surely think twice before polluting again." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 186, 120 S. Ct. 693, 707, 145 L. Ed. 2d 610 (U.S.S.C. 2000)] NEPA may not give

plaintiffs the power to hit NEPA offenders in the pocketbook, but it does give the Court power to enter a declaratory judgment when they have violated the law, which we think should be done in appropriate cases, both to serve as a strong deterrent against future violations and to inform the public when agencies have committed major violations of NEPA.

If TVA's position is accepted, federal agencies would be free to simply take whatever action they may choose, with *Sherwood v. TVA* as precedent, not bothering to even create an administrative record of their decision, ignoring the pleas of local governments across the region, and then if someone has the temerity to challenge the decision in court, just litigate and litigate and litigate, forcing the plaintiffs to expend prodigious amounts of time and energy, and then, if and when the agency loses the case on appeal, simply announce that the agency is suspending the policy, and *voila*, the court somehow loses jurisdiction over the case and cannot enter judgment that the agency has violated the law.

Note: Under TVA's view of the mootness doctrine, the Plaintiffs would not be eligible to recovery their attorney fees. TVA is presently arguing in the trial court that the Plaintiffs cannot recover their attorney fees, arguing that the Plaintiffs were not "prevailing parties," because there has been no "judgment or something similar, formally delivered in [their] favor," and because TVA's action in (supposedly) suspending the 15-foot rule was (supposedly) voluntary. [TVA's brief opposing attorney fees, Doc.284, PageID#25878] TVA is basing its anti-attorney fee argument on the "voluntary action" doctrine described in *Buckhannon Bd. And Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 618, 121 S.Ct. 1835, 1847, 149 L.Ed. 855 (2001). Under this doctrine a case can be rendered moot, under certain circumstances, by a "voluntary change in conduct." As Justice Scalia describes the practice, this outcome "sometimes denies fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment." [*Buckhannon Bd. And Care Home, Inc., v. West Virginia Dept. of Health and Human Resources*, 532 U.S. 598, 618, 121 S.Ct. 1835,

1847, 149 L.Ed. 855 (2001)] As mentioned, TVA is claiming that because neither this Court nor the trial court has granted an injunction or entered a declaratory judgment, and because it supposedly "voluntarily" suspended the 15-foot rule, the Plaintiffs are not "prevailing parties." Thus, according to TVA's argument, since the plaintiffs are not "prevailing parties", it should be allowed to "slink away" (to use the words of Justice Scalia), without having to pay attorney fees. The question of attorney fees is not presently before the Court, but the issue amply demonstrates a very substantial drawback to a doctrine that would reflexively deny the entry of a declaratory judgment.

Note: The Court should grant the relief requested in this section even if it affirms the trial court's finding that TVA has suspended the 15-foot rule and/or finds that TVA has already cut down all of the trees in the wire zone.

6. The Trial Court Should Have Allowed Discovery Prior to Making Any Rulings Adverse to the Plaintiffs

Standard of Review: This Court holds that before ruling on summary judgment motions, a district court judge "must afford the parties adequate time for discovery, in light of the

circumstances of the case." *Plott v. Gen. Motors Corp., Packard Elec. Div.*, 71 F.3d 1190, 1195 (6th Cir. 1995) *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 n. 5, 257, 106 S.Ct. 2505, 2511 n. 5, 91 L.Ed.2d 202 (1986) (stressing importance of allowing ample time for discovery); *Celotex Corp. v. Catrett,* 477 U.S. 317, 322, 326, 106 S.Ct. 2548, 2552, 2554, 91 L.Ed.2d 265 (1986) (same). This Court further noted that "[p]arties who suffer an adverse summary judgment may base their appeals on the lack of opportunity to discover evidence necessary to establish a genuine issue of material fact. *Id.* The Court has "generally applied the abuse of discretion standard" to these decisions. *Id*. Here it is not a question of allowing additional time for discovery, but instead simply the denial of any and all discovery, without stating a reason.

Argument: The trial court ruled that TVA had suspended the 15-foot rule without mentioning the very substantial evidence that TVA *has not* suspended the 15-foot rule, and also held that TVA has already removed all of the trees in the wire zone, without mentioning the irrefutable evidence that it had not, while at the

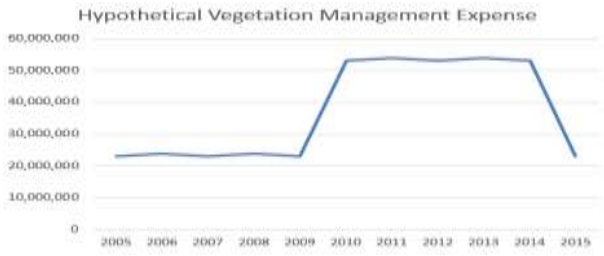
same time denying any and all discovery. We will give three examples of what discovery might have disclosed. The first example would be the deposition of the vice-president who provided the conclusory and self-serving declaration. Her deposition would find out exactly what she means when she says she has "suspended" the 15-foot rule, while improperly re-defining the 15-foot rule as cutting down all of the trees in the buffer zones, and exactly what that means as a practical matter. Her deposition would also find out what directions, if any, were given to the field personnel, and if there were any documentation that the 15-foot rule really has been suspended. Her deposition could be taken on location, for example in the wire zone at one of the locations shown above, where there is an abundance of trees in the wire zone. She could simply be asked if she can see and touch the trees and confirm that they really are present in the wire zone. She could also be asked to confirm that there are millions of other trees similarly located in the wire zone.

The second example would be general discovery as to whether the wire zone is replete with millions of trees. This should be a

simple matter, with discovery taking the form of requests for admission, or interrogatories, or depositions of other TVA personnel, to complement the deposition of the vice-president, as mentioned above. No matter how disingenuous TVA may have been in the past, it will not be able to deny the existence of the vast number of trees in the wire zone. This discovery would also include the quantity of trees in the wire zone that TVA has destroyed, similar to the trees it destroyed in the wire zone on the Anderson property. The most likely result of allowing discovery would be that TVA would avoid the embarrassment by quickly admitting the obvious fact that there are millions of trees in the wire zone.

A third example would be accounting discovery. As this Court noted in the first appeal, "TVA also increased the budget 'to allow for reclearing the width of the ROWs…" [*Sherwood v. TVA*, 2014 WL 5368863, *8] If TVA really has reverted to its prior practices, this should be evident in its expenditures for tree-clearing. TVA's accounting records should show that the cost of TVA's vegetation management spiked when it implemented the 15-foot rule, and

then fell back to the prior level when it (supposedly) suspended the 15-foot rule. The TVA executive plainly stated in his declaration 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] (emphasis added) The executive stated that the cost of the "massive widening initiative" was going to be $10,000-$12,000/mile. With 159,000 miles of right-of-way, that would be a total cost of at least $159,000,000, or approximately $31,000,000/year for the 5-6 year project (as the executive describes it). Just guessing at a "before" budget of $23,000,000-24,000,000/year, the graph of TVA's vegetation management expenditures should look something like this, if TVA really has suspended the 15-foot rule:



If this discovery does not confirm that TVA's tree-clearing expenditures have really fallen to their previous levels, this would

be strong evidence that TVA has not, in reality, suspended the 15-foot rule.

Conclusion

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

1. To reverse the trial court's finding that the Plaintiffs' NEPA claims are moot, and rule that the Plaintiffs have established a genuine issue of fact as to whether TVA has actually suspended the 15-foot rule, and remand for trial or other proceedings.
2. To enter summary judgment in favor of the Plaintiffs, granting an injunction ordering TVA to suspend the 15-foot rule, or the practice of clearing "virtually all" of the trees in the right-of-way, by some other name, until it has completed an environmental impact statement.
3. To reverse the trial court's finding that TVA has already clear-cut all of the trees from the wire zone, and enjoin TVA from further implementing or re-implementing the 15-foot

rule in the wire zone until it completes an environmental impact statement.

4. To grant an injunction that specifies that TVA's "de novo environmental review" prior to further implementing or re-implementing the 15-foot rule, or the practice of eliminating "virtually all" of the trees in the right-of-way by some other name, must be an environmental impact statement.
5. To enter a declaratory judgment that TVA's action in clear-cutting thousands of miles of right-of-way, continuing straight through three nesting seasons, without first making an environmental impact statement was a (massive and flagrant) violation of NEPA.
6. To remand with directions that the trial court allow discovery as in other cases.
7. To grant general relief.

Respectfully submitted,

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Dated: Jan. 20, 2016

Certificate of Service

Counsel hereby certifies that on Jan. 20, 2016, 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.

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