

In the U.S. District Court for the District of Columbia

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| <p>Sierra Club, Plaintiff</p> <p>50 F St. NW, Eighth Floor</p> <p>Washington, DC, 20001</p> <p>v.</p> <p>Tennessee Valley Authority, Defendant.</p> <p>400 West Summit Hill Drive</p> <p>Knoxville, TN 37902</p> | <p>Case No. 12-1852</p> |
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COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case challenges the Tennessee Valley Authority (“TVA”)’s ongoing failure to provide information to the public as required by the Freedom of Information Act (“FOIA), 5 U.S.C. § 552, in response to FOIA requests that Sierra Club lodged with TVA over six months ago. The information is directly relevant to evaluating and commenting upon TVA’s proposal to spend a billion dollars to extend the life of the fifty year old Gallatin Fossil Plant. The information is urgently needed in the immediate future. TVA’s announcement that it would extend the life of the plant was contained in an Environmental Assessment that TVA

prepared pursuant to the National Environmental Policy Act, in which TVA explained it would only accept public comment on its proposed decision until November 30, 2012.

Moreover, TVA has announced that it intends to begin construction on at Gallatin in February 2013.

2. Sierra Club has repeatedly, and unsuccessfully, sought to obtain the requested documents from TVA without resort to a lawsuit. Without other recourse, Sierra Club now files this complaint to compel TVA to disclose information in response to Sierra Club's FOIA requests prior to the closure of the TVA's public comment period on the Gallatin life extension project.

INTRODUCTION

3. Over six months ago, on April 27 and May 17, 2012, Sierra Club filed three FOIA requests with TVA requesting information about TVA's proposal to extend the life of the Gallatin Fossil Plant-- an old coal-fired power plant on the Cumberland River east of Nashville-- rather than retire the plant and replace it with cheaper, and cleaner, energy efficiency and renewable energy. As TVA's EA reveals, TVA's plan to extend the life of the plant would require capturing heavy metals and other toxic pollutants that currently are released into the air without modern controls and instead store them in one or more massive 150-foot tall coal ash landfills. TVA proposes to build these landfills in what has been a state wildlife management area near Old Hickory Lake, an impoundment of the Cumberland River. As part of this project, it will also destroy a unique facility for breeding federally listed endangered species native to Tennessee for future repopulation of Tennessee rivers which served in part to offset TVA's impacts on those species in other locations.

4. Sierra Club's FOIA requests sought information necessary to understand these major impacts and to evaluate cheaper, cleaner alternatives to them. This information included records relating to the environmental impacts of the plant before and after TVA's plan; TVA's plans to handle the enormous new waste stream that the plant will be generating; and the costs and environmental impacts of alternatives to TVA's plan. This information is vital to ensuring that Sierra Club, and the general public, can meaningfully comment on TVA's plans, before TVA commits itself, and its customers, to over a billion dollars in spending and decades of continued pollution from the over fifty-year-old plant.
5. As discussed below, Sierra Club intends to disseminate the information from TVA to Sierra Club members and to the public so that they can comment on TVA's proposed action. The Gallatin life extension project will directly affect thousands of people throughout the region as members of the community around the plant, and as ratepayers and consumers of the electricity that TVA generates. Sierra Club also intends to provide written comments on the Environmental Assessment itself.
6. Despite FOIA's requirement that government agencies like TVA respond to FOIA requests within twenty days, TVA provided no documents to Sierra Club for over six months. During this interim period Sierra Club repeatedly sought to facilitate the disclosure of information in a timely fashion by attempting to cooperate with TVA and prioritize its requests.
7. Meanwhile--although TVA was purportedly unable to provide Sierra Club a single document relating to the Gallatin project in response to Sierra Club's FOIA request --TVA

has raced forward with implementing the project by completing its own initial internal review of the project.

8. On October 17, 2012, TVA released a draft Environmental Assessment of its massive power plant project and announced that the public's opportunity to comment on the project would close 30 days later, on November 16.
9. Sierra Club immediately wrote TVA on October 19, 2012, requesting that TVA extend the comment period. Sierra Club then wrote TVA again on October 23, 2012 requesting that TVA expedite processing Sierra Club's FOIA request, or that TVA otherwise hold open its public comment period until TVA can produce the documents and they can be reviewed.
10. TVA initially refused to extend the comment period at all. However, on November 2, 2012, TVA reversed itself in response to pressure from organizations from across Tennessee and extended the comment period by two weeks, until November 30, 2012. However, it still refused to disclose to Sierra Club and the public documents requested in the FOIA that are necessary for informed public comment prior to the close of the public comment period.
11. On November 7, Sierra Club received what TVA acknowledged was a partial response to its FOIA requests. However, the response, which was largely composed of spreadsheets from an earlier general planning process that did not bear directly on Gallatin, left critically important categories--such as what air pollutant controls were considered, how reliable they are, and how the large new waste stream of toxic scrubber waster will be handled--completely unanswered.
12. Sierra Club continued to work to resolve this matter in an amicable fashion, culminating in a call on November 14, 2012, with the General Counsel's office of TVA, in which TVA's

General Counsel's office refuse to disclose the requested records prior to closing its public comment period.

13. On November 15, 2012, Sierra Club filed this complaint seeking injunctive relief compelling TVA to provide documents in response to Sierra Club's outstanding FOIA requests before TVA closes its public comment period on its Environmental Assessment, and with adequate time to review that information. Both FOIA and NEPA reflect fundamental national commitments to transparent government and informed public participation. By moving forward with a billion dollar project on a truncated timetable, and without providing the public information it is entitled to on a timetable that allows the public to use that information, TVA is frustrating the purposes of these statutes, depriving Sierra Club of its right to information under FOIA, and preventing Sierra Club's members and the public as a whole from engaging in the NEPA process in a meaningful manner.

JURISDICTION

14. This Court has jurisdiction over this action pursuant to 5 U.S.C. § 552(a)(4)(B) (FOIA) and 28 U.S.C. § 1331 (federal question). The court may grant any appropriate relief. 28 U.S.C. § 1651.
15. Venue in this court is proper under 5 U.S.C. § 552(a)(4)(B) because FOIA grants the District Court of the District of Columbia jurisdiction and Sierra Club and TVA both have offices in this district.

PARTIES

16. Plaintiff Sierra Club is a non-profit organization incorporated in the State of California with approximately 600,000 members nationwide. Since its founding in 1892, Sierra Club has

pursued its mission to enjoy, explore, and protect the planet. Sierra Club has large organizing and media departments dedicated to informing the public about actions and projects which may affect them through regular press releases, reports, an extensive website, email, a radio show, films and videos, book publications, and newspaper columns. Sierra Club's Tennessee Chapter, which is headquartered in Nashville, has approximately 6,555 members throughout the state, including members who are directly affected by the Gallatin plant's pollution and who will see bill impacts caused by TVA's proposed Gallatin project. Sierra Club and its members routinely communicate with each other and to the public about the Gallatin project and about TVA's activities.

17. Defendant TVA is a federal corporation, created by the TVA Act, 16 U.S.C. § 831. TVA's activities are of vital concern to people throughout Tennessee and its larger seven-state service region because it provides the vast bulk of electric power to the region, meaning that the decisions TVA makes with regard to its power plants have large and lasting implications for the public. TVA is subject to FOIA and NEPA. It may sue and be sued in its corporate name. 16 U.S.C. § 831c(b). The TVA Act provides that TVA is to construct projects "for the benefit of the people of the [region] as a whole" and that TVA shall provide power "at the lowest possible rates." 16 U.S.C. § 831j.

STATUTORY BACKGROUND

The Freedom of Information Act (FOIA)

18. FOIA, 5 U.S.C. § 552, is designed to provide the public the information it needs to meaningfully engage with government decisionmaking.

19. FOIA requires records to be made “promptly available” upon request. 5 U.S.C. § 552(a)(3)(A)(ii). It further provides that each agency shall respond to requests within 20 working days. *Id.* § 552(a)(6)(A).
20. FOIA further provides that if the agency does not respond within the statutory time period, the person making the request will be “deemed to have exhausted his administrative remedies with respect to such request.” *Id.* § 552(a)(6)(C)(i).
21. FOIA allows agencies to establish tracked processing systems based on the amount of work or time required to process a request, but does not waive its general response deadlines regardless of track assignments. *See id.* § 552(a)(6)(D). The statute explicitly requires agencies to process requests with due diligence at all times. *Id.* § 552(a)(6)(D)(iii). TVA has established such a multi-track system. *See* 18 C.F.R. § 1301.5.
22. To further enhance transparency, FOIA requires agencies to provide for “expedited processing” of record requests where a compelling need for those records exists. *Id.* § 552(a)(6)(E). TVA regulations accordingly provide for expedited processing. It may grant expedited treatment, for instance, where there a person primarily engaged in disseminating information confronts “[a]n urgency to inform the public about an actual or alleged federal government activity,” where “substantial due process rights” are at issue, or where the request concerns “[a] matter of widespread and exceptional media interest in which there exist possible questions about the government’s integrity which affect public confidence.” 18 C.F.R. § 1301.5(d).
23. President Obama has ordered that FOIA “be administered with a clear presumption: In the face of doubt, openness prevails.” Memorandum for the Heads of Executive Departments

and Agencies 74 Fed. Reg. 4,683 (Jan. 21, 2009). He ordered that all agencies “should take affirmative steps to make information public.” *Id.*

The National Environmental Policy Act (NEPA)

24. Congress enacted NEPA “to promote efforts which will prevent . . . damage to the environment,” 42 U.S.C. § 4321, by ensuring that government agencies incorporate environmental considerations into their decisionmaking. *See, e.g.*, 42 U.S.C. § 4332(2). As explained by the Council on Environmental Quality – the agency charged with promulgating binding regulations to implement NEPA, 40 C.F.R. § 1500.3 -- NEPA “insure[s] that environmental information is available to public officials and citizens before decisions are made and before actions are taken” so that “public officials make decisions that are based on [an] understanding of environmental consequences.” 40 C.F.R. § 1500.1(b), (c) (emphasis added).
25. To this end, NEPA’s regulations specifically emphasize that “public scrutiny [is] essential to implementing NEPA,” *id.* § 1500.1(b) (emphasis added), and that agencies “shall to the fullest extent possible . . . [e]ncourage and facilitate public involvement.” *Id.* at § 1500.2 (emphasis added); *see also* § 1501.4. TVA recognizes in its rules that the NEPA process must “encourage public participation,” *see* TVA Instruction IX § 5.8.15.
26. Accordingly, if a major federal action may “significantly affect[] the quality of the human environment” the acting federal agency “shall” prepare a “detailed statement” – an EIS – that addresses both the “environmental impact of the proposed action” and reasonable alternatives to it. 42 U.S.C. § 4332; *see also* 40 C.F.R. § 1502.

27. Whenever there is a question as to whether an EIS is required, an agency must ordinarily at least prepare an Environmental Assessment (“EA”), *id.* § 1508.9, to determine whether impacts may be “significant,” in which case it must prepare a full EIS, or whether there is no likelihood of significant impacts in which case the agency prepares a Finding Of No Significant Impact (“FONSI”). *Id.*; *see also id.* § 1501.4.

FACTUAL BACKGROUND

The Gallatin Life Extension Project

28. Gallatin is a TVA owned and operated coal-burning power plant on the banks of the Cumberland River upstream of Nashville. Although TVA completed Gallatin in 1959, it has never installed a full suite of modern pollution controls on the plant. Pollution from plants like Gallatin in TVA’s fleet, and TVA’s continued operation of the fleet without installing controls, ultimately led to enforcement efforts by the U.S. Environmental Protection Agency, several states, and several citizens’ groups, including the Sierra Club. In an effort to remedy these decades-long compliance issues, the groups resolved those suits in a set of agreements in 2011 which require TVA to finally upgrade or retire many of its oldest, dirtiest, coal-fired power plants, including Gallatin.

29. As a result of the 2011 settlement agreements, TVA has therefore been confronted with having to decide whether to spend significant amounts of funds prolonging the life of decades-old plants to meet electricity demand, or investing considerably less to invest in managing that demand through energy efficiency and looking to new, modern generation such as renewables. In this regard, a federal investigation by the General Accountability Office determined last year that TVA has never fully considered using energy efficiency in

its planning process, rather than, for instance, continuing to operate its aging coal-fired fleet.

TVA itself commissioned a 2011 study to evaluate energy efficiency options, which concluded there were tremendous energy efficiency opportunities—opportunities to save money and reduce demand—that TVA was not embracing.

30. Sierra Club filed its FOIA requests in early 2012, seeking information relevant to what the environmental impacts of TVA's extending the life of its obsolete coal plants, what alternatives exist to extending the plants' life, and what the environmental impacts of those alternatives may be. Sierra Club also commissioned an independent third-party study of energy efficiency opportunities available to TVA, and in the summer of 2012, the study concluded, consistent with TVA's own study, that there were numerous opportunities for TVA to address electricity demand using lower cost energy efficiency resources.

31. On October 17, 2012, TVA issued its draft Environmental Assessment announcing its proposed decision to spend a billion dollars to extend the life of the Gallatin plant. Nowhere in the EA was there any meaningful discussion of any alternatives to extending the life of the plant, and TVA's discussion of critical environmental impacts of extending the plant's life was minimal. Compounding matters, TVA announced that it would only accept public comment on its decision for thirty days, until November 16.

32. TVA's proposed retrofit project would perpetuate many of Gallatin's worst features, while causing new problems. For instance, according to TVA's EA for the project, TVA intends to store massive amounts of ash and other waste – which contains hazardous heavy metals like mercury and selenium that the life extension project would generate—in at least one, and possibly two, 150-foot tall landfills atop what to date has been a state wildlife management

area abutting Old Hickory Lake on the Cumberland River. Other liquid waste from the plant, including heavy metals, would be sluiced through ponds to the river without effective treatment. Similarly, some airborne pollutants would continue to be emitted at high levels, such as carbon dioxide, while others would be emitted at reduced levels, but would still be being emitted in significant amounts—though the exact amounts is not clear as TVA has not responded to Sierra Club’s FOIA requests.

33. TVA’s overhaul would also displace – and likely permanently close – the Cumberland River Aquatic Center (CRAC), which is dedicated to propagating rare and federally listed endangered species to sustain populations in the Tennessee River system and other rivers throughout the state. The U.S. Fish and Wildlife Service required TVA to provide space at Gallatin for this facility in a 2006 order, which is intended to offset damage to these species from TVA’s hydroelectric systems. Yet TVA has already ordered this facility to close by spring to make way for TVA’s plan to overhaul the plant.

Sierra Club’s FOIA Requests

34. Sierra Club submitted three FOIA requests to TVA in April and May of 2012 to better understand and meaningfully participate in TVA’s decisionmaking process as TVA considers whether to retire or extend the life of Gallatin and the other coal units in its fleet.
35. The first of these requests, submitted April 27, 2012, sought information on the costs and consequences of TVA’s plans to retrofit Gallatin specifically, including information on the engineering and design of the project; the environmental performance of the plant with and without the retrofits; and how TVA planned to handle the new toxic waste streams that would be generated once TVA retrofitted the Gallatin plant. It also sought documents

showing how far along in the life extension project TVA was, and whether TVA had considered alternatives to the project, including energy efficiency, that may be cheaper and have fewer environmental impacts.

36. The second and third of these requests, submitted April 27 and May 17 sought further information on TVA's planning process and its energy efficiency programs.
37. Sierra Club requested TVA waive processing fees for its requests, on the ground that they bore on matters of pressing public interest, and TVA agreed and granted the waiver.
38. TVA did not produce any records responsive to these requests for more than six months.
39. Although TVA acknowledged that at least some of the information Sierra Club had requested might be readily available and already gathered in TVA's files, it did not quickly provide this information. Instead, TVA informed Sierra Club that its requests had been placed in "tracks" which would take months – or longer – to process.
40. TVA further indicated that it had no idea how long it would take to respond to Sierra Club's most crucial FOIA request, request one, regarding Gallatin. It said that a response to the second April request (regarding TVA planning), would not be forthcoming for at least 90 days, and provided no clear timeline on the third request
41. Sierra Club initially worked with TVA, without waiving any of its requests, to see if TVA would produce at least a few responsive documents on TVA's planning process. Although TVA initially indicated that several of these documents could be produced by July 2012, none were. TVA then indicated in late July that most documents would be ready by the end of August, but, again, none were. In late August, TVA offered that the documents would appear "soon," within the month of September. None did. Next, in early October,

TVA asserted that most of this small subset of documents would be ready by the end of October. They were not.

42. While TVA continued to fail to respond to *any* portion of Sierra Club's FOIA requests, it issued its EA for the Gallatin plant life extension project.

The Gallatin Time Crunch Created By TVA's NEPA Review

43. When TVA released the EA on October 17, 2012, it also announced that it would only accept public comment until November 16, 2012. Again, at this time TVA had not disclosed a single document to Sierra Club.
44. On October 19, 2012, immediately after receiving notice of the draft EA, Sierra Club wrote TVA requesting that it not close the comment period on the Gallatin life extension project until TVA had fulfilled the FOIA requests and Sierra Club had a chance to review the disclosed information.
45. On October 23, 2012, not having received a commitment to keep the public comment period open until FOIA documents were provided, Sierra Club wrote TVA and requested expedited handling of its FOIA request, recognizing that TVA's failure to respond, at all, to its FOIA requests would make it impossible to meaningfully engage in the NEPA process. The letter explained that TVA was frustrating both FOIA and NEPA by failing to provide these documents within the comment period.
46. TVA initially refused to extend the comment period at all. Only after a public outcry from numerous public interest organizations did TVA partially relent. On November 2, TVA issued a letter agreeing to extend the NEPA comment period – but only to November 30, 2012. TVA still had not provided Sierra Club with any documents in response to its FOIA

requests, nor did it commit to provide Sierra Club records responding to the FOIA requests before the public comment period closed.

47. Meanwhile, TVA was required to respond to the expedited processing request itself within ten calendar days, *see* 18 C.F.R. § 1301.5(d), but failed to do so. Instead, on November 5, thirteen calendar days later, TVA wrote Sierra Club to say that TVA would send a CD with some documents relating to the subset of documents responsive to the May request which TVA had initially indicated would be available in July. The CD arrived November 7. The CD contained no documents responsive to Sierra Club's FOIA request that specifically sought documents relevant to TVA's Gallatin plant. Instead, TVA had sent several hundred documents consisting of general, and redundant, spreadsheets and other documents describing TVA's general system planning process. The spreadsheets do not provide information about the Gallatin retrofit project itself, or TVA's decisionmaking on that project, or the environmental consequences of that project and alternatives to it.
48. TVA has still, to date, never even issued a determination as to whether it will expedite its disclosure of information as Sierra Club had requested. Instead, in a letter accompanying the CD, TVA stated that it intended to continue to "track" Sierra Club's FOIA requests, and did not indicate that they would be completed before the end of the comment period or, indeed, before work is planned to start on the Gallatin retrofit project.
49. On November 14, 2012, Sierra Club's efforts to seek an amicable resolution of this matter culminated in phone calls with the general counsel's office of TVA. TVA's attorney represented that they would respond at the end of the day on November 14, 2012 to Sierra Club's request to disclose all responsive documents prior to the close of the public comment

period. In a subsequent call on that day, TVA's counsel informed Sierra Club that it was TVA's position that it would not hold open the public comment period to allow for the disclosure of information responsive to Sierra Club's FOIA request, and TVA still did not know when it would disclose information responsive to Sierra Club's FOIA request.

50. Because TVA has not complied with FOIA and provided documents to Sierra Club, its members, and the public cannot provide informed comments to TVA on its proposal to retrofit Gallatin. Without FOIA documents, Sierra Club lacks records which bear centrally upon the EA's assertions, the environmental impacts of continuing the Gallatin plant's life, and alternatives thereto, and so Sierra Club cannot fully and independently review those assertions. This frustrates FOIA's purpose of ensuring that government decisions are transparent and NEPA's purpose of promoting informed public discussion of the environmental consequences of government projects.
51. Further, without full responses to its FOIA requests, Sierra Club cannot disseminate relevant records to the public and to members of the media. As a result, many other affected citizens will be unable to offer fully informed comments on TVA's plan.

PRAYER FOR RELIEF

52. Sierra Club hereby incorporates by reference paragraphs 1-51 above.
53. By failing to provide all records responsive to Sierra Club's FOIA requests in a timely manner, while moving forward with the very project which Sierra Club sought to examine, TVA is in violation of the letter and the intent of FOIA, 5 U.S.C. § 552.
54. WHEREFORE, Sierra Club respectfully requests that this Court find for it and enter a judgment:

- a) Declaring that TVA has violated FOIA, 5 U.S.C. § 552, by, *inter alia*, failing to respond to Sierra Club's FOIA requests filed on April 27 and May 12, 2012, within the statute's deadlines, *see* 5 U.S.C. § 552(a)(6)(A), and, further, by failing to fulfill its duties to promptly make available all records responsive to those requests, *see id.* § 552(a)(3)(A)(ii), and to process those requests with due diligence, *see id.* § 552(a)(6)(D)(iii);
- b) Ordering TVA to a) provide all records responsive to Sierra Club's FOIA requests before the NEPA comment period closes (and a *Vaughn* index of all documents which TVA may withhold), with adequate time to review the documents and submit comments, or b) provide all records responsive to Sierra Club's FOIA requests (and a *Vaughn* index if appropriate) and re-open the comment period, if it has closed, to allow for the filing of comments, withholding any final decision on the project until such comments are submitted and considered by TVA;
- c) Awarding Sierra Club its reasonable fees and costs in this action;
- d) Granting any other relief, including preliminary injunctive relief, as the Court finds just and proper.

Dated: November 15, 2012

Respectfully submitted,

/s/ Craig Segall

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