IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE

PROTECT OUR AQUIFER, ENERGY ALABAMA, and APPALACHIAN VOICES,	)	
Plaintiffs,	)	**Case No. 2:20-cv-02615-TLP-atc**
v.	)	
TENNESSEE VALLEY AUTHORITY,	)	
Defendant.	)	

REPLY BRIEF IN FURTHER SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
(Oral Argument Requested)

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INTRODUCTION

Facts in the record establish that TVA violated the TVA Act and NEPA when the agency made its game-changing decision to roll out the Never-ending Contracts. In 2019, TVA foresaw load loss as a financial risk to its preferred financial and generation asset plan. To foreclose the possibility of that future, TVA developed its anticompetitive Never-ending Contracts. The Contracts on their face violate the TVA Act's twenty-year limit. TVA's twisted read cannot change the plain language of the statute. Facts in the record show that the Contracts come with foreseeable environmental consequences that dramatically alter the status quo. The Contracts keep TVA's existing fossil fuel plants running more day-to-day, delay the retirement of those plants, and proliferate new methane gas-fired power plants, resulting in more pollution and water use than would occur under the previous contracts. Yet contrary to all evidence, TVA unreasonably determined that NEPA did not apply. Connecting evidence in the record with the declarations attached to the Amended Complaint, Conservation Groups have set forth facts that establish they have standing. Conservation Groups are entitled to summary judgment. This Court should vacate the Contracts and award the additional relief sought in their Motion. (Doc. 74.)

ARGUMENT

I. The Never-ending Contracts violate Section 10 of the TVA Act.

The Never-ending Contracts exceed TVA's limited authority to enter into contracts "for a term not exceeding twenty years." 16 U.S.C. § 831i. Each of TVA's Never-ending Contracts contains an "initial term" of twenty years, but the "contract shall be extended" by a year every year. (*E.g.*, Athens Contract, Doc. 73-6, PageID#5500.)[1] If a distributor wants to terminate a

[1] TVA makes much of Conservation Groups' citations to the form Never-ending Contract. (Doc. 82, PageID#7245–46.) Other than placeholders, such as "[DATE 1]" and "Municipality," the "Term of Contract" language is the same between the form Contract and executed Contracts.

Contract, the Contract requires twenty years' advance written notice of termination. (*Id.*) During the twenty-year termination period, the Contract requires the distributor to pay more for worse service. (Doc. 74-1, PageID#5850.) The result is that, once signed, the Contracts last forever. Those perpetual instruments exceed TVA's authority.

To argue that the statute somehow allows perpetual contracts, TVA offers multiple strained readings. Under one theory, only the "initial term" must comply with the twenty-year limit. (Doc. 82, PageID#7246.) Because the amended power supply contracts "are all older than twenty years" (*id.* at 7247), the twenty-year limit is a dead letter. That reading conflicts with the plain language and the purpose of the limit, which is to preserve a role for local democratic accountability. (*See* Doc. 74-1, PageID#5852–55.) Under a conflicting theory, TVA acknowledges that "the LTA Amendments . . . are subject to the 20-year 'term' in Section 10" (Doc. 82, PageID#7247), arguing that each contract "at any given time, is for a term that does not exceed 20 years." (Doc. 75, PageID#6688; *see also* Doc. 82, PageID#7246.) This reading concedes that the "initial term," extension, and termination periods must comply with Section 10's twenty-year term limit. But TVA insists that each period must be read in isolation.

The statute says no such thing. It does not cabin the twenty-year limit to "initial terms," and it does not exempt extension or termination periods. Each of TVA's readings would render the twenty-year limit toothless, imposing no constraints on the duration of TVA's contracts. Contrary to TVA's assertion (Doc. 82, PageID#7247), Conservation Groups do not argue that extensions and renewals are prohibited. (*See* Doc. 17, PageID#1255 ¶ 243; Doc. 74-1 at PageID#5851–55.) Whether permissible or not, contract extensions cannot be used to sidestep a

(*Compare* Doc. 33-6, PageID#3419 *with* Doc. 73-6, PageID#5500.) TVA has not identified any language that is meaningfully distinct between the form Contract and executed Contracts.

clear limit that Congress imposed.

As TVA concedes, the Never-ending Contract must comply with the twenty-year term limit. (Doc. 82, PageID#7247.) Belying TVA's litigation position, the Contract itself states that the "Term of Contract" includes an "initial term," one-year extension periods, and a twenty-year termination period. (*E.g.*, Doc. 73-6 at PageID#5500.) The whole "Term of Contract"—indeed, the whole Contract—must comply. Any other reading imposes no real limit on TVA's contracts. Courts have routinely refused to allow parties to evade statutory term limits through contract extensions. (*See* Doc. 74-1, PageID#5855–58.)

To dodge the weight of authority, TVA contends that its Never-ending Contract provides for a "renewal," rather than an extension. (Doc. 82, PageID#7246.) But the Contract itself says otherwise, stating that "the contract shall be *extended*" by one year every year. (*E.g.*, Doc. 73-6 at PageID#5500) (emphasis added). Courts take a functional approach to determining whether a provision is an extension or renewal. *BSG, LLC v. Check Velocity, Inc.*, 395 S.W.3d 90, 93–94 (Tenn. 2012); *Jack Tyler Eng'g Co. v. SPX Corp.*, 294 F. App'x 176 at *4 (6th Cir. 2008).[2] Here, while labeled a "renewal term," the provision operates as an extension.

TVA's irrational interpretation of Section 10, articulated solely in litigation, deserves no deference. *Commodity Futures Trading Comm'n v. Erskine*, 512 F.3d 309, 314 (6th Cir. 2008); *see also Ala. Power Co. v. TVA*, 948 F. Supp. 1010, 1023 (N.D. Ala. 1996) (court not required to "defer to the *ipse dixit* arguments of TVA as a litigant."). When *Chevron* deference is inappropriate, courts may analyze an agency's interpretation under the framework articulated in

[2] To construe TVA's power supply contracts, courts apply federal common law. *See, e.g., Gillham v. TVA*, 488 F. App'x 80, 83–84 (6th Cir. 2012). "In developing federal common law rules of contract law interpretation, [courts] take direction from both state law and general contract law principles." *Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 556 (6th Cir. 1998).

Skidmore v. Swift & Co., 323 U.S. 134 (1944). *United States v. Mead Corp.*, 533 U.S. 218, 227–28 (2001). Such factors include an agency's "formality and relative expertness," as well as the "persuasiveness of the agency's position." *Id.* at 228. This Court's expertise in reading contracts and construing statutes is greater than TVA's. Accordingly, TVA's litigation positions are entitled to no deference.

TVA argues that reading Section 10 to limit contracts to twenty years leads to "absurdity." (Doc. 82, PageID#7247–48.) As TVA acknowledged, TVA and its distributors have "renewed and/or amended [power supply contracts] hundreds of times." (Doc. 75, PageID#6669.) There is nothing absurd in concluding that a contract "for a term not exceeding twenty years" requires TVA to negotiate with democratically accountable distributors at least once every twenty years.[3]

II. TVA's failure to apply NEPA to the Never-ending Contracts is unreasonable.

The Court evaluates the threshold question of whether NEPA applies to the Never-ending Contracts for "reasonableness under the circumstances." *Southwest Williamson Cnty. Cmty. Ass'n, Inc. v. Slater*, 243 F.3d 270, 277 (6th Cir. 2001). Contrary to TVA's assertion (Doc. 82, PageID#7244), the reasonableness standard is "less deferential" than the arbitrary and capricious review courts apply to evaluate the contents of environmental impact statements or assessments prepared under NEPA. *See Northcoast Env't Ctr. v. Glickman*, 136 F.3d 660, 667 (9th Cir. 1998).

The Court owes no deference to TVA's unreasonable determination that NEPA does not apply to the game-changing Never-ending Contracts. Against the overwhelming evidence of the

[3] TVA suggests that the Never-ending Contracts do not undermine democratic accountability because distributors voted *once* to sign Never-ending Contracts. (Doc. 82, PageID#7248.) The problem is not that distributors made that decision. The problem is that signing distributors will never again have a meaningful opportunity to choose where and on what terms they receive their power.

Contracts' unexamined environmental impacts (Doc. 74-2, PageID#5885–5888 ¶¶ 36–49; PageID#5894–97 ¶¶ 80–97), TVA offers two flawed and formalistic rebuttals. First, TVA claims that the Flexibility Provision does not change the environmental status quo because NEPA allows the agency to wait until *after* it irretrievably commits resources to 130-plus Contracts to evaluate the impacts of that provision. (Doc. 82, PageID#7251–54.) Second, TVA claims that NEPA allows it to incorporate the Perpetual Term—a key feature of its proposed action—into its baseline or no-action alternative, such that the Contracts result in "no change" to its power operations. (Doc. 82, PageID#7254–66.) TVA is wrong on both points. NEPA applies to the Never-ending Contracts and TVA's determination otherwise is unreasonable.[4]

A. TVA committed its resources before studying the Flexibility Provision.

TVA claims NEPA did not apply to the Flexibility Provision because there was no final agency action until TVA completed its belated environmental review in July 2020. (Doc. 82, PageID#7251.) TVA has it exactly backward. The Flexibility Provision was part of the quid pro quo for the Contracts. (*See* Doc. 80, PageID#6960; *see also* Doc. 33-6, PageID#3417, 3420; AR009282, 86; AR009317, 21.) Within hours after the Board adopted the resolution in August 2019, TVA executed Contracts that committed TVA to providing flexibility and imposed the 5% cap. (*See* Doc. 54-1, PageID#5192 n.8.) After that point, TVA had no offramp from providing flexibility. (*See* Doc. 74-1, PageID#5863; *see also* Doc. 33-27, PageID#4239.) Further, the Board's adoption and TVA's execution of the Contracts—not the individual provisions—are

[4] TVA objects to Conservation Groups' use of evidence in the 2019 Integrated Resource Plan and accompanying environmental impact statement, as well as in the Flexibility environmental assessment, accusing Conservation Groups of a "collateral attack." (Doc. 82, PageID#7249–50.) But Conservation Groups are simply citing to those documents as evidence in the record of the Never-ending Contracts' non-trivial changes to the environmental status quo.

major Federal actions to which NEPA applies. 42 U.S.C. § 4332(C).[5]

Whatever TVA recited in the Never-ending Contract about distributors' power requirements (Doc. 82, PageID#7252), it strains credulity to state that the Flexibility Provision maintains the environmental status quo. The Flexibility Provision irretrievably commits TVA to allowing each distributor to serve 3-5% of its demand with non-TVA power. (*See* Doc. 74-1, PageID#5863; Doc. 33-6, PageID#3420; Doc. 33-27, PagelD#4239.) The shift to non-TVA power enshrined in the Flexibility Provision has reasonably foreseeable indirect and cumulative impacts. Among the potentially significant environmental effects TVA identified were energy production and use, socioeconomics, air, water, and land resources, and waste generation. (Doc. 33-28, PageID#4258.)

TVA makes much of the fact that the agency ultimately found no significant impacts. (Doc. 79, PageID#6866.) But the conclusions drawn by TVA in its belated study are not relevant to the question of *when* TVA should have prepared a statement under NEPA. Nor do those conclusions suggest that TVA's error is harmless, as TVA suggests. (Doc. 82. PageID#7253–54.) By the time TVA prepared the Flexibility environmental assessment, the agency had taken the "no action" alternative (no Never-ending Contract) off the table and had committed itself to the arbitrary 5% cap. (Doc. 74-1, PageID#5874–75.) For the same reason, Conservation Groups' comments on the belated study do not "cure" TVA's unlawful precommitment. (Doc. 82, PageID#7253–54.) Had TVA studied the environmental impacts at the appropriate time—before it had irretrievably committed its resources to the Contracts and the 5% cap—TVA's conclusions might have been different (and not preordained). (Doc. 74-1, PageID#5863–64.)

[5] Despite TVA's objections (*e.g.*, Doc. 79, PageID#6863), it is irrelevant whether the Flexibility Provision is a "term and condition" of TVA's power supply contracts. TVA has no discretion to violate NEPA. 42 U.S.C. § 4332(C).

TVA asserts that Conservation Groups' arguments regarding the Flexibility Provision constitute an "unfair surprise." (Doc. 82, PageID#7250.) To the contrary, the harsh caps on local renewables imposed by the Flexibility Provision are described numerous times in the Amended Complaint. (*E.g.*, Doc. 17, ¶¶ 2, 89.) So too are its effects on local access to distributed solar. (*E.g.*, *id.*, ¶¶ 2, 89, 157, 179, 182, 187, 218, 222.) The Amended Complaint identifies the Flexibility environmental assessment as an inadequate post hoc environmental review. (*Id.* ¶ 124.) Conservation Groups incorporate all of their allegations into the NEPA cause of action (*Id.* ¶ 224), specifically allege environmental harm caused by the constraints the Contracts put on local renewables (*Id.* ¶ 233), and further allege that TVA irretrievably committed to the Contracts without complying with NEPA (*Id.* ¶ 236). The only unfair surprise in this case was TVA's announcement of the Contract to the public as a done deal and its execution of the Contract with distributors only hours afterward.

B. TVA cannot consider the Perpetual Term part of its no action alternative.

TVA claims that the Perpetual Term results in no change to the environmental status quo because TVA's 2019 Integrated Resource Plan already plans for TVA to provide "full requirements" power to its 153 distributors. (Doc. 82, PageID#7255.) TVA's argument proves too much. Evidence in the record shows that the Never-ending Contracts reverse-engineer the load (i.e., revenue) levels that TVA wants to maintain, foreclosing a realistic high load loss future TVA viewed as unfavorable in the 2019 Integrated Resource Plan. (*See* Doc. 74-2, PageID#5883, 5885–88, 5892–95; *see also* Doc. 74-1, PageID#5865–70.)[6] NEPA does not allow

[6] TVA objects to facts from its own Integrated Resource Plan on the grounds that such evidence requires expert opinion. (Doc. 79, Page ID#6847 ¶ 76; Page ID#6849 ¶ 77.) No expert opinion is necessary to perform a straightforward comparison of the capacity addition tables Conservation Groups cite. (*Compare* Doc. 33-17, PageID#3732 (Base Case in Current Outlook scenario "1A") *with* Doc. 33-17, PageID#3736 (Base Case in Rapid DER scenario "5A").) For example, this

TVA to constrain the future perpetually and then claim that nothing has changed.

TVA's argument that it has not upset the status quo because, in its view, it had full requirements contracts with distributors before and after adopting the Never-ending Contracts, omits critical facts. (Doc. 82, PageID#7255.) By adopting the Contracts TVA made dramatic new policy choices that would have significant effects on its decisions about dispatching its existing fossil resources, investing in generation assets, and defining the rights and obligations of distributors related to generating power and purchasing power from TVA. Courts have recognized that contracts that commit an agency to important policy choices are significant actions requiring NEPA review. *See Forelaws on Bd. v. Johnson*, 743 F.2d 677, 682 (9th Cir. 1984) (long-term power supply contracts "significantly affect the environment because they involve important policy choices . . . ."); *Confederated Tribes & Bands of Yakima Indian Nation v. FERC*, 746 F.2d 466, 476–77 (9th Cir. 1984) (holding that relicensing hydropower facilities, even under comparable terms as the old licenses, is a significant action because it is informed by substantially the same considerations at issue in the first licensing).

TVA defends its failure to consider load loss part of the no action alternative by calling it "hypothetical" and "imaginary." (Doc. 82, PageID#7255–56.) But in the 2019 Integrated Resource Plan, TVA concluded that each scenario—including, critically, the high load loss Rapid DER scenario—"[r]epresented a plausible, meaningful future in which TVA could find itself operating within over the 20-year study period." (Doc. 33-15, PageID#3569.) The high

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comparison shows that the Base Case in the Current Outlook scenario includes 14.2 GW of gas by 2028, whereas the Base Case in the Rapid DER scenario includes 10.9 GW, a difference of 3.3 GW as described in Conservation Groups' Statement. (Doc. 74-2, PageID#5893 ¶ 76.) Similarly, by 2038, the Base Case in the Current Outlook includes 16.6 GW of gas, whereas the Rapid DER includes 11.6 GW of gas, a difference of 5 GW as described in Conservation Groups' Statement. (Doc. 74-2, PageID#5893 ¶ 77.)

load loss future was so plausible that TVA addressed it as a "Frequently Asked Question" and discussed it at length at its August 2019 meeting. (Doc. 80-3, PageID#7007; AR001640–41.)

The high load loss future is also the one TVA's senior management explains the Never-ending Contracts mean to prevent. (*See, e.g.*, AR001625 ["deploy[ing] partnership proposal to achieve longer customer commitments"]; AR001645 ["the opportunity to align contract length with our asset decisions"].) "Longer customer commitments" guarantee load, which in turn, guarantees revenue. Ensuring sufficient revenue to satisfy its long-term commitments is the primary reason TVA offered the Never-ending Contracts. (Doc. 33-6, PageID#3418.)

Contrary to TVA's claims, taking action to lock in TVA's preferred future is not the same as maintaining the status quo. (Doc. 82, PageID#7265; Doc. 33-26, PageID#4235.) An agency cannot artificially change the baseline against which it measures significance by incorporating elements of its new program into the no action alternative. *Pit River Tribe v. U.S. Forest Service* is the case in point. 469 F.3d 768 (9th Cir. 2006). There, the court held that the agency should have prepared an environmental impact statement for a lease extension and could not rely on a subsequent statement that incorporated the lease extension into the no action alternative. *See id.* at 786; *see also Friends of Yosemite Valley v. Kempthorne*, 520 F.3d 1024, 1038 (9th Cir. 2008) (holding invalid a no-action alternative that assumed the existence of the plan being proposed); *N.C. Wildlife Fed'n v. N.C. Dept. of Transp.*, 677 F.3d 596, 603 (4th Cir. 2012) ("[C]ourts not infrequently find NEPA violations when . . . the baseline assumes the existence of the proposed project.").

TVA nevertheless tries to argue that *Center for Biological Diversity v. TVA*, No. 3:18-CV-1446-LCB, 2021 WL 9440638 (N.D. Ala. Aug. 21, 2021) is on all fours with this case. (Doc. 82, PageID#7263.) Not so. *Center for Biological Diversity* addressed a rate change adopted

before the Never-ending Contracts and did not concern whether the baseline or no action alternative should include load loss. *Center for Biological Diversity*, 2021 WL 9440638 at *2.[7]

Conservation Groups are not asserting the effects of the Contracts "ipse dixit," as TVA claims. (Doc. 82, PageID#7263.) There is ample evidence in the record that by locking in load and limiting competition, the Contracts cause environmental impacts. The Contracts cause more greenhouse gas emissions, more air pollution, and more water use than would have occurred under the previous contracts. (*See* Doc. 74-2, PageID#5894–95 ¶¶ 80–84 (citing Doc. 33-23, PageID#4098–4101).)[8] In addition to charts directly comparing the environmental impacts of TVA's preferred and high load loss futures in the Integrated Resource Plan (Doc. 33-23, PageID#4098–4101), TVA's Chief Financial Officer recited by memory the effects of load loss on TVA's preferred power plans at the August 2019 Board meeting. (AR001640–41.) And TVA executives have repeatedly stated that the Contracts help fund its investments in new gas plants. (AR001627, 33.)

Under the contours of the previous contracts—with their shorter-duration customer commitments—TVA foresaw a significant risk of revenue and load loss in the coming years. As a result, the correct baseline against which TVA should have measured the significance of the Contracts is one that incorporates foreseeable load loss. Its failure to do so violates NEPA.

C. The facts show an environmental impact statement is required.

TVA offers no meaningful response to Conservation Groups' arguments that the agency

[7] Use of the appropriate baseline is also relevant to understanding the straightforward chain of causation through which the Contracts harm Conservation Groups and their members.

[8] TVA erroneously asserts that air emissions and gas and water use under the Current Outlook "are lower than" in the Rapid DER scenario. (Doc. 79, PageID#6854–6857 ¶¶ 81–84.) TVA is incorrect. The cited Appendix E tables in TVA's Integrated Resource Plan plainly show that the Base Case in Current Outlook (1A) results in dramatically higher impacts across the board than the Base Case in the high load loss Rapid DER (5A). (*See* Doc. 74-2, PageID#5894 ¶¶ 81–84 (citing Doc. 33-23, PageID#4098–4100).)

precommitted to the Contracts and should have prepared an environmental impact statement. (Doc. 74-1, PageID#5871–75.) Instead, TVA simply relies on its faulty determination that NEPA does not apply. (Doc. 82, PageID#7264.) TVA fails to address at least three of the significance factors that trigger TVA's obligation to prepare an environmental impact statement: the context of the Contracts and their historic and regional import, their precedential effect in eliminating a high load loss future and setting into motion TVA's gas buildout, and their cumulative impacts as more and more distributors become locked in, with all of the accompanying environmental harm caused by the operation of TVA's power system. (*See* Doc. 74-1, PageID#5872.) Any one of those factors dictate that the Contracts should have been studied in an impact statement *before* TVA committed itself in perpetuity to provide power. (Doc. 74-1, PageID#5871–75.)

III. Conservation Groups set forth facts showing they have standing.

Conservation Groups have adduced facts demonstrating that TVA's violations of NEPA and the TVA Act caused actual or imminent injuries to the groups and their members. Conservation Groups agree with TVA that the Court must assess standing based on the facts at the time of the Amended Complaint. *Rockwell Intern. Corp. v. United States*, 549 U.S. 457, 473–74 (2007). Declarations addressing harms that post-date the Amended Complaint (Docs. 74-6 to 74-11) are relevant to the question of remedy because they show that Conservation Groups and their members are suffering ongoing and imminent harm, which the court can redress through declaratory and injunctive relief. *See Alaska Wilderness Recreation & Tourism Ass'n v. Morrison*, 67 F.3d 723, 732 (9th Cir. 1995) (remanding to district court to find facts and balance equities in crafting injunction).

A. Conservation Groups establish standing to pursue the TVA Act claim.

1. Conservation Groups have suffered injuries-in-fact.

By perpetually locking in its distribution customers, TVA's unlawful Never-ending

Contracts injure Conservation Groups and their members. TVA insists that *only* "harm[s] traditionally recognized as providing a basis for lawsuits in American courts" survive *TransUnion*. (Doc. 82, PageID#7228–29.) Not so. Courts have long recognized that injuries to aesthetic and recreational interests can establish standing. *See, e.g.*, *Friends of the Earth, Inc. v. Laidlaw Env't Services (TOC), Inc.*, 528 U.S. 167 (2000). In addition to economic injuries (*e.g.*, Doc. 17-8 ¶ 17; Doc. 17-16 ¶¶ 5–8; Doc. 17-11 ¶¶ 5–9), Conservation Group members suffer injuries to legally protected interests in recreation (*e.g.*, Doc. 17-10 ¶¶ 9–11) and drinking water (*e.g.*, Doc. 17-8 ¶ 12).

Conservation Groups' injuries are "actual or imminent." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). TVA attempts to ratchet up the imminence requirement (Doc. 82, PageID#7229), but the Supreme Court has emphasized that imminence requires showing that "the threatened injury is certainly impending, *or* there is a *substantial risk* that the harm will occur." *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (emphasis added) (internal quotations omitted); *see also 520 Michigan Ave. Assocs., Ltd. v. Devine*, 433 F.3d 961, 962 (7th Cir. 2006) ("Standing depends on the probability of harm, not its temporal proximity").

Since early 2019, MLGW has evaluated its power supply options (Doc. 50 ¶ 69), and the Never-ending Contract—the lowest-price offer from TVA—has been on the table since August 2019. Over 95% of TVA's distributors have signed the Never-ending Contract. (Doc. 73 ¶ 52.) While not "literally certain," *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, 414 n.5 (2013), there is a substantial risk that MLGW will sign a Never-ending Contract. Even if MLGW refuses, Protect Our Aquifer and its supporters are harmed by Never-ending Contracts signed elsewhere. TVA uses at least 3.5 million gallons of Aquifer water per day, and its withdrawals risk spreading extremely high levels of toxic contamination near TVA's coal ash impoundments.

(Doc. 17-8 ¶¶ 23–24.) Prolonged and increased demand for TVA power, whether from MLGW or other locked-in distributors, requires TVA to run its existing fossil fuel fleet, including Allen, more. *See* Section III.2. Increased or prolonged operation of the Allen gas plant jeopardizes Protect Our Aquifer supporter Ward Archer's right to clean water. (Doc. 17-8 ¶ 24.) If MLGW does not sign, Mr. Archer will also continue to pay 3.1% *more* than other TVA ratepayers for power that, because of the Contracts, is increasingly reliant on volatile fossil fuels. (Doc. 17-8 ¶ 18; TVA Board Meeting Slide Deck 43 (Aug. 31, 2022).)[9]

Prolonged reliance on fossil fuel plants harms individuals like Energy Alabama member Jonathan Rossow, whose recreation is impaired by TVA's Kingston coal plant. (Doc. 17-10, ¶¶ 9–11.) TVA says retiring Kingston is certain to relieve Mr. Rossow's injuries (Doc. 82, PageID#7230), but the Kingston coal plant will operate at least through 2027. 86 Fed. Reg. 31780, 31781 (June 15, 2021).

Conservation Groups have standing based on organizational injuries. (Doc. 80, PageID#6931–32.) Inventing a new standard, TVA asserts that only some organizational goals matter, and that Conservation Groups' goals do not. (Doc.82, PageID#7233.) Under long-standing precedent, the perceptible impairment of an organization's activities "with the consequent drain on the organization's resources" constitutes an organizational injury. *Havens Realty Corp. v. Coleman,* 455 U.S. 363, 379 (1982). There is no assessment of which activities matter and which do not. *See id*. at 363–382. Conservation Groups' core activities include advocacy to distributors regarding their power supply. (Doc. 17-9, PageID#1344–45; Doc. 17-

[9] Available at https://www.tva.com/about-tva/our-leadership/board-of-directors/meetings-archive/2022/08/31/default-calendar/tva-board-meeting---august-31-2022. The Court may take judicial notice of the information on TVA's website. *See* Doc. 73, PageID#5417 n. 2; *Mitchell v. TVA*, No. 3:14-cv-360-TAV-HBG, 2015 WL 1962203, at *4 n.2 (E.D. Tenn. Apr. 30, 2015) (taking judicial notice of TVA's website).

13, PageID#1361–63; Doc. 17-7, PageID#1330–31.) The sort of advocacy Protect Our Aquifer engaged in—communicating with the local distributor's board and educating the public about power supply options (Doc. 17-7, PageID#1333–35)—becomes not just "perceptibly impaired," *Havens*, 455 U.S. at 379, but largely futile once distributors are locked into Never-ending Contracts. All three organizations have diverted resources, including "attention, time, and personnel," *Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110–11 (2d Cir. 2017), to fighting the Contracts. (Doc. 17-9, PageID#1344–46; Doc. 17-13, PageID#1362–63; Doc. 17-7, PageID#1333–34.) As TVA notes (Doc. 82, PageID#7232), Energy Alabama has continued to advocate for more distributed energy, but that advocacy is perceptibly impaired by the 5% cap that limits the growth of distributed energy resources like rooftop solar. (Doc. 17-9, PageID#1345.) Protect Our Aquifer has already diverted considerable resources to fighting against the illegal Contract on the table for MLGW (Doc. 17-7, PageID#1333) and it faces the imminent risk that its advocacy to MLGW will be perceptibly impaired if MLGW is locked into a Never-ending Contract.

2. The Never-ending Contracts have caused Conservation Groups' injuries.

Conservation Groups' injuries are fairly traceable to TVA's Never-ending Contracts. The anticompetitive program has four primary effects: (1) increasing reliance on TVA's existing fossil fuel plants; (2) funding TVA's investments in new gas plants; (3) limiting distributed energy resources in the Valley; and (4) limiting distributors' ability to make decisions regarding their power supply.

TVA's own analysis shows that the Contracts increase TVA's reliance on its existing fossil fuel plants. When a Board member asked specifically about load loss at the August 2019 Board meeting, TVA's CFO explained the impacts on TVA's system. (AR001640–41.) One impact was that "[t]he fuel cost would come down because you would be dispatching lower in

your fleet[.]" (AR001641.) The fuel costs TVA's CFO referred to are fossil fuels: coal and gas.[10] Dispatching lower in the fleet means operating expensive fossil fuel plants less.[11] By preventing load loss, the Contracts cause TVA to operate expensive fossil fuel plants more.

The 2019 Integrated Resource Plan confirms that. While TVA did not model load loss associated with departing distributors, TVA did model load loss in the Rapid DER scenario, which assumed widespread growth of distributed generation, such as rooftop solar. (Doc. 33-15, PageID#3570.) Forecasting approximately 10% load loss by 2028—roughly the same as MLGW's load—the Rapid DER scenario would result in up to 3.3GW less gas on the system, and 0.8GW of additional coal retirements. (Doc. 33-17, PageID#3724.)

The Contracts finance at least a decade of TVA's investments in new gas plants. TVA's CFO John Thomas explained that the Never-ending Contracts play a critical role in funding TVA's capital expenditures, allowing TVA to carry more debt without raising base rates. (AR001630–31.) At the same meeting, Mr. Thomas discussed "capacity expansion" as one of the biggest areas of capital expenditure over the next decade. (AR001612.) Mr. Thomas explained that the financial plan would "fund capital" to invest in "New Gas Builds." (AR001627.)

The Never-ending Contracts limit distributed energy resources throughout the Valley by imposing harsh caps. (*See* Doc. 33-27, PageID#4239) As costs have plummeted, distributed solar has become increasingly cost competitive. TVA identified declining costs of distributed energy resources as a fundamental threat to its economic model. (Doc. 74-2 ¶¶ 13–15.) TVA recognized

[10] Renewables do not have fuel costs. TVA's nuclear fleet serves "baseload" and does not fluctuate with changes in load. (Doc. 33-14, PageID#3547.)

[11] (*See* Doc. 33-16, PageID#3653) ("Depending on how an asset's dispatch cost compares to other assets in the fleet, the amount of energy sourced from an asset may vary greatly over time. For example, when natural gas prices are low, those assets powered with natural gas serve customers with more energy than when natural gas prices are high.")

that "[d]ue to decreasing prices and increasing consumer demand for energy choice, distributed generation is expected to continue to grow." (Doc. 33-16, PageID#3680.) While previous contracts were "full requirements" (Doc. 33-26, PageID#4235), they did not last forever. A reasonable notice of termination period allows distributors to explore options to add local renewable generation well beyond 5%, as MLGW has in its power supply process.[12]

Prolonging and increasing reliance on fossil fuels, while limiting access to increasingly affordable distributed energy, means Conservation Groups' members pay more money for dirtier energy. That is particularly true because consumers pay TVA's fuel costs, including volatile gas prices. TVA has acknowledged that "[a]s natural gas becomes a larger portion of the portfolio, the volatility of natural gas prices becomes a greater risk[.]" TVA Board Meeting Slide Deck 43 (Aug. 31, 2022). TVA and its distributors pass TVA's fuel costs on to customers, so "all consumers in the Tennessee Valley pay for fuel."[13] By funding TVA's increased reliance on natural gas and limiting increasingly affordable distributed generation, the Contracts create the imminent risk that Conservation Group members will pay more for dirtier power.

TVA again insists that only four Never-ending Contracts could cause Conservation Groups' injuries. (Doc. 82, PageID#7226–27.) But Conservation Groups' environmental injuries stem from *all* of the Never-ending Contracts. (Doc. 80, PageID#6933.) By funding TVA's increased reliance on gas, *all* of the Contracts create the imminent risk of economic harm for

[12] In July 2020, MLGW's consultant recommended that, if the distributor leaves TVA, MLGW should "[m]aximize the amount of local renewable generation." Siemens, Integrated Resource Plan, MLGW, 28 (July 2020). Conservation Groups request that the Court take judicial notice of materials available on MLGW's website. "Public records and government documents are generally considered 'not to be subject to reasonable dispute.' This includes public records and government documents available from reliable sources on the Internet." *United States ex rel. Dingle v. BioPort Corp.*, 270 F.Supp.2d 968, 972 (W.D. Mich. 2003) (citation omitted).

[13] TVA, Total Monthly Fuel Costs, https://www.tva.com/energy/our-power-system/total-monthly-fuel-costs (last accessed November 14, 2022).

Conservation Group members. (Doc. 80, PageID#6929–32). Conservation Group members want the chance to buy power on their preferred terms. (Doc. 17-8, ¶ 17; Doc. 17-9, ¶ 18; Doc. 17-16, ¶ 5.) The Contracts deny this opportunity by limiting distributed generation and exposing these members to TVA's volatile fossil fuel costs.

Finally, the Contracts fundamentally undermine democratic engagement by removing any meaningful opportunity for distributors to choose how and with whom they contract for power. Because they are perpetual (Doc. 74-1, PageID#5849–51) the Contracts eliminate distributors' ability to do what MLGW was doing in 2019 and is doing right now: consider power options in a public process. (Doc. 50 ¶ 69.)

3. Conservation Groups' injuries are redressable by this Court.

Because TVA's unlawful Contracts cause the harm, a favorable ruling is likely to redress Conservation Groups' injuries. Vacating or reforming the Contracts' offending provisions would reinstate democratic accountability and allow distributors to pursue alternative power supply options that include more distributed energy, decreasing reliance on TVA's existing fleet. A favorable ruling could cause TVA to revisit its capacity plans underwritten by the perpetual Contracts. These injuries are redressable "even though the agency . . . might later, in the exercise of its lawful discretion, reach the same result for a different reason." *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998).

B. Conservation Groups establish standing to pursue the NEPA claim.

Conservation Groups meet their burden to show standing for the NEPA claim. "To show a cognizable injury in fact in a procedural injury case, a plaintiff must allege that the agency violated certain procedural rules, that these rules protect a plaintiff's concrete interests and that it is reasonably probable that the challenged action will threaten these concrete interests." *Friends of Tims Ford v. TVA*, 585 F.3d 955, 968 (6th Cir. 2014) (internal quotations omitted). TVA has

violated NEPA, *see* Section II, and it is reasonably probable that TVA's Contracts will threaten Conservation Groups' concrete interests, Section III.A.2. TVA objects that the "concrete interest analysis [is] all mixed up" (Doc. 82, PageID#7237), but Conservation Groups have clearly identified environmental, economic, and organizational interests threatened by TVA's Contracts. *See* Section III.A.1. NEPA's purposes serve to protect Conservation Groups' and their members' environmental interests, *see* 42 U.S.C. § 4321. Because NEPA protects interests that "rest on both economic and environmental concerns," *Latin Ams. For Social and Econ. Dev. v. Adm'r of Fed. Hwy Admin.*, 756 F.3d 447, 466 (6th Cir. 2014), it also protects members' interests in more affordable, cleaner electricity.

TVA argues that NEPA cannot give rise to Conservation Groups' informational standing. (Doc. 82, PageID#7243.) The Supreme Court has recognized that plaintiffs have informational standing when they are denied "information subject to public-disclosure or sunshine laws that entitle all members of the public to certain information." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2214 (2021). TVA insists this cannot include NEPA, but "TVA agrees that the purpose of NEPA's EIS requirement is to *make relevant environmental information available to the public*[.]" (Doc. 82, PageID#7243.) That's public disclosure. *See Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989) (NEPA provisions "provide for broad dissemination of relevant environmental information"). NEPA entitles the public to information, and courts have recognized that the failure to comply with NEPA can give rise to an informational injury. *See, e.g., Nat'l Wildlife Fed. v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988). Conservation Groups have identified specific downstream consequences that TVA's unlawful failure to disclose information caused. (*See, e.g.*, Doc. 17-8 ¶ 19; Doc. 17-13 ¶ 19; Doc. 17-9 ¶ 14.)

TVA argues that Conservation Groups are not injured as organizations because they

"have failed to show a cognizable concrete interest that belongs to the organizations." (Doc. 82, PageID#7245.) Conservation Groups are injured because TVA's Contracts have perceptibly impaired their core activities, leading to the diversion of resources. Section III.A.1. TVA's failure to comply with NEPA additionally impairs Conservation Groups by depriving them of information that they would have used in their core advocacy and public education activities. *See Farm Sanctuary v. U.S. Dep't of Agric.*, 545 F. Supp. 3d 50, 64–65 (W.D.N.Y. 2021).

Conservation Groups' injuries are fairly traceable to TVA's unlawful Contracts. In procedural rights cases, "the causation and redressability requirements are relaxed." *Klein v. Dep't of Energy*, 753 F.3d 576, 579 (6th Cir. 2014). Conservation Groups have spelled out how the Contracts' effects—increasing reliance on existing fossil fuel plants, funding new fossil fuel plants, inhibiting distributed generation, limiting local decision-making—injure Conservation Groups and their members here.[14] Section III.A.2; *see also* Doc. 74-2, PageID#5885–88, 92–97. TVA repeats its argument that the Integrated Resource Plan alone influences TVA's generation decisions. (Doc. 82, PageID#7240.) As Conservation Groups have shown, the Contracts also influence TVA's generation portfolio by locking in load, limiting local generation, and financing new gas plants. (Doc. 80, PageID#6938.)

Conservation Groups' and their members' injuries are redressable because "there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant." *Massachusetts v. EPA*, 549 U.S. 497, 518 (2007). *See also* Section III.A.3, Section IV.

[14] TVA contends that Conservation Groups omitted any discussion of causation in their memorandum in support of summary judgment (Doc. 82, PageID#7239.) Conservation Groups did not. Because TVA's causation of the harms are inextricably caught up with the NEPA merits, Conservation Groups incorporated their discussion of the Contracts' effects. (Doc. 74-1, PageID#5843.)

IV. The appropriate remedy is vacatur of the Never-ending Contracts.

Vacatur is the presumptive remedy for agency actions contrary to law. 5 U.S.C. § 706(2). TVA has been on notice of the relief sought in this case since at least the filing of the Amended Complaint. Yet now, at the eleventh hour, TVA asks this Court to further delay granting relief so that TVA can confer with its distributors, none of whom have sought to intervene in this case. (Doc. 82, PageID#7266.) TVA also claims it does not itself have a clue how to fashion a remedy, despite having had two years to think about how the agency might be able to pay its debts and plan for the future while also complying with the law. (*Id.*) TVA could, for example, with appropriate environmental review, offer its distributors more access to affordable local renewable energy—even if it means changing the agency's own financial and power supply plans. In other words, instead of engaging in unlawful monopolistic behavior that thwarts local democratic accountability, TVA could compete fair and square.

As demonstrated in the declarations filed with Conservation Groups' Motion, Conservation Groups and their members are suffering ongoing environmental, economic, and informational injuries and are imminently threatened by additional harm, as TVA continues to sign Contracts, lock in more load, and march forward its massive gas buildout. (*See* Doc. 74-6 through 74-11.) Vacatur of the Contracts is necessary to repair the integrity of TVA's flawed decision-making and ameliorate the effects of the Never-ending Contracts on TVA's ratepayers and the environment across its service territory. There is no reason for further delay.

For the foregoing reasons, Conservation Groups respectfully request that the Court declare illegal and vacate the Never-ending Contracts, permanently enjoin TVA from entering into perpetual power supply agreements, and require TVA to prepare a full Environmental Impact Statement prior to adopting new contract amendments that comply with the law.

Respectfully submitted,

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