National Environmental Policy Act/Natural Gas Plant: Federal Appellate Court Addresses Whether to Overturn Vacatur Order Pending TVA Appeal on the Merits



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The United States Court of Appeals for the Sixth Circuit ("6th Circuit") addresses in an October 16th Opinion a National Environmental Policy Act ("NEPA") issue arising out of the construction of a natural gas plant. *See APPALACHIAN VOICES; CENTER FOR BIOLOGICAL DIVERSITY; SIERRA CLUB v. TENNESSEE VALLEY AUTHORITY*, No. 26-5836.

The question addressed was whether the 6th Circuit should grant an administrative stay while the parties complete their briefing addressing the merits.

The Tennessee Valley Authority ("TVA") is replacing its coal-fired steam-generating plant in Harriman, Tennessee. The utility's coal fleet is described as "among the oldest in the nation." After considering ongoing "failures" at Kingston, TVA proposed to:

… retire three of its "units as early as 2026, but no later than 2031, and the remaining six units as early as 2027, but no later than 2033."

TVA in 2021 issued a notice of intent explaining that it would prepare a NEPA Environmental Impact Statement ("EIS") about the retirement and replacement of its Kingston units.

The notice listed several alternatives which included:

- Take no action and continue to operate the Kingston coal-fired units with updates.
- Construct and operate a gas-powered plant at the Kingston site or a different location.
- Retire the Kingston coalfired units and construct and operate solar facilities instead.

A draft EIS prepared in 2023 identified a gas plant at Kingston as TVA's preferred option. The utility executed a "Precedent Agreement" with East Tennessee Natural Gas, LLC in 2021, in which East Tennessee Natural Gas would supply the gas required to meet the new Kingston plant's energy needs.

The final EIS was published in 2024, and identified TVA's stated purpose and need as the retirement of the Kingston coal-fired units by 2027 and their replacement with 1,500 megawatts of reliable new generation.

The final EIS identified three options and determined that the natural gas plant best meet the project's goals because it would satisfy the need for flexible, fast-ramping generation in commercial operation by the end of 2027.

The Record of Decision was issued in April 2024, and construction began that same month.

Appalachian Voices, Center for Biological Diversity, and Sierra Club (collectively, "CBD") filed an action in the United States District Court six months later to halt the Kingston project alleging TVA violated NEPA when issuing its EIS and Record of Decision.

NEPA requires federal agencies to include values and issues in their decision-making processes. Its federal mandate is accomplished by agency consideration of environmental impacts of proposed actions and reasonable alternatives to those actions.

The statute requires federal agencies in certain circumstances to prepare a detailed EIS. However, the requirement to prepare this document is only triggered in the event of a major federal action which will significantly affect the human environment.

NEPA differs from action enforcing environmental statutory programs such as the Clean Water Act and the Clean Air Act. It does not impose substantive mandates. Instead, it is limited to requiring federal agencies to meet procedural requirements such as preparation of the EIS and certain defined instances. NEPA does not require a certain alternative or to meet a particular standard. Nevertheless, failure to adhere to applicable NEPA requirements can result in an action being enjoined until there is compliance.

CBD identified what it alleged were the following NEPA violations by TVA:

- Failure to consider enough alternatives to a gas plant.
- Failure to take the required "hard look" at this plant's environmental effects.
- Unlawfully pre-committed itself to the plant before issuing its final decision.
- Arbitrarily found that the plant was the cheapest alternative.

CBD asked that the United States District Court vacate the TVA's EIS and Record of Decision and issue new decisions that complied with NEPA and enjoin further construction in the interim.

CBD never sought a preliminary injunction, and therefore the Kingston project has continued throughout the two-year life of the litigation. It is stated to be approximately half completed.

The U.S. District Court found two NEPA violations:

- Failure to consider at least two alternatives that satisfy the relevant criteria—namely, that they be feasible and consistent with the proposal's purpose and need (concluding that only the gas-plant proposal met these criteria).
- Unlawfully pre-committing to the gas plant in its Precedent Agreement with East Tennessee Natural Gas (concluding that the agreements compelled TVA to build the gas plant no matter what the NEPA review disclosed).
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- The U.S. District Court saw no basis for remand-without-vacatur because TVA was held to have made more than a "technical error" in its NEPA analysis. Thus, the EIS and Record of Decision were vacated.
- TVA asked the District Court to stay the order on an expedited basis. Further, it appealed and renewed its stay with the 6th Circuit. The 6th Circuit granted an administrative stay to allow the parties to complete their briefing on TVA's motion to stay pending appeal.
- The 6th Circuit noted that the vacatur order functionally requires TVA to stop construction.
- The 6th Circuit invoked the factors that govern a stay of an injunction when analyzing a request for stay a vacatur order, which included:
- Has the stay applicant made a strong showing that it is likely to succeed on the merits?
- 6th Circuit concludes TVA has the better argument.
- U.S. District Court held that TVA did not consider enough alternatives, but CBD did not identify any alternative that would redress their injury.

- U.S. District Court likely misunderstood the NEPA rule requiring agencies to address alternatives to their proposed action.
- Neither the U.S. District Court nor CBD identified any viable option other than the natural gas plant.
- Will the applicant be irreparably injured absent a stay?
- 6th Circuit concludes that U.S. District Court likely misunderstood TVA's Precedent Agreement with East Tennessee Natural Gas when finding a second NEPA violation.
- Parties' stay briefs did not cite any statutory provision that bans agency precommitments or predeterminations.
- Even if some precommitments violate NEPA, TVA will likely show that it made no forbidden precommitment.
- Case likely falls on the permissible planning side of the line.
- Precedent Agreement had exit ramps if TVA opted against the gas plant and thus did not "irreversibly" commit it to that plant.
- Will the issuance of the stay substantially injure the other parties interested in the proceeding?
- 6th Circuit states that TVA will likely still prevail even if the 6th Circuit is wrong on the two NEPA legal points because the U.S. District Court may have chosen the wrong remedy.
- Courts typically consider two factors when deciding on the proper remedy:
- Seriousness of a mistake.
- Disruptive consequences of vacating a decision.
- Both factors show that the U.S. District Court likely picked the wrong remedy.
- NEPA errors that the District Court identified appear harmless.
- Which side does the public interest favor?
- TVA is held to have shown it will likely suffer irreparable harm if forced to halt construction of the half-completed gas plant, and harm includes both lost money and a risk of power outages.
- Noting a work stoppage would have significant time and money ramifications in terms of rehiring a new group.
- Warranties on the expensive gas turbines, generators, motors and transformers would continue to run during the stoppage.
- Grid instability qualifies as an irreparable injury.
- Final two factors (harm to other parties and the public interest) merge where, a government agency is a party.
- CBD's decision to treat this case like any other suit undercuts their claim to irreparable injuries, noting they did not file a complaint until six months after construction began.

The 6th Circuit stays the United States District Court's vacatur order and judgment pending TVA's appeal.

A copy of the Opinion can be found here.