

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**SIERRA CLUB and PRAIRIE RIVERS
NETWORK,**

Plaintiffs,

V.

TENNESSEE VALLEY AUTHORITY,
DON MOUL, in his official capacity as
 President and Chief Executive Officer of the
 Tennessee Valley Authority, and **BRYAN**
WILLIAMS, in his official capacity
 as Senior Vice President of the
 Tennessee Valley Authority,

Defendants.

Case No. 25-cv-2202-JPG

Oral Argument Requested

**PLAINTIFFS' RESPONSE IN OPPOSITION TO
TENNESSEE VALLEY AUTHORITY'S MOTION TO DISMISS**

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The Court should deny defendant Tennessee Valley Authority's ("TVA") Motion to Dismiss ("TVA's Motion") because TVA seeks to rewrite its own documents, Plaintiffs' complaint, and relevant caselaw. First, TVA's misinterpretation of the relevant leases was never articulated anywhere prior to TVA's Motion and contradicts how TVA read those leases previously—including in filing a federal lawsuit. TVA's position is that its approval of an immensely harmful mining expansion expressly announced in a final environmental impact statement ("EIS") and final Record of Decision ("ROD") was somehow not a final agency action and that its environmental review was a hollow, after-the-fact farce. Part III.A. Second, TVA miscasts Count II as ignoring "contractual considerations," but the Complaint specifically seeks to correct TVA's misinterpretation of the relevant contracts. Part III.B. Third, TVA asks the Court to endorse the merits of its unexplained assumption that a serial environmental law violator will operate in perfect future compliance. Part III.C. Finally, TVA seeks to evade judicial review of an explicitly final environmental review decision contained in a ROD to divest its huge coal holdings simply because another law requires other steps be taken next. Part III.D. Moreover, half of TVA's Motion is brought under the wrong rule of civil procedure. Part II.

Plaintiffs' Complaint asks the Court to require that TVA conduct a legally adequate review before approving mining, as required by the relevant leases, the National Environmental Policy Act ("NEPA"), and Administrative Procedures Act ("APA"). The Court should deny TVA's Motion and set a schedule for merits briefing based on a full record.

I. Statement of Facts

A. The 2002 Leases Recognized the Importance of Environmental Protection and Environmental Review.

In 2002, TVA entered into two leases to mine TVA-owned coal in southern Illinois (the "Leases). *See Sierra Club & PRN v. TVA*, Complaint, Dkt. 1 ("Compl.") ¶ 22. Mining under

those Leases is now done by Sugar Camp Mining, LLC (“Sugar Camp”). Compl. Dkt. 1 ¶ 26. Under the Leases, whose relevant terms are identical, Sugar Camp must submit mining plans to TVA and “shall not commence any mining activity” until TVA has completed the environmental review of those plans as “required for compliance with all applicable laws and regulations.” XENC-3L Lease, Dkt. 12-4 & XICR-1L Lease, Dkt. 12-5 (together the “Leases”) § 2. In 2018 TVA asked a federal court to enforce this provision and block Sugar Camp from mining “before allowing TVA to perform and complete appropriate environmental reviews of th[e] activity pursuant to NEPA.” *TVA v. Sugar Camp Energy, LLC*, No. 3:18-cv-239, at *6 (E.D. Tenn. 2018) (“TVA 2018 Complaint”).

The Leases give TVA multiple means to control or prohibit new mining. TVA may “prohibit mining on a portion of, or all of, the leasehold,” on the basis of environmental review. Leases § 2. Sugar Camp must conduct mining operations “so as to (a) comply with all applicable local, state, and federal laws and regulations and (b) protect the environment.” Leases § 9. If Sugar Camp violates any of these terms, “TVA may terminate th[e L]ease[s].” Leases § 15. In short, the Leases (1) forbid Sugar Camp from expanding its mining before TVA conducts appropriate environmental reviews; (2) authorize TVA to prohibit mining; (3) obligate Sugar Camp to operate in compliance with law and more broadly protect the environment; and (4) empower TVA to terminate the Leases if Sugar Camp violates their terms or the law.

B. Sugar Camp’s Serial and Ongoing Violation of Environmental Laws.

Since almost immediately upon beginning operations, Sugar Camp has operated in violation of environmental and safety laws. *See* Compl. Dkt. 1 ¶¶ 29-47. One of Sugar Camp’s most serious violations was its response to a 2021 fire in its mine. The company failed to timely alert workers or regulators of the fire. *Id.* ¶ 40. In an unsuccessful attempt to extinguish the fire,

Sugar Camp injected vast quantities of firefighting foam made of Polyfluoroalkyl Substances (“PFAS”), commonly called “forever chemicals” due to their long-lasting harms to human health and the environment. *Id.* ¶ 39. Sugar Camp’s PFAS remains in the ground and continues to bubble into people’s yards, including Plaintiffs’ members, causing serious harms; related enforcement actions remain ongoing. *See id.* ¶¶ 12-13; 47.

C. In 2023, 2024, and 2025, TVA’s NEPA Documents Evaluated “Whether” to Approve Sugar Camp’s Mine Expansion and “Whether” to Divest Coal Reserves.

In June 2023, Sugar Camp submitted requests to expand its mining operations to the Illinois Department of Resources and TVA. In September 2023, TVA began the environmental review process by issuing a Notice of Intent to prepare an EIS that would “consider whether to approve Sugar Camp’s application to mine TVA-owned coal” and “evaluate the divestiture of TVA’s mineral rights.” *Sugar Camp Energy LLC Mine No. 1 Significant Boundary Revision 8, Notice of Intent*, 88 Fed. Reg. 60,527, 60,527 (Sept. 1, 2023). In 2024, TVA solicited comments on its Draft EIS, which considered the same questions. *Sugar Camp Energy, LLC Mine No. 1 Significant Boundary Revision 8 Final Environmental Impact Statement* Dkt. 12-1 (“EIS”) at 46.¹ During the comment period, Plaintiffs, the U.S. Environmental Protection Agency (“U.S. EPA”), and others, asked TVA to consider Sugar Camps’ history of violating environmental and safety laws, and Plaintiffs further proposed an alternative action that would keep all 680 million tons of TVA owned coal in the ground. EIS, Dkt. 12-1 at 273-77.

D. TVA’s Final EIS Asserted, Without Explanation, that the Leases Restricted TVA’s Consideration of Alternatives and Dictated its Preferred Alternative.

In the Final EIS, TVA announced its Preferred Alternative: to both approve Sugar Camp’s expansion request and divest its remaining coal reserves in the Illinois Basin. EIS, Dkt.

¹ Plaintiffs refer to the page numbers applied by the ECF system when citing attachments to TVA’s filings.

12-1 at 6-7. While recognizing the massive global and local environmental impacts of mining and burning the coal, TVA rejected fully considering alternatives proposed by commenters that would have kept TVA-owned coal in the ground because TVA claimed such alternatives were “not reasonable due to the existing, enforceable lease.” EIS, Dkt. 12-1 at 69. TVA neither explained that claim nor acknowledged the lease provision allowing TVA to “prohibit all mining.” In March 2025, TVA published a ROD, stating that it had decided to implement its Preferred Alternative: “pursuing divestment of the TVA Mineral Rights Area from TVA’s control and custody,” and approving Sugar Camp’s proposed expansion, because doing so was required to “comply with the terms and conditions of the previously executed leases.” *Sugar Camp Energy, LLC Mine No. 1 Significant Boundary Revision & Environmental Impact Statement Record of Decision*, Dkt. 12-15 (“ROD”) at 2. Neither the Final EIS nor the ROD explained which “terms and conditions” compelled TVA’s decision, nor did they mention the “procedural approval” that is now the centerpiece of TVA’s Motion. Instead, both documents focused on the same decisions on which TVA sought public comment: whether to “approve” the requested expansion and whether to divest TVA’s Illinois coal reserves.

II. Legal Standard

Though TVA describes its “motion to dismiss Counts I and IV [as] facial attacks to subject-matter jurisdiction” under Rule 12(b)(1), Brief in Support of TVA’s Motion to Dismiss, Dkt. 13 (“TVA Br.”) at 9. TVA’s entire motion is properly considered under Rule 12(b)(6). TVA’s Motion is unrelated to subject-matter jurisdiction and so Rule 12(b)(1) cannot apply. As such, the Court must reject TVA’s attempt to shift the burden onto Plaintiffs on Counts I and IV.

TVA invokes Rule 12(b)(1) by describing its arguments as asserting that the Court lacks jurisdiction over Counts I and IV, claiming, under various theories, that the counts “fail to identify final agency actions subject to judicial review” under the APA. TVA Br., Dkt. 13 at 9.

But the Seventh Circuit treats the elements of an APA claim—including finality—as going to the merits, not jurisdiction. *Dhakal v. Sessions*, 895 F.3d 532, 534, 538 (7th Cir. 2018) (holding that lack of APA finality is not a jurisdictional bar); *Kewayfati v. Bondi*, 165 F.4th 342, 354-55 (5th Cir. 2026) (noting that Seventh Circuit “treat[s] finality as bearing on the merits rather than jurisdiction”). Thus, Rule 12(b)(1) is not the proper vehicle for TVA’s arguments on Counts I and IV, whether styled as “facial” or “factual,”² and the entire motion is subject to Rule 12(b)(6).

As TVA’s entire motion is properly considered under Rule 12(b)(6), it is irrelevant that a “[p]laintiff faced with a 12(b)(1) motion to dismiss bears the burden of establishing that the jurisdictional requirements have been met.” TVA Br., Dkt. 13 at 9. The Seventh Circuit is clear: “every circuit court to address this issue—this Court included—has interpreted Rule 12(b)(6) as requiring the movant to show entitlement to dismissal.” *Marcure v. Lynn*, 992 F.3d 625, 631 (7th Cir. 2021). Under Rule 12(b)(6), “[i]n construing the complaint, [courts] accept all of the well-pleaded facts as true and draw all reasonable inferences in favor of the plaintiff.” *United States ex rel. Berkowitz v. Automation Aids, Inc.*, 896 F.3d 834, 839 (7th Cir. 2018)(quotation omitted). The Court should reject TVA’s attempt to shift the burden onto Plaintiffs and apply Rule 12(b)(6)’s standards to the entire motion.

TVA’s reliance on documents outside the Complaint reveals that its arguments are inappropriate under Rule 12(b) altogether. TVA contests the merits of Plaintiffs’ APA and NEPA claims: its Count I and IV finality arguments are merits arguments and its Count II and III arguments raise merits questions about the proper interpretation of the Leases and whether TVA

² TVA improperly attaches documents to its self-described “facial” 12(b)(1) challenge, citing for support *Phillips v. Prudential Ins. Co. of America*, 714 F.3d 1017, 1019-20 (7th Cir. 2013). TVA Br., Dkt. 13 at 8. TVA’s quote-splicing leads to a revealing misrepresentation of *Phillips*: that case involved a motion under Rule 12(b)(6), not 12(b)(1). *Id.* at 1019. Indeed, another case TVA cites, *Apex Digit*, expressly **rejected** attaching documents to support a “facial” challenge: the “critical difference between [12(b)(1)] facial and factual challenges to jurisdiction” is “[i]n the context of facial challenges... the court does not look beyond the allegations in the complaint, which are taken as true for purposes of the motion.” *Apex Digit, Inc. v. Sears, Roebuck & Co.*, 572 F.3d 440, 443–44 (7th Cir. 2009).

analyzed all “reasonably foreseeable” impacts under NEPA. *Infra* §§ II.B & C. The Court should deny TVA’s Motion, order TVA to provide the entire administrative record that was before it at the time of its decision, and then decide merits questions at the summary judgment stage on that full record.³ *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (“[APA] review is to be based on the full administrative record that was before the Secretary at the time he made his decision.”); *Friends of the River v. U.S. Army Corps of Engineers*, 870 F. Supp. 2d 966, 976 (E.D. Cal., 2012) (“Determining whether [these] ... are final agency actions ... requires a review of the full administrative record”). Revealingly, none of TVA’s cases related to attaching documents involves NEPA or APA claims.⁴ TVA Br., Dkt. 13 at 9.

III. Argument

A. Count I States a Proper Claim Challenging TVA’s Arbitrary and Capricious Final Agency Action to “approve” Sugar Camp’s Mine Expansion.

TVA asserts that it procedurally approved Sugar Camp’s expansion through two weeks of silence in August 2022, and, therefore, that its express “approv[al]” in 2025 cannot be challenged as a final agency action under the APA. TVA Br., Dkt. 13 at 11. TVA’s argument is based on a misreading of the Leases never before articulated and that contravenes TVA’s own position in previous litigation. Courts do not allow agency lawyers to justify flawed decisions with post hoc rationalizations in briefs. *See infra* § I.A.1. TVA’s newfound interpretation is wrong as a matter of law in any event, *infra* § I.A.2, and TVA’s cases confirm that its approval of expanded mining is a final agency action subject to judicial review—and reversal—under the APA, *infra* § I.A.3.

³ TVA cannot cherry-pick its record through its affidavit and the attachments to TVA’s Motion do not constitute the proper administrative record. Illustrating the improper nature of TVA’s attachments is Attachment 7 to the Casady Affidavit, a document never referenced in TVA’s NEPA analysis and that appears to be missing multiple substantive pages, undated, and not signed by TVA. Casaday Aff. Att. 7, Dkt. 12-9 at 5, *generally*.

⁴ To the extent the Court considers TVA’s improper attachments as to its 12(b)(6) arguments at all, “the motion must be treated as one for summary judgment” and “[a]ll parties must be given a reasonable opportunity to present all material that is pertinent to the motion.” F.R.C.P. 12(d). In a record review case under the APA or NEPA, that means the agency must first file the full administrative record.

1. The Court Must Reject TVA’s Counsel’s New Reading of the Leases Because They Constitute Impermissible Post-Hoc Rationalizations.

TVA asks the Court to ignore the plain language of its Scoping Notice, Draft EIS, and Final EIS because the EIS “was drafted by non-attorneys.” TVA Br., Dkt. 13 at 5. But that is not a legal defense, and agencies cannot “attempt to justify rash, uniformed actions through “‘post hoc’ rationalizations” once they are aware they are being sued.” *Citizens to Preserve Highway J Citizens Group v. Mineta*, 349 F.3d 938, 958 (7th Cir. 2003) (quoting *Citizens to Preserve Overton Park*, 401 U.S. at 419). An “agency’s action must be upheld, if at all, on the basis articulated by the agency itself”; “courts may not accept [] post hoc rationalizations for agency action.” *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983).

Both the analysis and the conclusion of the EIS turned on TVA’s lease interpretation, and yet TVA offered no explanation of how it read the Leases during the NEPA process. The EIS Executive Summary demonstrates this conclusory approach: “[t]he Preferred Alternative is aligned with the terms and conditions of the existing coal leases.” EIS, Dkt. 12-1 at 7. TVA cited no provision of the Leases, nor described what it meant to be “aligned” with the Leases. Later—and again without any explanation—TVA stated that the Preferred Alternative “would implement the terms of the existing coal lease agreement.” EIS, Dkt. 12-1 at 67.

Now TVA’s litigation counsel claim TVA had already approved Sugar Camp’s requested mining expansion in 2022, before it even began its environmental review. TVA Br., Dkt. 13 at 6. TVA’s brief makes that claim even though the Final EIS never made any reference to this supposed 2022 approval, or indeed, to the concept of procedural approval at all. According to TVA’s lawyers, the multiple rounds of public comment and hundreds of pages of analysis in the EIS, which TVA described as informing “whether” to “approve” expanded mining were all conducted *after* TVA had already approved the mine expansion and were instead actually aimed

at deciding whether TVA should exercise its discretion to prohibit mining entirely, a question TVA never even mentioned during that NEPA process. *Id.*

TVA's new position is entirely undercut by TVA's former position reiterated dozens of times in the EIS itself.⁵ TVA stated that it "prepared th[e] (EIS) to inform TVA's decisions on *whether to approve* Sugar Camp's application to mine TVA-owned coal." EIS, Dkt. 12-1 at 6 (emphasis added). The No Action Alternative was "TVA *not approving* the [expanded] mining." *Id.* (emphasis added). TVA described the three action alternatives as "approving the plan," "approving the mining," and "not approving Sugar Camp's request to mine the TVA-owned coal." *Id.* Later, TVA is even more explicit about its role, stating that "the proposed mining requires approval from TVA for mining the TVA-owned coal." *Id.* at 56. Even the documents TVA chose to attach to its Motion confirm that, everywhere except in its brief, TVA described the EIS as necessary to decide whether to approve the mining expansion. *See* Casady Affidavit, Att. 7, Dkt. 12-9 at 6 ("TVA's approval of the proposed . . . expansion is dependent on the completion of an [EIS].").

TVA's post hoc rationalizations cannot undo its failure to follow the law. "[A]gency action must be judged on the reasoning given by the agency at the time of its decision." *Apogee Coal Co. v. Office of Workers' Compensation Programs*, 113 F.4th 751, 759 (7th Cir. 2024). While TVA noted in the EIS that approvals under the Leases cannot be "unreasonably with[e]ld," it never explained why it would have been unreasonable to do so here. EIS, Dkt. 12-1 at 275. Merely invoking the language of a regulation or agreement in a "general and conclusory manner," as TVA did here, is not enough. *Apogee Coal Co.*, 113 F.4th at 759.

⁵ *See e.g.* EIS, Dkt. 12-1 at 6, 8, 12, 14, 16, 18-21, 38, 49, 56-57, 67-69, 72-76, 78-85.

2. The Leases are Clear that TVA was Not Compelled to Approve Expanded Mining and Can Forbid or Limit Mining Based on NEPA review.

TVA now asserts that the EIS was published after a “procedural approval” of mining expansion in 2022 and that all of the alternatives considered in the NEPA process that would reject the expansion were foreclosed by the Leases’ terms. TVA Br., Dkt. 13 at 1, 6. But the Leases plainly state otherwise. The Leases make clear that (1) Sugar Camp cannot mine until TVA completes environmental review (Leases § 2); (2) TVA has the authority to prohibit mining on the basis of its environmental review, as both parties agree (Leases § 2; TVA Br., Dkt. 13 at 4); and (3) Sugar Camp is obligated to comply with the law and to protect the environment in its mining activities under the Leases (Leases § 9).⁶

TVA’s interpretation is untenable under the plain language of the Leases. “Where the words of a contract in writing are clear and unambiguous, its meaning is to be ascertained in accordance with its plainly expressed intent.” *CITGO Asphalt Refining Co. v. Frescati Shipping Co., Ltd.*, 589 U.S. 216 (2020). The Leases’ express terms make clear that neither the 2002 signing of the Leases nor the so-called “procedural approval” TVA now identifies could possibly have conferred on Sugar Camp a ‘right to mine,’ as TVA claims in its brief. TVA Br., Dkt. 13 at 6. As TVA itself explained to a different federal court in 2018, Sugar Camp cannot mine “before allowing TVA to [] complete appropriate environmental review.” TVA 2018 Complaint ¶ 31. TVA’s new interpretation would also render the environmental review and termination provisions of the Leases meaningless, violating the “cardinal principle of contract construction[] that a document should be read to give effect to all its provisions and to render them consistent with each other.” *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 63 (1995). Under

⁶ The Leases allow TVA to prohibit mining or terminate the leases for environmental compliance or other concerns without reference to how other authorities might react to Sugar Camp’s noncompliance with the law. That state agencies also oversee mining or enforce laws does not limit TVA’s exercise of these contractual rights.

TVA counsel's new misinterpretation of the Leases, TVA would be required to perform environmental reviews of expansion requests, but could not decide "whether" to "approve" proposed mine expansions on the basis of those reviews. *See* Compl., Dkt. 1 ¶ 99.

TVA's new view of the Leases also cannot be correct because it would turn the environmental review that is expressly required under the Leases to comply with federal law, Leases § 2, into an after-the-fact exercise that could not possibly inform the relevant decision, subverting the purpose of the relevant federal law, NEPA. While the Supreme Court recently instructed courts to defer to agencies on many NEPA implementation issues, it reaffirmed that NEPA's core goal is to "ensur[e] that the agency and the public are aware of the environmental consequences of *proposed* projects" and to "hel[p] agencies [] make better decisions." *Seven County Infrastructure Coalition v. Eagle County, Colorado*, 605 U.S. 168, 177 (2025) (emphasis added). NEPA reviews must be made "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Wyoming v. U.S. Dep't of Agriculture*, 661 F.3d 1209, 1263 (10th Cir. 2011), (quoting *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000)). To conduct an EIS *after* the relevant decision has already been made, as TVA argues the Leases require, would contravene NEPA's purpose as TVA itself described it: to "requir[e] federal agencies, such as TVA, to study the effects their actions may have on the human environment *prior to* taking them." TVA 2018 Complaint ¶ 11 (emphasis added). Even now, TVA's counsel describes its 2018 case as concerning "a *lease violation*," namely "Sugar Camp's commencement of mining operations *before* TVA completed an environmental review." TVA Br., Dkt. 13 at 18 n.4 (emphasis added). NEPA is often summarized as requiring agencies to "look before they leap," and yet TVA's new interpretation is that the Lease compelled it to leap before it looked.

3. TVA’s Own Cases Demonstrate that Count I Properly Seeks APA Review of a Final Agency Action: the 2025 Final Decision to “Approve the Plan to Mine TVA-Owned Coal.”

Count I alleges that TVA acted arbitrarily and capriciously in deciding to allow Sugar Camp to expand mining on the basis of a legally erroneous interpretation of the Leases, a decision which TVA made in a 2025 Final EIS and ROD that explicitly “approve[d] the plan to mine TVA-owned coal in the SBR No. 8 Mine Area.” ROD, Dkt. 12-15 at 2; Compl., Dkt. 1 ¶ 86. TVA’s Motion ignores that ROD entirely in arguing there is no final agency action for the Court to review. TVA Br., Dkt. 13 at 11-15. TVA must be joking. Dozens of circuit court cases find that RODs are final agency action under the APA. *See, e.g., Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016) (“The issuance of a ROD generally constitutes a final agency action”); *Sierra Club v. Slater*, 120 F.3d 623, 631 (6th Cir. 1997) (“[I]t appears well-established that a final EIS or the ROD issued thereon constitute the ‘final agency action’ for purposes of the APA.”) (collecting Ninth, Second, and Third Circuit cases). TVA failed to cite a single decision, from any court, ruling that a ROD was not final agency action under the APA. Count I properly identifies final agency action and alleges it failed to meet APA standards.

Implicitly claiming it misled U.S. EPA, Plaintiffs and the rest of the public throughout the NEPA process, TVA’s Count I argument is based entirely on the assertion that its approval of a massive mine expansion—into an additional over 21,000 acres, Compl., Dkt. 1 ¶ 78—was somehow not an agency action at all. TVA accuses Plaintiffs of “conflating separate and distinct agency actions”: a so-called “procedural approval” that turned on agency silence in 2022 and declining to exercise TVA’s contractual discretion to prohibit mining at any time. TVA Br., Dkt. 13 at 1. But Plaintiffs’ Count I targets neither. Count I seeks review of the one action TVA itself described as its single decision to “approve the plan to mine TVA-owned coal.” Compl., Dkt. 1 ¶ 86. TVA attempts to rewrite the Complaint, so its Rule 12(b)(6) motion must fail.

TVA’s garbled Count I arguments on “agency action,” finality, and limiting judicial relief to ordering only “legally required” agency actions all fail for the simple reason, among others, that they ignore the 2025 ROD.⁷ TVA Br., Dkt. 13 at 11–15 (introducing Count I judicial review arguments as confined “[t]o the extent Count I seeks to challenge TVA’s procedural approval of SBR No. 8 under the XENC-3L Lease’s Mining Plan provision”).

TVA’s reliance on *Village of Bald Head Island Club v. United States Army Corps of Engineers*, 714 F.3d 186 (4th Cir. 2013), for its “implementation” argument is entirely misplaced. In that case, plaintiffs challenged the Corps’ implementation of a dredging project approved a decade earlier. *Id.* at 193. Because the *Bald Head* plaintiffs aimed their challenge at *only* the 2010-11 “performance” of the Corps’ formal approval in 2000, the court upheld the lower court’s dismissal for lack of reviewable agency action. *Id.* at 192, 193–94. The Fourth Circuit was clear that the earlier, formal plan “*approval* was a ‘determination’ that amounted to ‘agency action.’” *Id.* at 193 (internal emphasis in original). Application of *Bald Head* would clearly allow for APA review of TVA’s 2025 ROD, which facially “approved” the expanded mining plan—it did not implement a prior plan approval or commitment. ROD, Dkt. 12-15 at 2.

TVA’s argument is that its 2022 “procedural approval” somehow authorized the expansion without being the culmination of its decisionmaking process; and, thus, that there is no final agency action under the APA subject to judicial review—not even the 2025 ROD. TVA’s convoluted argument is wrong. As alleged in the Complaint, Dkt. 1 ¶ 72, TVA’s decision to approve the expansion culminated with the 2025 ROD, which plainly meets *Bald Head*’s requirement that agency action be “circumscribed and discrete.” *Bald Head*, 714 F.3d at 194

⁷ TVA also argues vaguely that Count I improperly states a standalone APA claim to obtain “substantive relief,” TVA Br., Dkt. 13 at 11, but notably limits its APA arguments to those related to “final agency actions” and does not assert that an APA claim is generally unavailable.

(citing *Norton v. S. Utah Wilderness All. (“SUWA”)*, 542 U.S. 55, 62 (2004)). The ROD here “mark[s] the consummation of the agency’s decisionmaking process” because it was TVA’s final word on whether to approve expanded mining and determined “rights or obligations.” *Home Builders Ass’n of Greater Chicago v. U.S. Army Corps of Eng’rs*, 335 F.3d 607, 614 (7th Cir. 2003) (cited at TVA Br., Dkt. 13 at 13). TVA concedes that the ROD “enabl[ed] Sugar Camp to commence mining,” TVA Br., Dkt. 13 at 1, and that “TVA’s approval of the proposed [] expansion is dependent on the completion of an [EIS].” Casady Aff. Att. 7, Dkt. 12-9 at 6.

Plaintiffs do not ask the Court to assume administration of the Leases or require TVA to take any specific substantive action under the Leases, contrary to TVA’s revisions of the Complaint. TVA Br., Dkt. 13 at 13–15. The Complaint asks only that the Court require TVA to make *its* decisions under a proper interpretation of its rights and responsibilities, acknowledging that the Leases allow TVA to reject further mining. Compl., Dkt. 1 at ¶ 87, 92–93, 97–99.

Similarly, TVA mischaracterizes Count I as seeking to compel TVA to take a substantive action that TVA is not “legally required” to take by arguing about a section of the APA that the Complaint does not even cite. *Compare* TVA Br., Dkt. 13 at 14 (citing *SUWA*, 542 U.S. at 64, analyzing “§ 706(1)’s authorization for courts to ‘compel agency action unlawfully withheld’”) *with* Compl., Dkt. 1 ¶ 85-99 (citing 5 U.S.C. § 706(2)(A) arbitrary and capricious standard). Plaintiffs do not request an order compelling TVA to reject the expansion or terminate mining under § 706(1). Rather, the Complaint asks the Court, under APA § 706(2), to return the matter to TVA for proper consideration of whether to permit the expansion under a proper reading of the Leases. *Id.* ¶ 87; *see Oregon Natural Desert Ass’n v. Bureau of Land Management*, 625 F.3d 1092, 1118-19 (9th Cir. 2010) (contrasting § 706(2)(A) relief “reviewing [] validity of [] final agency action” to relief in *SUWA* under § 706(1) “demanding [] the agency take some action”).

B. Count II Properly Asks the Court to Require that TVA Conduct Its NEPA Review under a Proper Interpretation of the Leases, a Question of Law on which TVA is Owed No Deference.

1. TVA’s NEPA Analysis was Based on Legal Error.

TVA’s argument that Count II seeks to “elevate Plaintiffs’ environmental concerns over TVA’s contractual considerations,” TVA Br., Dkt. 13 at 15, fails because it misrepresents the Complaint, which asks the Court to correct TVA’s legal error in considering its contracts. Agency actions based on legal errors cannot stand, and the pure legal question here is “TVA’s interpretation of its own lease.” *Id.* at 16. As explained above, TVA based its decisions on an erroneous and unexplained interpretation of its rights and duties under the Leases. An agency action “based upon a determination of law ... may not stand if the agency has misconceived the law.” *Sec. & Exch. Comm’n v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *see also Grand Trunk Corp. v. Surface Transp. Bd.*, 143 F.4th 741, 753 (7th Cir. 2025) (explaining “foundational principle of administrative law that agency action may not stand if the agency has misconceived the law”) (internal quotations omitted). Count II properly alleges that TVA’s misinterpretation of the Leases caused it to ignore feasible alternatives. Compl., Dkt. 1 ¶ 106.

The Court cannot defer to TVA’s misinterpretation of the Leases because the halcyon days of judicial deference to agencies’ erroneous interpretations of the law are over. In *Loper Bright*, the Supreme Court rejected *Chevron* deference to agency interpretations of law based on the text of the APA: “the reviewing court shall decide all relevant questions of law.” *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 391 (2024), (quoting 5 U.S.C. § 706).⁸ As

⁸ *Loper Bright* focused on interpreting statutes, but its reasoning applies equally to contract interpretation. Indeed, the same APA provision cited by the Court states both that courts “shall decide all relevant questions of law” and, separately, that courts shall “interpret constitutional and statutory provisions,” demonstrating “relevant questions of law” must be broader than statutory interpretation. 5 U.S.C. § 706. And, when the *Chevron* doctrine was in place, the Seventh Circuit noted that, when interpreting agency contracts, the Court’s task was the same as in resolving other legal questions, to “find whether the [agency]’s interpretation of the contract was reasonable and in full conformance with law.” *Amoco Production Co. v. FERC*, 765 F.2d 686, 690 (7th Cir. 1985).

explained above, with or without judicial deference, TVA's new reading of the Leases must be rejected: it is inconsistent with the text of the Leases, illogical, and an impermissible post hoc rationalization. *See supra* at III.A.1 & III.A.2.

2. TVA's Assertion in the Final EIS that the Leases Compelled it to Authorize Expanded Mining is Unsupported in the Record.

The Leases plainly entitled TVA to reject the proposed mine expansion if the required environmental review revealed that such approval was unwise. Count II states a proper claim because the EIS disregarded lease provisions that allowed TVA to consider alternatives it ignored. TVA did not acknowledge in the NEPA process that the Leases give it the power to prohibit all mining, instead repeatedly asserting that a "need to adhere to the executed lease agreements" required approving the expansion request. *See e.g.* EIS, Dkt. 12-1 at 87.

At bottom, TVA's Motion relies on mischaracterizing the Complaint. TVA claims Count II does not allege that TVA failed to consider the relevant factors. *See* TVA Br., Dkt. 13 at 16. However, Count II clearly states that TVA's erroneous construction of the Leases caused it to "rejec[t] an otherwise technically and economically feasible alternative without meaningful consideration or reasonable explanation." Compl., Dkt. 1 ¶ 106. Plaintiffs do not ask the Court to "elevate" environmental concerns over TVA's "contractual considerations." TVA Br., Dkt. 13 at 16. Instead, Plaintiffs ask the Court to exercise its independent judgment on the legal question of the proper reading of those "contractual considerations," and to require TVA to do its statutory duty by acknowledging, and analyzing the implications of, all lease provisions.

C. The Court Can Neither Dismiss Count III on a Rule 12(b)(6) Motion, Nor Defer to TVA's Choice to Ignore Sugar Camp's Ongoing and Reasonably Foreseeable Violations of Law.

The Court should reject TVA's argument that Count III fails to state a claim that TVA violated NEPA's requirement to analyze "reasonably foreseeable" impacts, which simply argues

the merits of that properly-stated NEPA claim. TVA's position on Count III is based entirely on asking the Court to endorse TVA's unreasonable "assum[ption] that mining under SBR No. 8 would be conducted in accordance with applicable environmental laws." TVA Br., Dkt. 13 at 17. TVA's argument is premature: judicial review of the reasonableness of agency assumptions is a NEPA question that must be evaluated on the full administrative record. At the merits stage, the Court should reject this unreasonable assumption because: (1) TVA ignores that the serious violations alleged, including violations ongoing and unresolved at the time of the EIS, make future violations reasonably foreseeable; and (2) TVA is incorrect that to be "reasonably foreseeable," under NEPA the details of future impacts must be predictable with certainty.

1. Sugar Camp's Past and Ongoing Violations Make TVA's Assumption that Sugar Camp Would Not Further Violate the Law Unreasonable.

NEPA requires agencies to analyze "reasonably foreseeable environmental effects of the proposed agency action." 42 U.S.C. § 4332(C). Agencies have discretion as to how they approach NEPA analyses within the bounds of reasonableness. *Seven County*, 605 U.S. at 173. However, TVA may not make unreasonable assumptions that ignore reality; nor may it ignore its statutory obligation to assess reasonably foreseeable direct impacts of its actions. *State Farm*, 463 U.S. at 43 (holding agency must present "a rational connection between the facts found and the choice made.").

TVA cites *Protect Our Parks v. Buttigieg*, 39 F.4th 389, 399 (7th Cir. 2022). That case reiterates only that an agency is responsible under NEPA for considering environmental impacts that it can control. *Id.* Here, TVA owns the coal that will be mined and retains final control over whether expansion or divestment will occur. TVA Br., Dkt. 13 at 19. The Leases allow TVA to deny mine expansion based on its environmental review and TVA acknowledges it has the right

to prohibit mining. TVA Br., Dkt. 13 at 3, 14. TVA has never—not during the NEPA review and not in its brief—explained why it must ignore Sugar Camp's offenses in approving the expansion.

Plaintiffs' Complaint alleges Sugar Camp's pattern of harmful environmental law violations in detail. Compl., Dkt. 1 ¶¶ 29-46. Indeed, Sugar Camp's violations were ongoing at the time TVA was considering approving additional mining and conducting its EIS. Sugar Camp's intentional dumping of PFAS continues to harm the environment and Plaintiffs' members. *Id.* ¶¶ 12, 14. As the Illinois Attorney General explained in a still-unresolved 2021 complaint, PFAS “are both persistent in the environment and resistant to chemical, biological, and physical degradation,” so “[v]iolations of the pertinent environmental statutes will continue until” Sugar Camp removes the PFAS from the environment. *People ex rel. Raoul v. Sugar Camp Energy, LLC*, No. 22-CH-2, Verified Complaint ¶ 20, 73 (Franklin Cnty. Cir. Ct. Jan. 7, 2022). Plaintiffs and other public commenters alerted TVA to these ongoing violations, yet TVA refused to consider them in its EIS. Compl., Dkt. 1 ¶¶ 62-63.

Count III properly states a claim because these facts support Plaintiffs' allegation that it was “reasonably foreseeable” Sugar Camp would continue to violate the law given its past and ongoing violations of law. *Id.* ¶ 108 (citing 42 U.S.C. § 4332(C)). The Court's review of TVA's assumption of perfect future compliance is a merits question, as Count III alleges TVA failed to provide a “detailed statement” on “reasonably foreseeable” impacts of future violations by Sugar Camp, not an issue to resolve on a motion to dismiss. *Id.* ¶ 113.

2. NEPA Requires Reasonable Predictions, Not the Perfect Foresight TVA Asserts.

TVA asserts that assuming perfect future compliance is “reasonable [...] because it would be impossible for TVA to determine what laws or permit requirements Sugar Camp might violate in the future.” TVA Br., Dkt. 13 at 17-18. This is yet another impermissible post hoc

rationalization not found in the EIS. And, even if the precise nature of future violations cannot be predicted definitively, under the facts alleged, it is still unreasonable to assume there will be no future violations.

Even if future violations cannot be predicted with certainty and courts cannot “substitute its judgment for that of the agency,” this Court must still “[e]nsure that the agency has taken a ‘hard look’ at environmental consequences.” *Kleppe*, 427 U.S. at 410 n.21 (footnote cited approvingly in *Seven County* discussion of appropriate judicial review, 605 U.S. at 183). “Reasonable forecasting and speculation is thus implicit in NEPA, and we must reject any attempt by agencies to shirk their responsibilities under NEPA by labeling any and all discussion of future environmental effects as crystal ball inquiry.” *City of Davis v. Coleman*, 521 F.2d 661, 676 (9th Cir. 1975) (internal quotations omitted); *see also Habitat Educ. Ctr., Inc. v. U.S. Forest Serv.*, 609 F.3d 897, 902 (7th Cir. 2010) (holding that where “effects are predictable, even if their extent is not, they may be more likely to be capable of meaningful discussion”).

D. Count IV Properly Asks the Court to Set Aside the 2025 Final EIS as the Culmination of TVA’s Environmental Review as to Divestment of its Coal Holdings.

TVA moves to dismiss Count IV by arguing there is no final agency action on TVA’s decision to divest its coal holdings. TVA Br., Dkt. 13 at 19. That argument fails because TVA’s 2025 ROD adopted the Final EIS’s Preferred Alternative, which included both mining expansion approval *and divestment*, and constitutes final agency action under the APA. ROD, Dkt. 12-5 at 2. Though completing divestment requires TVA Board approval, judicial review of an EIS is available when the agency issues a ROD based on it and when the EIS describes itself as the culmination of the agency’s NEPA review. The Court should draw the “reasonable inference” that TVA can be taken at its word that divestment NEPA review is complete and, therefore, Count IV properly targets a final agency action. *Berkowitz*, 896 F.3d at 839.

The Seventh Circuit holds that “the issuance of a ROD generally constitutes final agency action.” *Citizens for Appropriate Rural Roads v. Foxx*, 815 F.3d 1068, 1079 (7th Cir. 2016).

TVA issued its March 2025 ROD adopting the Final EIS, distinguishing the facts of this case from *Citizens for Appropriate Rural Roads*, where plaintiffs sued after the final EIS, but before any ROD that announced the termination of environmental review. *Id.* Here, Plaintiffs filed Count IV challenging the Final EIS as to divestment after the TVA issued the 2025 ROD.

TVA relies on *Openlands v. United States Department of Transportation*, 124 F. Supp. 3d 796 (N.D. Ill. 2015), to argue that “TVA has not made a final decision concerning the divestment of its mineral rights in Southern Illinois.” TVA Br., Dkt. 13 at 19. But the *Openlands* plaintiffs challenged a ROD and a Final EIS related to a federal highway project, and the court found the agency’s environmental review was non-final as to a specific portion of the highway because the final EIS “expressly state[d] that the Agencies’ determinations as to [the relevant] properties [we]re preliminary” and called for further NEPA studies. *Openlands*, 124 F. Supp. 3d at 810. This case presents the opposite situation. The Final EIS and ROD here both make final statements about the environmental review as to both the divestment and mining expansion decisions and there are no similar express statements that more review will follow. TVA “decided to adopt the preferred alternative identified in the [Final EIS],” which is “approving the mining of the TVA-owned coal ... **and** divesting the TVA Mineral Rights.” ROD Dkt. 12-15 at 2; EIS, Dkt. 12-1 at 6 (internal emphasis added). The Final EIS presents a final NEPA conclusion on divestment, “TVA has prepared this [EIS] to inform TVA’s decisions on . . . *whether to divest* TVA of all mineral reserves in Illinois.” EIS, Dkt. 12-1 at 6 (emphasis added).

TVA argues that because “TVA will consider divestiture of the property in a separate ROD... through ... action by the TVA Board of Directors” there is no final action to review for

compliance with NEPA. TVA Br., Dkt. 13 at 20. However, that second ROD is necessary only because the TVA Act requires Board approval for divestment, not because TVA's NEPA analysis of divestment is subject to change. ROD, Dkt. 12-15 at 4 (citing 16 U.S.C.A. § 831dd). That a separate statute requires TVA to undertake further, non-NEPA steps to implement its Preferred Alternative is irrelevant. Relying on *Citizens for Appropriate Rural Roads* as TVA does contravenes the Supreme Court's instructions on when to initiate NEPA judicial review: "[T]he time at which a court enters the process is when the report or recommendation on the proposal is made, and someone protests either the absence or the adequacy of the final impact statement." *Kleppe v. Sierra Club*, 427 U.S. at 406 n.15; *see also Envtl. Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 868 (9th Cir. 2022) ("final NEPA documents are final agency actions").⁹ TVA has failed to carry its burden under Rule 12(b)(6).¹⁰

Conclusion

TVA acted arbitrarily and capriciously when it ignored the terms of the Leases and decided it was obliged to approve a destructive mining expansion without fully considering its environmental impacts or reasonable alternatives under a proper interpretation of relevant contracts. Because Plaintiffs ask the Court to correct TVA's errors of law and failures to consider reasonably foreseeable effects of its decision, as NEPA requires, the Complaint properly states APA and NEPA claims. TVA's Motion should be denied and Plaintiffs respectfully request that the Court set a deadline by which TVA shall file complete administrative record.

⁹ The D.C. Circuit rightly noted that *Kleppe's* language applies to the final agency action requirement. *Public Citizen v. Office of U.S. Trade Representatives*, 970 F.2d 916, 920 (D.C. Cir. 1992).

¹⁰ If the Court dismisses Count IV, it should do so without prejudice so that Plaintiffs can refile once the TVA Board acts. *See Amponsah v. Barr*, 2020 WL 7327699, at *3 (N.D. Ill., 2020) (dismissing without prejudice for lack of finality; "[s]hould the [agency's] decision become final, Plaintiff may re-file her claim."); *Doe v. United States Citizenship and Immigration Services*, 2021 WL 1379485, at *4, 6 (N.D. Ill., 2021) (dismissing without prejudice for lack of final agency action) And, if the Court does dismiss without prejudice, Plaintiffs respectfully request an order explicitly reflecting the manner of dismissal. Fed. R. Civ. P. 41.

Respectfully submitted this 13th day of April, 2026.

/s/ Robert Weinstock_____

Robert Weinstock (IL Bar No. 6311441)
Northwestern Pritzker School of Law
Bluhm Legal Clinic
Environmental Advocacy Center
375 East Chicago Avenue
Chicago, IL 60611
Ph: (312) 503-1457
robert.weinstock@law.northwestern.edu
Counsel for Prairie Rivers Network

/s/ Albert Ettinger_____

Albert Ettinger (IL Bar No. 3125045)
7100 N. Greenview
Chicago, Illinois 60626
Ph: (773) 818-4825
ettinger.albert@gmail.com
Counsel for Sierra Club