BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In the Matter of	**)**	
	)	
Tennessee Valley Authority	**)**	**CAA Docket No. 00-6**
	)	
Docket No. CAA-2000-04-006	**)**	

RULINGS AND GUIDELINES ON DISCOVERY

This is a special proceeding on reconsideration of an administrative compliance order issued to the Tennessee Valley Authority ("TVA") by the Regional Administrator of the Region 4 Office of the United States Environmental Protection Agency pursuant to Sections 113 and 167 of the Clean Air Act ("CAA"). The order has been amended several times, but the current substantive provisions are found in the Fourth Amended Order, issued on April 10, 2000 ("FAO"). The FAO alleges that TVA failed to comply with the CAA's New Source Review ("NSR"), Prevention of Significant Deterioration ("PSD"), and certain State Implementation Plan requirements under those programs, with respect to various projects undertaken at nine of TVA's coal-fired electric power plants. TVA claims that these projects constituted routine maintenance activities that are excluded from the definition of "major modification" which triggers the NSR permitting requirements. 42 U.S.C. § 7501(4); 40 CFR 51.166(b)(2)(i).

The Administrator has delegated the conduct of this proceeding to the Environmental Appeals Board ("EAB"), which has appointed the undersigned Administrative Law Judge ("ALJ") to preside at the hearing. The Administrator has established a deadline of September 15, 2000, for the EAB to render the Agency's final decision on reconsideration of the FAO. A prehearing conference was held on June 7, 2000, in Knoxville, Tennessee. The hearing has been scheduled to begin on July 11, 2000, in Atlanta, Georgia, and to continue until July 21, 2000. The parties are also engaged in filing briefs on legal issues as directed by the EAB.

Discovery Guidelines and Rulings

In accord with a schedule agreed to at the prehearing conference, the EPA Enforcement Staff ("EPA") and TVA have each filed extensive requests for the production of documents and interrogatories seeking written responses from the opposing party. Each party has filed objections to these document requests and interrogatories. At this juncture, the parties have reported that they are in the process of negotiating an agreement under which TVA would respond before the hearing to narrower discovery requests by EPA. Hence these rulings will not address EPA's discovery requests

directed to TVA.

EPA has also filed a response to TVA's first set of interrogatories, although it had filed objections to the interrogatories. These rulings will therefore not address the interrogatories, but only TVA's document requests.

EPA has responded to TVA's document requests to date by undertaking an extensive search for responsive documents, primarily in the Region 4 Office in Atlanta, and in agency headquarters in Washington. EPA has already made a large number of documents available to TVA for copying, and is continuing to do so on a regular basis. In addition, EPA has provided TVA with the documents comprising the administrative record of its decision to issue the compliance order, and 198 documents listed in its preliminary prehearing information exchange of proposed exhibits. Many of these latter materials are TVA documents that describe the projects undertaken at the subject coal-fired plants.

EPA has stated that it will continue to provide TVA with "all non-privileged responsive documents, regardless of its [sic] probative value." However, that statement (on page 3 of EPA's Responses and Objections) is followed by general and specific objections to TVA's document requests. EPA also filed a supplemental response listing examples of documents it claims are privileged from disclosure. Hence it is not clear exactly what documents EPA has disclosed or is willing to disclose, at least with regard to non-privileged responsive documents.

Nevertheless, as the parties are aware, the vast bulk of discovery in this case must be accomplished on a voluntary basis. The river of discovery is flowing and can only be slightly nudged to one side of the channel or the other by these rulings or guidelines. These rulings will not be exhaustive. I will address only those general and specific objections to TVA's requested discovery to the extent I can as a practical matter at this juncture in the proceedings.

- <u>EPA's General Objections</u>

As stated at the prehearing conference, discovery in this proceeding will be guided by the standard set forth in 40 CFR §22.19(e)(1). Under that rule, discovery beyond the prehearing exchange may be ordered only if it: "(i) Will neither unreasonably delay the proceeding nor unreasonably burden the non-moving party; (ii) Seeks information that is most reasonably obtained from the non-moving party, and which the non-moving party has refused to provide voluntarily; and (iii) Seeks information that has

significant probative value on a disputed issue of material fact relevant to liability or relief sought." This standard is much more restrictive than discovery under F.R.C.P. Rule 26 which provides that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the subject action . . ." F.R.C.P. 26(b)(1). The rule also allows discovery of information that "appears reasonably calculated to lead to the discovery of admissible evidence."

It must also be remembered that this is a proceeding to reconsider an administrative compliance order. The Administrator delegated to the EAB the authority to make the agency's final decision upon providing the parties with an opportunity for limited discovery and a hearing. This is not a federal court action or even a standard Part 22 administrative enforcement proceeding.

Many of EPA's general objections are grounded primarily on the alleged unreasonably burdensome nature of TVA's document requests. In this category are EPA's objections to the discovery of the following: information from regional offices other than Region 4; information from offices or individuals within the agency that do not administer the Clean Air Act; material that has been archived in federal records depositories; material in enforcement case files other than the TVA matter; documents concerning industries other than the coal-fired steam electricity generating industry; documents that are available and accessible to the general public; and computer disks and drives. EPA has also claimed that most of this requested discovery will not yield information with significant probative value.

The threshold of reasonableness with regard to the potential for causing delay and undue burdens in responding to discovery must be placed relatively low in this proceeding due to the extremely short time frames we are all laboring under. The type of massive discovery sought by TVA may well be appropriate in federal court litigation governed by the F.R.C.P. However, as TVA responded in its own objections to EPA's first document requests, it will simply not be physically possible for EPA to produce all categories of the documents sought by TVA from all its regions and program divisions. It is also hard to imagine how TVA would be able to review such voluminous information as, for example, other CAA enforcement files before the hearing. The parties' resources would best be devoted to preparing their own cases and analyzing the actual evidence proposed by the opposing party as revealed in the prehearing exchanges.

In addition, TVA has not shown generally that many of the categories of documents it is seeking will have significant

probative value on a disputed issue of material fact in this proceeding. It is not enough to assert that a document request seeks "probative" information without specifying the relevant issue of fact on which the information is believed to be probative. TVA's replies to EPA's objections do not generally specify the disputed issues of material fact, and I am not willing to presume what those issues are. Therefore, EPA's general objections to TVA's discovery are generally upheld. I will not direct EPA to produce those categories of information covered by the general objections. EPA should, however, exercise its good faith in producing those documents that are responsive to TVA's requests and reasonably accessible.

EPA also objects to TVA's discovery requests that seek documents that "relate to," "concern," or "refer to," (or similar terms) various subjects. I agree that these types of terms are vague and likely to include an unreasonably large number of documents of little or no probative value. Such requests should therefore be construed as only applying to documents that primarily relate to or concern the various Clean Air Act legal and factual issues relevant to this proceeding, as defined in the particular discovery request.

Based on the parties' filings it appears that EPA is continuing to respond to TVA's document requests by producing those documents it believes are most responsive and most reasonably accessible within the time frames of the proceeding. In the context of this proceeding, we all essentially will have to rely on each party's good faith in determining the reasonable scope of its disclosure. Each party, acting in good faith, is the best judge of what it can disclose that is responsive to the requests and not unreasonably burdensome or time-consuming. The parties will have an opportunity to show at the hearing, or in post-hearing briefs, any prejudice arising from the failure of the opposing party to respond to discovery requests.

EPA's Specific Objections

In the interests of efficiency and brevity, these rulings will, for the most part, address EPA's responses to TVA's specific document requests and TVA's replies to those responses in groups, rather than individually. Initially, a number of the requests are adequately dealt with by the rulings or guidelines stated above on EPA's general objections. In response to these requests, EPA has stated that it intends to produce non-privileged responsive documents, subject to its general objections. In this category are TVA's following numbered document requests: 1-6, 7(b-c), 8, 9, 11-15, 39, 43, and 50-58.

- EPA's Privilege Claims

EPA asserts that numerous responsive documents are protected from discovery under the attorney work product doctrine, the attorney-client privilege, the deliberative process privilege and the settlement deliberations privilege. TVA contends that EPA has not provided documentation of its privilege claims as promised. Further, TVA asserts that if EPA intends to claim a privilege it cannot simply provide a broad categorical listing of documents, but rather must make its privilege claims on a document specific basis. TVA also argues that EPA is not entitled to raise the deliberative process privilege in the circumstances in which it has been asserted and that EPA has failed to follow the proper procedures for claiming the privilege. TVA cites several federal court decisions in support of its position. *See, e.g.*, *Resolution Trust Corp. v. Diamond*, 137 F.R.D. 634 (S.D.N.Y. 1991); *Krikorian v. Dep't of State*, 984 F.2d 461 (D.C. Cir. 1992).

Generally, due to the quantity of documents involved, we have no choice but to largely accept EPA's assertions of privilege. In addition, the requirements for claiming the deliberative process privilege are not as strict in this administrative forum as in federal district court. (See *Chautauqua Hardware Corp.*, 3 E.A.D. 616, 623, Order on Interlocutory Appeal, EAB 1991).

Nevertheless, TVA is correct in pointing out that it is normally necessary for privileges to be asserted on a document-specific basis. Each of the privileges has different prerequisites that must be met, and each document is unique. Therefore, EPA will be directed to prepare a privilege log, similar to the listing of examples in its supplementary response, of those responsive documents it believes, in good faith, are potentially most relevant to the issues raised in this proceeding. Although it is difficult to envision as a practical matter, I may then allow TVA to contest by oral or written motion, or request an in camera review of, a small number of documents which it believes to be particularly probative and not entitled to protection under the claimed privilege or privileges. Given the time constraints imposed on this proceeding, any such requests must be strictly limited and will be handled on an expedited basis in a procedure to be determined.

EPA asserted these privileges as its primary response to the following numbered document requests: 10, 16-30, 32-36, 38, 40, and 45-49. Accordingly, as with the other requests, EPA will continue to produce those responsive non-privileged documents in response to those requests, subject to its general objections.

- Remaining Miscellaneous Document Requests

Document requests ##41, 42 and 44 each seek, in part, information relating to States, including enforcement actions, inspection practices, permitting and any similar EPA actions or analysis of such State activities. EPA has agreed to provide the requested information for States in which TVA plants are located, but contends that information relating to States other than those in which TVA plants are located lacks probative value. EPA also objects that document requests 41 and 42 are vague and overly broad. I find that, consistent with the discussion above of EPA's general objections, EPA's position is reasonable. Accordingly, EPA will not be required to produce the information in document requests 41, 42 and 44 for states other than those in which TVA plants are located.

EPA contends that the information sought in request #31 dealing with the electric utility industry, consists of documents originally obtained from TVA or that are more accessible to TVA than to EPA. As stated in my Prehearing Order, the parties may simply cite documents known to be in the possession of or readily available to the opposing party, rather than producing copies for the prehearing exchange or other discovery. EPA will continue to produce non-privileged responsive documents relevant to this request, subject to these comments.

TVA's request #37 seeks all documents concerning statements by EPA analysts in a 1986 article discussing the applicability of the NSR program to older generating units. TVA has not sufficiently shown that the information sought has significant probative value under the standards of 40 CFR §22.19(e). Hence, EPA will not be required to produce documents in response to this request.

Summary of Rulings

In general, these rulings simply ratify the course of discovery that the EPA has engaged in thus far in response to TVA's requests. In the circumstances of this proceeding, EPA's general objections concerning the burdensome nature of TVA's requests, their vagueness, and TVA's lack of a showing of sufficient probative value, are upheld, subject to the comments above. EPA is directed to continue to exercise its good faith in providing responsive information that is not unduly burdensome and has potential probative value on disputed issues of material fact. Several other discovery requests were dealt with separately above.

EPA will also be directed to provide a more detailed privilege log or equivalent information to enable TVA to focus on specific

documents if it wishes to contest the claimed privilege with respect to any particular documents and seek disclosure. It is possible that an expedited procedure can be followed to resolve such disputes over a very limited number of documents.

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 29, 2000
Washington, D.C.