



TENNESSEE VALLEY AUTHORITY

18 CFR Part 1304

Approval of Construction in the Tennessee River System; Revisions to Administrative Appeals Process; Job Title and Address Updates

AGENCY: Tennessee Valley Authority

ACTION: Final Rule

SUMMARY: The Tennessee Valley Authority (TVA) is making non-substantive changes to Title 18 of the Code of Federal Regulations. The purpose of this rule is to amend the process for issuing final determinations on administrative appeals of permitting decisions under section 26a of the TVA Act. Formerly, final determinations were made by the TVA Board of Directors. In 2004, the TVA Act was amended to change TVA's governance structure from a three-member, full time board to a nine-member, part-time policy board with a chief executive officer (CEO). Accordingly, the TVA Board approved revisions to the section 26a appeals process to provide for an appeal to the CEO followed by a discretionary review by a committee of the Board. The revised appeals process is consistent with the new governance structure. This rule amends TVA's published regulations to incorporate the revisions approved by the Board and to make the regulations consistent with the change in TVA's governance structure. TVA is also making minor changes to update addresses and job and organizational titles.

DATES: This final rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Rebecca C. Tolene, Vice President
Natural Resources, Tennessee Valley Authority, Knoxville, Tennessee, (865-632-4433).

SUPPLEMENTARY INFORMATION:

I. Legal Authority

This rule is promulgated under the authority of the Tennessee Valley Authority Act of 1933, *as amended*, 16 U.S.C. 831-831ee.

II. Background

Section 26a of the TVA Act requires that TVA's approval be obtained prior to the construction, operation, or maintenance of any dam, appurtenant works, or other obstruction affecting navigation, flood control, or public lands or reservations across, along, or in the Tennessee River or any of its tributaries. TVA's rules governing such approval are codified at 18 CFR Part 1304. The rules include an appeals process whereby an applicant who is not satisfied with an initial permitting decision may obtain administrative review of that decision.

Previously, when TVA was governed by a three-member, full-time board, dissatisfied applicants who exhausted their intermediate appeal rights could appeal TVA's permitting decisions to the full TVA Board for final determination. That stage of the appeals process became obsolete, however, when Congress amended the TVA Act to change TVA's governance structure to a nine-member, part-time policy board with a chief executive officer. 118 Stat. 2963-2967, 16 U.S.C. 831a.

Hence, this rule amends the appeals process to make it consistent with TVA's governance structure. Instead of a final appeal to the full TVA Board, dissatisfied applicants who have exhausted their intermediate appeal rights may appeal to TVA's

CEO, with an opportunity for further discretionary review by a committee of the Board (Committee). The Committee will review the CEO's decision only if one or more Committee members determine that extraordinary circumstances exist that warrant further review. The rule also makes minor changes necessary to update addresses and job and organizational titles.

TVA is promulgating this rule as a direct final rule with an immediate effective date. TVA did not publish a notice of proposed rulemaking for this rule because it is exempt from notice and comment rulemaking requirements under 5 U.S.C. 553(a)(2) and 553(b)(A) and (b)(B). The rule relates to agency management, and it is a rule of agency organization, procedure, or practice.

III. Administrative Requirements

Unfunded Mandates Reform Act and various Executive Orders, including E.O. 12866, Regulatory Planning and Review; E.O. 12898, Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations; E.O. 13045, Protection of Children from Environmental Health Risks; E.O. 13132, Federalism; E.O. 13175, Consultation and Coordination with Indian Tribal Governments; E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, and Use; and E.O. 12988, Civil Justice Reform Act.

The rule contains no federal mandates for State, local or tribal governments or for the private sector. Issuance of the rule does not constitute a significant regulatory action. The rule will not have an annual affect on the economy of \$100 million or more, and it will not result in expenditures of \$100 million in any one year by state, local, and tribal governments or the private sector. The rule will not have a substantial direct affect on the

States or Indian tribes, on the relationship between the Federal Government and the States or Indian tribes, or on the distribution of power and responsibilities between the federal Government and States or Indian tribes. Unified development and regulation of the Tennessee River system through an approval process for obstructions in or along the river system, and management of United States-owned land entrusted to TVA are federal functions for which TVA is responsible under the TVA Act. The rule simply codifies a change in TVA's procedure for reviewing denials of Section 26a permit applications. The rule does not concern an environmental health risk or safety risk that may disproportionately affect children, minority populations, or low-income populations. The rule is not likely to have a significant adverse affect on the supply, distribution, or use of energy.

List of Subjects in 18 CFR Part 1304

Administrative practice and procedure, Natural resources, Navigation (water), Rivers, Water pollution control.

For the reasons set forth in the preamble, title 18, Chapter XIII of the Code of Federal Regulations is amended as follows:

PART 1304—APPROVAL OF CONSTRUCTION IN THE TENNESSEE RIVER SYSTEM AND REGULATION OF STRUCTURES AND OTHER ALTERATIONS

1. The authority citation for 18 CFR Part 1304 continues to read as follows:

Authority: 16 U.S.C. 831-831ee.

2. Amend § 1304.2 by revising paragraph (b) to read as follows:

§ 1304.2 Application.

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(b) Applications shall be addressed to the Tennessee Valley Authority at the appropriate Regional Watershed Office location using the addresses provided below. To contact an office, call 1-800-882-5263. Applications are available on TVA's internet website and at the addresses listed below.

(1) For Chickamauga and Nickajack Reservoirs: 1101 Market Street, PSC 1E-C, Chattanooga, TN 37402-2801;

(2) For Apalachia, Blue Ridge, Chatuge, Hiwassee, Nottely, and the Ocoee Reservoirs: 4800 US Highway 64 West, Suite 102, MLO 1A-MRN, Murphy, NC 28906;

(3) For Guntersville, Normandy, and Tims Ford Reservoirs: 3696 Alabama Highway 69, CAB 1A-GVA, Guntersville, AL 35976-7196;

(4) For Cherokee, Douglas, and Nolichucky Reservoirs and the French Broad River: 3726 E. Morris Boulevard, MOC 1A-MOT, Morristown, TN 37813-1270;

(5) For Boone, Fort Patrick Henry South Holston, Watauga, and Wilbur Reservoirs and the Bristol Project: 106 Tri-Cities Business Park Drive, WTR 1A-GRT, Gray, TN 37615;

(6) For the Beech River Project, Kentucky Reservoir, and the Lower Duck River: 2835-A East Wood Street, WTB 1A-PAT, Paris, TN 38242-5948;

(7) For Fontana, Fort Loudon, Great Falls, Melton Hill, Norris, Tellico, and Watts Bar Reservoirs, and the Little Tennessee, Clinch, and Powell Rivers: 260 Interchange Park Dr., LCB 1A-LCT, Lenoir City, TN 37772-5664;

(8) For Bear Creek, Cedar Creek, Little Bear Creek, Upper Bear Creek,
and the Duck and Elk Rivers, and Pickwick, Wheeler and Wilson Reservoirs:

P.O. Box 1010, MPB 1H-M, Muscle Shoals, AL 35662-1010.

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3. Revise § 1304.3 to read as follows:

§ 1304.3 Delegation of authority.

The power to approve or disapprove applications under this part is delegated to the Vice President, Natural Resources, or the designee thereof, subject to appeal to the Chief Executive Officer and discretionary review by a designated committee of the TVA Board, as provided in § 1304.6. The administration of applications is delegated to the Natural Resources staff or the group with functionally equivalent responsibilities.

4. Revise § 1304.4 to read as follows:

§ 1304.4 Application review and approval process.

(a) TVA shall notify the U.S. Army Corps of Engineers (USACE) and other federal agencies with jurisdiction over the application as appropriate.

(b) If a hearing is held for any of the reasons described in paragraph (c) of this section, any interested person may become a party of record by following the directions contained in the hearing notice.

(c) Hearings concerning approval of applications are conducted (in accordance with § 1304.5) when:

- (1) TVA deems a hearing is necessary or appropriate in determining any issue presented by the application;
- (2) A hearing is required under any applicable law or regulation;

(3) A hearing is requested by the USACE pursuant to the TVA/Corps joint processing Memorandum of Understanding; or

(4) The TVA Investigating Officer directs that a hearing be held.

(d) Upon completion of the review of the application, including any hearing or hearings, the Vice President or the designee thereof shall issue an initial decision approving or disapproving the application. The basis for the decision shall be set forth in the decision.

(e) Promptly following the issuance of the decision, the Vice President or the designee thereof shall furnish a written copy of the decision to the applicant and to any parties of record. The initial decision shall become final unless an appeal is made pursuant to § 1304.6.

5. Revise § 1304.5 to read as follows:

§ 1304.5 Conduct of hearings.

(a) If a hearing is to be held for any of the reasons described in § 1304.4(c), TVA shall give notice of the hearing to interested persons. Such notice may be given by publication in a daily newspaper of general circulation in the area of the proposed structure, personal written notice, posting on TVA's Internet website, or by any other method reasonably calculated to come to the attention of interested persons. The notice shall provide to the extent feasible the place, date, and time of hearing; the particular issues to which the hearing will pertain; the manner of becoming a party of record; and any other pertinent information as appropriate. The applicant shall automatically be a party of record.

(b) Hearings may be conducted by any such person or persons as may be designated by the Vice President, the Vice President's designee, or the Chief Executive Officer. Hearings are public and are conducted in an informal manner. Parties of record may be represented by counsel or other persons of their choosing. Technical rules of evidence are not observed although reasonable bounds are maintained as to relevancy, materiality, and competency. Evidence may be presented orally or by written statement and need not be under oath. Cross-examination by parties of witnesses or others providing statements or testifying at a hearing shall not be allowed. After the hearing has been completed, additional evidence will not be received unless it presents new and material matter that in the judgment of the person or persons conducting the hearing could not be presented at the hearing. The Vice President may arrange a joint hearing with another federal agency where the subject of an application will require the approval of and necessitate a hearing by or before that other agency. In TVA's discretion, the format of any such joint hearing may be that used by the other agency.

6. Revise § 1304.6 to read as follows:

§ 1304.6 Appeals.

(a) Decisions approving or disapproving an application may be appealed as provided in this section. Decisions by the Vice President's designee may be appealed to the Vice President and decisions by the Vice President may be appealed to the Chief Executive Officer, with the possibility of further discretionary review by a committee of the TVA Board.

(b) If a designee of the Vice President issues an initial decision disapproving an application or approving it with terms and conditions deemed unacceptable by the

applicant, the applicant may obtain the Vice President's review of that decision by mailing within thirty (30) days after receipt of the designee's decision a written request to the Vice President, Natural Resources, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902. Otherwise, the initial decision of the Vice President's designee becomes final.

(c) If the Vice President, either initially or as the result of an appeal, disapproves an application or approves it with terms and conditions deemed unacceptable by the applicant, the applicant may obtain the Chief Executive Officer's review of that decision by mailing within thirty (30) days after receipt of the decision a written request to the Chief Executive Officer, Tennessee Valley Authority, 400 W. Summit Hill Drive, Knoxville, Tennessee 37902. Otherwise, the Vice President's decision becomes final.

(d) The decision of the Chief Executive Officer shall become final unless a request for discretionary review by a committee of the Board (Committee) is justified by extraordinary circumstances and mailed within thirty (30) days after receipt of the decision to the attention of Board Services, Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902. If within 60 days of such a request, one or more members of the Committee indicate that there are extraordinary circumstances warranting further review, the matter will be reviewed by the Committee. Otherwise, the Chief Executive Officer's decision becomes final. The Committee will schedule a meeting not more often than twice a year as needed to hear discretionary appeals. The Committee decides what kind of process to use for these appeals. Deliberations and voting on the reviews will take place at these meetings.

(e) Any interested party who becomes a party of record at a hearing as set forth in § 1304.4(b) and who is aggrieved or adversely affected by any decision approving an application may obtain review by the Vice President or Chief Executive Officer, as appropriate, and may request discretionary review by the Committee, in the same manner as an applicant by adhering to the requirements of paragraphs (b), (c), and (d) of this section.

(f) All requests for review shall fully explain the reasons the applicant or other aggrieved party of record contends that the decision below is in error, and shall include a signed certification that the request for review was mailed to each party of record at the same time that it was mailed to TVA. TVA shall maintain lists of parties of record and make those available upon request for this purpose.

(g) The applicant and any party of record requesting review by the Vice President or Chief Executive Officer may submit additional written material in support of their positions within thirty (30) days after mailing the request for review or during such additional period as the Vice President or Chief Executive Officer may allow.

(h) In considering an appeal, the Vice President or Chief Executive Officer may conduct or cause to be conducted such investigation of the application as he or she deems necessary or desirable, and may appoint an Investigating Officer. The Investigating Officer may be a TVA employee or a person under contract to TVA, and shall not have been directly and substantially involved in the decision being appealed. The Investigating Officer may be the hearing officer for any hearing held during the appeal process. The Vice President or Chief Executive Officer shall render a decision approving or disapproving the application based on a review of the record and the information

developed during any investigation and/or submitted by the applicant and any parties of record.

(i) No applicant or party of record shall contact the Chief Executive Officer, Committee members, or any other TVA Board member during the appeal process, except as specified in correspondence from the Chief Executive Officer or from the Committee Secretary. The appeal process runs from the date of an appeal to the Chief Executive Officer until a final resolution of the matter.

(j) A written copy of the decision by the Vice President or the Chief Executive Officer shall be furnished to the applicant and to all parties of record promptly following determination of the matter.

(k) In the event the Committee grants a request for discretionary review, notice of that decision and information about the review shall be provided to the person(s) requesting review and to other parties of record in accordance with the methods set forth in § 1304.5(a). Written notice of the Committee's final determination of the appeal shall be provided to the applicant and to all parties of record in accordance with the methods set forth in § 1304.5(a).

7. In § 1304.412, add definitions of "Chief Executive Officer," "Committee," and "TVA Investigating Officer" in alphabetical order, and revise the definition of "Vice President," to read as follows:

§ 1304.412 Definitions.

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Chief Executive Officer means the Chief Executive Officer, TVA.

Committee means a committee of the TVA Board of Directors that has been designated by the TVA Board to hear appeals under this regulation.

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TVA Investigating Officer means a TVA employee or a person under contract to TVA appointed by the Vice President or the CEO to investigate any issue concerning an appeal of a decision on an application under this part.

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Vice President means the Vice President, Natural Resources, TVA, or a position with functionally equivalent supervisory responsibilities.

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Rebecca C. Tolene,

Vice President, Natural Resources.

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