

have not yet been approved by OMB. TVA will publish a document in the **Federal Register** announcing the effective date.

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SUPPLEMENTARY INFORMATION:

I. Legal Authority

These regulations are promulgated under the authority of section 26a of the Tennessee Valley Authority Act of 1933 (16 U.S.C. 831y-1), and TVA's property rights under certain deeds and flowage easement instruments.

II. Background

Section 26a of the TVA Act provides that no dam, appurtenant works, or other obstruction affecting navigation, flood control or public lands or reservations shall be constructed, and thereafter operated or maintained across, along, or in the Tennessee River system or any of its tributaries until the plans for such construction, operation, or maintenance shall have been submitted to and approved by the TVA Board of Directors, or its delegate. Commencement of construction, operation, or maintenance of such structures without such approval is prohibited.

On October 22, 1971, TVA promulgated regulations setting forth the approval process for and establishing a number of policies regarding the exercise of TVA's section 26a authority. The regulations have since been amended from time to time. In the September 20, 2000, issue of the **Federal Register** (65 FR 56,821), TVA published a proposed rulemaking to further amend the section 26a regulations by adding new sections regarding underground and aboveground storage tanks, marina sewage pump-out stations and holding tanks, wastewater outfalls and septic systems, and development within flood control storage zones of TVA reservoirs. TVA also proposed to add new sections providing for the handling of requests for waivers and variances, and to revise for clarity the sections governing the application process and the handling of appeals.

In addition, TVA proposed to add new subparts C and D regarding residential-related use of TVA-controlled residential access shoreland and TVA flowage easement shoreland in

order to incorporate into rules the SMP policy that was adopted by TVA's Board of Directors on April 21, 1999, and became effective on November 1, 1999. A detailed analysis of the proposed rulemaking is contained in the preamble to the proposed rule.

III. Discussion of Public Comments

In response to the September 20, 2000, **Federal Register** notice of proposed rulemaking, TVA received eleven letters and e-mail messages commenting on the proposed rule. Some commenters applauded aspects of the proposed regulations that they considered to be environmentally beneficial. Some urged TVA to take additional actions that they said would be even more protective of the environment. Others criticized parts of the proposed rule as overly restrictive. The following discussion addresses the major points raised by the commenters.

One commenter objected to the 50-foot-deep shoreline management zone (SMZ) described in proposed § 1304.203 as a taking of private property without due process of law. This is not the case, however, because § 1304.203 clearly applies only to land already owned by TVA. This commenter also objected to the size limitation for enclosed storage space (32 square feet) and to the prohibitions against enclosing or placing a roof on the second story of certain facilities that are contained in proposed § 1304.204. Enclosed storage space on a dock or a pier is approved solely for the storage of equipment used in boating and water recreation, such as skis, life vests, fishing equipment, etc. TVA's experience is that 32 square feet is sufficient for this storage need. Other equipment not directly related to boating or water recreation should be stored elsewhere. Second story structures and roofs create a visual obstruction and are not a necessary component of a dock or pier having the primary purpose of allowing water access. The commenter also questioned the proposed channel excavation rule (§ 1304.207). Channel excavation can adversely affect shoreline aquatic habitats and animal communities, and can create problems in placement and stabilization of the spoil material. TVA's policy is to minimize dredging and channel excavation, especially in shallow water areas. The provisions addressing depth of excavation, channel slope, and spoil placement are necessary to minimize siltation, adverse water quality impacts, and the need for frequent dredged channel maintenance.

The previous commenter also disagreed with the prohibition against the use of broken concrete for retaining

walls. The commenter stated that he intended to build a wall by neatly stacking broken concrete sections of uniform four-inch thickness salvaged from floors and sidewalks. This is not the type of broken concrete typically proposed for retaining walls, and TVA did not intend to prohibit the use of such concrete. Rather, TVA intended to prohibit the use of the irregular and crumbling concrete pieces that it has found to be unsightly and often ineffective for construction of retaining walls. To make clear that TVA would consider proposals to erect retaining walls from the type of concrete mentioned by the commenter, a parenthetical phrase has been added to § 1304.208(c)(2).

Some commenters suggested that the rule should contain an external appeals process providing that disputes about permitting of water-use facilities would ultimately be resolved by some entity other than TVA. These comments are inconsistent with section 26a of the TVA Act, which makes TVA responsible for determinations regarding the construction, operation, and maintenance of obstructions in the Tennessee River and its tributaries.

Some commenters stated that a permit should not expire simply because construction is not initiated within 18 months after a permit is issued (§ 1304.9). TVA does not agree. Eighteen months is a more than reasonable amount of time after the issuance of a permit to initiate construction. Conditions may change over time such that different permit terms would be appropriate. Adjacent landowners who wish to apply for water-use facility permits should not have their options limited by the existence of approved permits for facilities that may never be built.

Some commenters suggested a need for the rule to more clearly indicate the circumstances under which TVA would approve new owners' applications to continue using a permitted facility or conducting a permitted activity. It also was suggested that the rule should make clear that a new owner who had applied for a permit could continue using an existing facility pending TVA's decision on the new owner's application. TVA agrees with these suggestions and has changed the rule accordingly. Consistent with these changes, TVA also has revised § 1304.10 to refer to "facilities" and "activities" rather than structures.

A number of commenters objected to the proposed applicability section for TVA-owned residential access shoreland (§ 1304.201). These commenters stated that TVA is seeking