

#### IV. Other Changes from the Proposed Rule

In addition to the changes made in response to public comments, the final rule contains several minor clarifications. Also, TVA has decided not to implement two proposed changes to the existing rules governing hearings and appeals. The current rules provide for hearings to be held in certain situations. TVA proposed to change the rule to provide that a hearing would be held when requested by the applicant or any party of record. The final rule continues existing practice under the current rule except that it also provides for hearings to be held when directed by the TVA Investigator (§ 1304.4(c)). The current and proposed rules provide for appeals to the TVA Board of Directors by the applicant and by any party of record. Current rules provide that hearing notices indicate the manner in which an interested person may become a party of record. TVA proposed to change the rule to allow interested persons to become parties of record with right of formal appeal even if no hearing is held. The final rule continues existing practice under the current rule (§ 1304.4(b)). TVA's experience with the section 26a application process since publication of the proposed rule has demonstrated that continuing existing practices in these two respects is the best way for TVA to balance competing interests while continuing to efficiently process applications and appeals.

#### V. Administrative Requirements

*A. Unfunded Mandates Reform Act and Executive Orders: E.O. 12866, Regulatory Planning and Review; E.O. 13045, Protection of Children From Environmental Health Risks; E.O. 13132, Federalism; E.O. 13175, Consultation and Coordination With Indian Tribal Governments; and E.O. 13211, Actions Concerning Regulations that Significantly Affect Energy Supply, Distribution, or Use*

The rule contains no Federal mandates for State, local, or tribal governments or for the private sector. It is not a significant regulatory action. It will not have an annual effect 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 effect 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 policies and requirements regarding the use of TVA land and the size, type, and use of obstructions to be allowed in the Tennessee River system. The rule does not concern an environmental health risk or safety risk that may disproportionately affect children, and it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

#### B. Regulatory Flexibility Act

Under the Regulatory Flexibility Act (RFA) 5 U.S.C. 605, TVA is required to prepare a regulatory flexibility analysis unless the TVA Board certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small not-for-profit enterprises, and small governmental jurisdictions.

The TVA Board has approved the following certification:

[T]he Board of Directors has determined and hereby certifies that this action will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

The rule will not significantly add to the costs of any small entity that chooses to use TVA land or construct a new obstruction in the Tennessee River system. Existing obstructions that are permitted under current regulations will not have to be modified to conform to new standards. Any economic impact that will occur will not affect a substantial number of small entities because most applications to construct an obstruction in the Tennessee River system are submitted by residential applicants who do not meet the definition of a small entity.

#### C. Submission to Congress and the General Accounting Office

Under 5 U.S.C. 801(a)(1), as added by the Small Business Regulatory Enforcement Fairness Act of 1996, TVA has submitted a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the General Accounting Office. This is not a "major rule" as defined by 5 U.S.C. 804(2).

#### D. Executive Order 12988—Civil Justice Reform

The rule does not have a retroactive effect prior to the effective date. It does, however, incorporate into rules TVA's SMP (primarily the standards contained in subparts C and D) that have been in effect as internal TVA policy guidance since November 1, 1999. A number of the rule's grandfather provisions are based on the November 1, 1999, date. These situations are clearly identified in the rule. The rule preempts State and local law only to the extent any such law might purport to authorize activities on TVA land or along or in the Tennessee River system that are inconsistent with the rule. The rule's administrative appeal provisions must be exhausted before any action for judicial review of a TVA permitting action may be brought against TVA. (This assumes that such actions are subject to judicial review; nothing herein should be construed as an admission by TVA that its permit decisions under section 26a of the TVA Act or its decisions regarding use of TVA land are judicially reviewable.)

#### E. Executive Order 12630—Governmental Actions and Interference With Constitutionally Protected Property Rights

TVA expects that most applications to construct obstructions in or along the Tennessee River system or engage in other activities requiring a permit under this rule would be made in connection with land along TVA reservoirs that is owned by TVA or is subject to a TVA flowage easement. TVA's substantial landrights in these situations effectively reduce the likelihood of any takings implications because, even apart from this rule and section 26a of the TVA Act, TVA would have the right to restrict or prohibit the requested activity. In addition, the EIS for TVA's SMP considered the effect on property values along and near the shoreline of TVA reservoirs of the SMP standards incorporated into this rule, and it was determined that property values would be higher under such standards than under any of the other alternatives considered in the EIS.

#### F. Environmental Review

TVA prepared a detailed draft EIS assessing residential shoreline development impacts in the Tennessee Valley. Copies of the Executive Summary and/or draft EIS were distributed to numerous State agencies and public libraries in the Tennessee Valley and to approximately 8,000 interested individuals. Sixteen public