

On behalf of Tennessee Interfaith Power and Light, I am submitting the following comments on the proposed revisions to procedures that the Tennessee Valley Authority (TVA) will follow in carrying out its obligations pursuant to the National Environmental Procedures Act (NEPA). The mission of the Tennessee Interfaith Power & Light is to spiritually respond to the challenges of the climate crisis through upholding the sacredness of all life, protecting vulnerable communities, and caring for the Earth. We manifest our spiritual values by reducing our carbon footprint within our daily lives, releasing the spiritual power of our faith communities, and advocating for transformative climate protection and justice policies. We submit these comments to further accountability for the environmental impacts of TVA as a federal agency.

1. The Proposed Revisions do not address increased uncertainty due to Climate Change.

In its discussion of the reasons for the proposed revisions, TVA assumes that the environmental impacts of future actions will be the same as past actions. If past actions were found to not have a significant environmental impact, then the assumption is made that future actions will likewise not have a significant impact. TVA must practice caution in relying on the impact findings of past decades: It is probable that the coming changes in climate will affect the composition and health of our ecosystems, that climate change will impair the capacity and resiliency of our ecosystems: Specific impacts to be expected include rising temperatures, water stress and drought, increased wildfire risk, increases in insects and pathogens, increases in invasive species, extreme weather events, changes in soil moisture and nutrient content, and tree mortality, resulting in changes to ecosystem dynamics affecting the human environment. See “Considering the Effects of Climate Change on Natural Resources in Environmental Review and Planning Documents”, by Jessica Wentz, September 2016, Sabin Center for Climate Change Law, Columbia Law School and the sources cited therein. In our own region, we have experienced failed planning: federal, state and local officials could not foresee the effects of wildfires on the Gatlinburg community, TVA failed to foresee the failure of its coal ash dam. In my own experience as a regulator, I have seen countless examples of agencies’ over-reliance on “it’s never happened before” without taking a hard look at the true risks and potential impacts of projects.

TVA’s justifications for its proposals for expanding the numbers and types of actions which require no NEPA analysis falsely rely on the assumption that actions which had an insignificant effect in the past must therefore have an insignificant effect in the future.

The above comment is additional justification for narrowing the numbers and scopes of the categorical exclusions, particularly those with wetlands, species, wildfire and vegetative impacts.

2. TVA’s proposed definition of Categorical Exclusions is flawed and should be revised to delete mitigated actions because public and expert input on the ranges and types of mitigation is necessary.

TVA is proposing extensive changes to the definitions of and procedures for categorical exclusions. The agency has published the proposed changes in the forms of regulations in the Federal Register and has provided additional justifications in a separate publication.

https://www.tva.gov/file_source/TVA/Site%20Content/Environment/Environmental%20Stewardship/Environmental%20Reviews/Proposed%20Changes%20to%20TVA’s%20NEPA%20Procedures/tva_proposed_categorical_exclusions_supporting_documentation_june_8_2017.pdf

What is a categorical exclusion?

Broadly, it is a group of actions which a federal agency has determined do not have a significant effect on the environment. As a federal agency TVA's actions are subject to the procedures of the National Environmental Protection Act which can mean that TVA must evaluate the environmental effects through either an Environmental Impact Statement or a less burdensome Environmental Assessment. A third group of minor actions are those for which a significant impact is not expected, and these actions are defined as "categorically excluded" from the NEPA procedural and documentation requirements.

If a TVA action falls within a Categorical Exemption, there is no opportunity for public input prior to the determination that an action is categorically excluded from NEPA. In contrast, if TVA undertakes an environmental assessment or an environmental impact statement, there is the opportunity for comment by outside agencies and the public. It is somewhat unclear what TVA tracks and the purpose of the tracking, but it appears from the justification, that TVA tracks when it uses a categorical exclusion through a system called ENTAC. In addition, there is an additional documentation (probably just a checklist) for some CEs setting forth the considerations utilized in determining the eligibility of an action for a CE. Having worked with federal agencies, I can affirm that the use of CEs is a pragmatic way to make NEPA work and to focus environmental analysis on the actions with significant impacts. Thus, CEs are necessary to make NEPA function. Nonetheless, their use needs to be limited to appropriate circumstances. **There is no opportunity for input from the public on actions for which TVA claims a categorical exclusion.**

This is the TVA current definition of Categorical Exemptions which it is revising:

Categories of actions listed in this section are those which do not normally have, either individually or cumulatively, a significant impact on the quality of the human environment and require neither the preparation of an EA nor an EIS. The office proposing to initiate an action shall determine, in consultation with the Environmental Quality Staff as appropriate, whether or not the proposed action is categorically excluded. An action which would normally qualify as a categorical exclusion shall not be so classified if: (1) the proposed action could have a potentially significant impact on a threatened or endangered species, wetland or floodplain, cultural or historical resource, important farmland, or other environmentally significant resource; or (2) substantial controversy over the significance of the environmental impacts associated with the proposed action has developed or is likely to develop.

Note that there is no mention of mitigation. The proposed changes would be incorporated into new federal regulations at 18 CFR 1318.200 and 1313.201. I did not see substantive changes in the general definition of CE (corresponding to the first sentence of the old definition.)

However, the second sentence in the old definition has been expanded into a separate longer section which says that "extraordinary circumstance ... which cannot be mitigated" would not be eligible for a categorical exclusion. A slightly longer list of factors similar to the impacts described in the second section above is listed.

The phrase within 1318.201 "and cannot be mitigated, including through the application of other regulatory processes" should be deleted. If a normally insignificant action requires mitigation in order that it would not have a significant impact, then the type of mitigation which is being applied should be subject to the more rigorous scrutiny of an Environmental Assessment with the opportunity for public comment. For example, if a land sale poses an impact on an endangered species, then TVA should

consider alternatives to the action or alternative mitigations, with the opportunity for comment by state and federal agencies through an EA or EIS. This proposed definition would allow TVA to continue to use a categorical exclusion “with mitigation”, but without any outside expert or public scrutiny of the nature of the mitigation or the impacts. “Mitigation” is broadly defined at 40 CFR 1508.20 (these are the NEPA regulations applicable to all federal agencies) and includes rehabilitation, restoration, reducing the impacts over time, and compensating for the impact by replacing or providing substitute resources or environments. Thus, this proposed definition would now allow TVA to undertake a wide range of actions as mitigation when presented with extraordinary circumstances, and still use a categorical exclusion to comply with NEPA without outside input, notice or scrutiny. The identification of potential mitigation alternatives, discussion of feasibility and discussion of impacts constitutes a major and a productive aspect of Environmental Assessments. Often the mitigation identified in connection with a preferred alternative allows an agency find that the proposed action will not have a significant environmental impact. The public and outside experts play an important role in the identification of impacts, the potential for alternatives and for mitigation: If an action which is normally excluded requires mitigation, then it should be subject to at least an Environmental Assessment.

TVA may argue that the “other regulatory processes” provide sufficient environmental review. NEPA takes this into consideration. If another permit requires NEPA analysis, then TVA can tier off of that process without unnecessary duplication, but still allowing public notice and comment.

The history of Clean Water Act compliance with coal permits illustrates the importance of scrutinizing “other regulatory processes” as a justification for short-cutting the scope of environmental impacting. Agencies have relied on “nationwide permits” (not requiring project level NEPA) review without truly calculating their impacts: see e.g. *Black Warrior Riverkeepers v. ACOE*, (11th Cir. 2015)

<http://law.justia.com/cases/federal/appellate-courts/ca11/14-12357/14-12357-2015-03-23.html>.

Numerous other lawsuits have identified regulatory failures to identify environmental impacts. See e.g. If a state or federal “regulatory process” does not include a specific NEPA review, then the need for mitigation, effect of mitigation, and alternatives for mitigation would never be scrutinized. See e.g. *Kentucky Riverkeepers v. Rowlette*, 714 F.3d 402 (6th Cir. 2013).

What does the TVA documentation say about CEs and mitigation?

The Federal Register notice does not discuss the addition of mitigation as a factor in determining whether an action which normally is categorically excluded poses extraordinary circumstances. Neither does the “Proposed Categorical Exclusions Supporting Documentation” have a specific discussion of the addition of mitigation as a factor which would allow the use of a mitigated categorical exemption even if an extraordinary circumstance is identified.

There are scattered references to mitigation throughout TVA’s “Proposed Categorical Exclusions Supporting Documentation” and the term is used in several different contexts: mitigation which lessens the significance of an environmental impact, routine mitigation measures (more accurately best practices), and mitigation of non-environmental impacts such as safety. Thus, it is unclear

TVA provides examples of mitigation being identified in the course of an Environmental Analysis as an argument in support of its conclusion that the action is suitable to be categorically excluded from an impact analysis. For example, after performing an Environmental Analysis, TVA utilized mitigation measures to reduce effects on endangered bat species in the process of removing buildings on a 1000

acre site (p. 3-241). The proposed mitigation for Impacts on wetlands from the construction of 4.7 miles of new transmission lines was incorporated into the Finding of No Significant Impact.

TVA's logic is faulty: even if TVA concluded after an Environmental Analysis that the mitigated action had no significant impact on the environment, that conclusion does not support excluding the action from NEPA scrutiny: Alternatives to these actions were given a hard look, the impacts were considered, public input was allowed. When addressing endangered species and impacts to wetlands, it is important to the public and to the environment that TVA undertake the more rigorous scrutiny. If TVA has successfully utilized Environmental Assessments to analyze proposed actions such as these, then it should continue to do so.

In the context of a number of categorical exclusions, TVA discusses mitigation of cultural resources impacts and wetlands impacts. In these cases, the "mitigation" appears to be a type of best management practice or routine procedure.

3. TVA has been overly broad in its discussion of "mitigated" actions which may have an impact on cultural resources by failing to distinguish between best management practice type mitigation and discovery of resources which should trigger a more rigorous analysis

With respect to mitigation of impacts on cultural resources, see the specific discussions of CE # 16, 19, 22, 27 and 33. The most complete discussion is on pages p. 3-55 to 3-56: TVA states that it would "comply with all applicable federal, state, and TVA regulations to mitigate any effects on cultural resources. The potential impacts, mitigation commitments and associated consultation would be recorded by TVA in a Categorical Exclusion Checklist (CEC) in the ENTRAC database. "

TVA has failed to discuss what type of actions it considers to fall within its compliance and has failed to discuss when discovery of a potential resource would call a halt to the project and require further analysis. Some types of "mitigation", akin to best practices, are appropriately used with an action that is categorically exempt from NEPA. Examples are protocols for securing project areas, informing staff of potential for cultural resources, procedures for notifications of potential resource discoveries. However, the regulations proposed by TVA at 18 CFR 1318.201 fail to distinguish between the routine mitigation which is a type of best management practice and the more expansive mitigation actions described at 40 CFR 1508.20 which include provision of substituted resources or other compensation for cultural impacts.

TVA's justification for its expansion of the list and breath of categorical exclusions is fault because it fails to distinguish actions for which routine procedures only are used to identify potential cultural resources in an action area from actions which impact identified resources and will require more rigorous mitigation. While a CE may be appropriate if only routine best practice mitigation is anticipated, TVA's rules must require that other types of mitigation be examined in an EA or EIS. **Thus, CE # 16, 19, 22, 23, 27, 29, 31, 30, 33, 38, and 45 are overly broad, have the potential to significantly impact cultural resources and should not be implemented as written.**

4. CE # 16, and 19 are overly broad and TVA has failed to demonstrate that environmental impacts will be insignificant

CE # 16 is a proposed new categorical exception for the construction of new transmission line infrastructure generally no more than 10 miles in length, with no more than 125 acres of developed rights of way, no more than 1 mile of new roads, and no more than 10 acres disturbance for new facilities. On p. 3-56, TVA states that it intends to use this categorical exception even if TVA is required to mitigate for damages to wetlands damaged by the types of disturbances necessary for construction of 10 mile transmission lines. It speaks of “appropriate mitigation” but does not discuss what type of mitigation would be required. It is unclear whether all impacts to wetlands regardless of the size would be mitigated under the categorical exception (without the consideration of alternatives in an Environmental Assessment.) On p. 3-54: TVA gave an example of a much **shorter** power line construction in which the manner in which mitigation of wetlands was determined was through an Environmental Assessment. It is unclear what type of action was taken for mitigation or what mitigation alternatives were considered. TVA must commit to establishing understandable parameters for reviewing the area of the impacted wetlands to determine if the impacts are within the parameters of impact which it had previously determined were not significant when mitigated and should undertake and EA for actions which require off site mitigation. **TVA has identified a new powerline of less than 5 miles which so impacted wetlands that offsite mitigation was required. TVA should limit CE # 16 to new powerlines which are less than 4 miles and which do not require offsite mitigation of wetland impacts.**

There is a similar discussion of mitigation of cultural resources and wetlands in reference to rebuilding transmission lines (less than 25 miles in length and less than 125 acres of disturbance). See page 3-78. CE # 19. However the examples provided by TVA illustrate why the 25 mile standard will fail to meet NEPA standard. On pages 3-76 to 3-77, TVA cites to a 23 mile rebuild as supporting a categorical exemption. However, TVA states that in order to make a finding of no significant impact, **TVA rerouted a portion of the line to avoid impacting an endangered species. Without an Environmental Assessment, this alternative would not have been identified.** Similarly, TVA noted that in the Kirksman Clifty City project, the Environmental Assessment included site planning to avoid sensitive resources and implementation of environmental quality protection standards. Without the scrutiny of outside experts and the public, and without the consideration of alternatives, would these mitigation measures have been identified and implemented? Most of the citations given to support the minor nature of impacts are based on the more rigorous review and enhanced mitigation resulting from EAs and EISs. **TVA has failed to establish that the 25 mile standard in this categorical exemption will individually or cumulatively have an insignificant environmental impact.** TVA cites 3 other agencies as having comparable categorical exclusions. They are not comparable. One of the other agencies has a 20 mile standard, not a 25 mile standard for rebuilding. The second of the three agencies only provides for a 20 % pole replacement, not total replacement. The third agency only provides a 25 mile reconstruction only **“to enhance environmental or land use values.”** Thus, **no other agency provides for the total rebuilding of 25 miles of any and all transmission lines under a categorical exclusion.** This indicates that TVA is seeking to push the outer limits of its use of CEs to deny public scrutiny or input.

5. **CE # 45 is overly broad and confusing. TVA has failed to accurately describe the CE and its justification.**

TVA has proposed CE#45 to cover a broad range of totally unrelated activities with inadequate justification.

CE # 45 parts a and b describe changes to an existing facility without explaining how this CE subpart could possibly create up to 25 acres of new disturbance. We do not oppose the use of categorical exceptions for small changes to existing structures but the acreage authorizations would call into question whether these projects would be small or low impact.

In CE #45 c., TVA has proposed a vague standard for a “small number” of wind turbines with a height “generally” less than 200 feet as categorically excluded from any environmental review. However, the specific language of TVA’s own analysis demonstrates that positioning of wind turbines potentially has significant impacts on species:

Impacts of wind turbines on birds and bats vary by region and by species, so turbine site selection is a key consideration to design small wind projects that would not have the potential for significant impacts to birds and bats due to strikes/collisions with turbine components. Cumulative impacts to bat populations have a potential for significance due to a general region-wide decline of bats in the Eastern United States if initial project siting is not done appropriately (i.e. in accordance with industry best management practices [BMPs]).

Thus TVA notes that wind turbines have the potential for significant impacts and that site selection varies by region and species but still assumes that site selection can be done without an environmental analysis. Further, by using vague and undefined language such as “small” and “generally”, and by the potential footprint of 25 acres, TVA has created uncertainty about the intended scope of this categorical exemption. **TVA has failed to provide justification for the inclusion of the siting of new wind turbines as categorically exempt from NEPA analysis.**

6. TVA must require documentation beyond a simple notation for the application of Categorical Exceptions.

In the Appendix, TVA has provided a sample short check list of its documentation of the application of CEs. However, TVA is proposing that for some exemptions, there would be no documentation other than a notation in the tracking system. See e.g. 3-286: TVA would not document the application of CE # 44 for cleaning up small scale non-emergency solid waste or hazardous waste because the activities are intended to mitigate negative environmental effects. TVA has been using generic checklists for documenting these types of actions but now proposes that no documentation other than an entry in the ENTRAC database would occur. TVA has identified no adverse effects from the checklists. **TVA should document all uses of categorical exemptions.**

Respectfully submitted,

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