



Tennessee Valley Authority, 400 West Summit Hill Drive, Knoxville, Tennessee 37902

January 2, 2020

Electronic Submittal

<https://www.regulations.gov>

Attention: Docket ID No. EPA-HQ-OGC-2019-0406-0001

Dear Sir or Madam:

RE: COMMENTS OF THE TENNESSEE VALLEY AUTHORITY ON EPA'S PROPOSED RULE: MODERNIZING THE ADMINISTRATIVE EXHAUSTION REQUIREMENTS FOR PERMITTING DECISIONS AND STREAMLINING PROCEDURES FOR PERMIT APPEALS

The Tennessee Valley Authority (TVA) appreciates the opportunity to submit its comments on the U.S. Environmental Protection Agency's (EPA) proposed rule, "Modernizing the Administrative Exhaustion requirements for Permitting Decisions and Streamlining Procedures for Permit Appeals," which was published in the Federal Register on December 3, 2019. 84 Fed. Reg. 66084 (December 3, 2019).

EPA's Environmental Appeals Board (EAB) has historically improved EPA's ability to effectively and efficiently execute the EPA Administrator's statutory responsibility to preside over administrative appeals of enforcement proceedings and EPA-issued permits. The subject proposal concerns the permitting process and does not affect EAB's enforcement functions. The growing number of States with authorized permitting authority under federal environmental statutes has dramatically reduced the number of permit appeals filed before the EAB over the past quarter century. TVA understands the EAB's remaining purview relates to challenges of EPA's permitting decisions under the National Pollutant Discharge Elimination System (NPDES) program of the Clean Water Act (CWA), the Underground Injection Control (UIC) program of the Safe Drinking Water Act's (SDWA), the Title V, Acid Rain and New Source Review (NSR) programs of the Clean Air Act (CAA), and the Resource Conservation and Recovery Act (RCRA).

TVA is a non-profit corporate agency of the United States that provides electricity for business customers and local power distributors serving nearly 10 million people in parts of seven southeastern states. TVA receives no taxpayer funding, deriving virtually all of its revenues from sales of electricity. As part of its regional resource development mission, TVA operates the nation's largest public power system. The energy resources that TVA relies upon to serve the public include coal-fired power plants, nuclear plants, combustion turbine plants, hydroelectric dams, renewable energy, and energy efficiency.

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TVA's assets and infrastructure include resources in Tennessee and parts of six other states (Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia). While permitting for these resources generally comes under the purview of the Valley States that have assumed permitting authority for various environmental permit programs under the CAA, CWA, SDWA and RCRA, there could nonetheless be certain permitting decisions that qualify for EAB review.

The Tennessee Valley Authority generally supports the Environmental Protection Agency proposal to streamline and modernize the agency's permit appeal process. TVA submits the attached comments in support of improving and implementing this proposed procedural rule.

Once again, TVA appreciates the opportunity to comment on EPA's voluntary efforts to solicit public input.

Please feel free to contact me if you have any questions at (865) 632-2523.

Sincerely,

A handwritten signature in blue ink that reads "M. Carolyn Koroa". The signature is fluid and cursive, with a long horizontal stroke at the end.

M. Carolyn Koroa
Director
Environment and Energy Policy

Docket ID No. EPA-HQ-OGC-2019-0406-0001

TVA Comments:

TVA generally supports the proposed changes to EPA's rules of agency organization, procedure or practice relative to the EAB's administrative appeals process for certain RCRA, UIC, NPDES and NSR permits. TVA's specific comments are provided below.

1. TVA supports the creation of a time-limited alternative dispute resolution (ADR) process requiring parties to participate in that process before seeking judicial review of an EPA permit. TVA understands EPA's proposal as providing parties the opportunity to seek agreement on selective issues in any given dispute before the EAB. Because of the potential complexity of EPA permit appeals and disputes, ADR enables parties to reach agreement on those issues amenable to resolution, and defer issues on which agreement cannot be reached for the appeal before the EAB. Allowing partial issue resolution should improve the efficiency and speed with which the EAB can later rule on disputed issues. EPA's proposed modification supports the purpose and intent of the Administrative Dispute Resolution Act of 1996, enabling more creative, less expensive and more efficient dispute resolution, better reflecting Congress' goal of issue resolution at the earliest stage of any dispute process.

In the interest of clarity, TVA suggests modifying 40 C.F.R. §124.19(d)(2)(iii) to make the concept of selective issue resolution clear (proposed addition shown in *italics* below):

(iii) Initial mediation.

(A) Each party must meet with the Settlement Judge in a private session at or before the convening meeting. In the private session, the Settlement Judge shall provide each party with a confidential, oral assessment of the strengths and weaknesses of their case. Unless authorized by the communicating party, the Settlement Judge may not disclose any information provided in private session.

(B) Following the private sessions, the parties may engage in direct discussions to resolve the dispute.

(C) *The Settlement Judge and the parties may agree to resolve severable portions of the dispute no later than 30 days after the deadline provided in paragraph (b)(1) of this section, and proceed with an appeal under §124.20 of this chapter of only those issues or conditions that would not benefit from further ADR or settlement efforts.*

TVA also suggests adding a subsection at 40 C.F.R. §124.19(d)(3)(i) as shown in *italics* below:

(3) Concluding the resolution process.

(i) At the conclusion of the convening meeting, or no later than 30 days after the deadline provided in paragraph (b)(1) of this section, the parties may decide by unanimous agreement to:

(A) Continue mediation under the Environmental Appeals Board's alternative dispute resolution program;
(B) Proceed with an appeal under §124.20 of this chapter; or
(C) *Proceed with an appeal under §124.20 of this chapter of only those issues or conditions that the parties and the Settlement Judge agree would not benefit from further ADR or settlement efforts.*

2. TVA supports limiting the EAB's scope of review to findings of fact and conclusions of law. Discretionary or important policy considerations, that a federal court would not otherwise review, should not be within the EAB's scope of review.
3. TVA agrees that limiting *amicus curiae* participation in the EAB proceeding is reasonable and supports efficient resolution of disputes, since any interested person can file comments on draft permits and thereby preserve standing to participate in the EAB proceeding. However, TVA would offer that, rather than eliminating any opportunity for *amicus curiae* participation, the EAB should allow *amici* participation in two scenarios. The first scenario would be where *amici* participants have exhausted the administrative process by raising appropriate issues in draft permit comments. The second would be where the EAB requests *amici* participation on particularly difficult legal issues that would benefit from other perspectives in reaching resolution.

Accordingly, TVA proposes that, instead of deleting 40 C.F.R. §124.19(e) *en toto*, EPA consider modifying the regulation through changes shown below in *italics* and ~~strikethrough~~):

(e) Participation by *amicus curiae*.

(1) Parties that have exhausted the administrative process for comments submitted on draft permits may file amicus with the EAB.

(2) Upon approval by the EAB, Any-interested persons may file an amicus brief in any appeal pending before the Environmental Appeals Board under this section. ~~The deadline for filing such brief is~~ Any such amicus briefs are due 15 days after the filing of the response brief, except that amicus briefs in PSD or other new source permit appeals must be filed within 21 days after the filing of the petition. Amicus briefs must comply with all procedural requirements of this section.

4. TVA supports the proposal to eliminate the EAB's authority to review Regional permit decisions on its own initiative. TVA agrees that parties to a permit dispute should have control over the process to resolve their disputes. Allowing *sua sponte* review does not further such control, nor improve the timeliness, efficiency or fairness of the appeals process.
5. TVA supports the proposal that, for appeals which have been fully briefed and argued, the EAB will issue a final decision within 60 days. TVA understands this change as caveated to allow the EAB to exercise discretion over filing requirements for good cause

shown. Good cause could include the need to solicit *amicus curiae* briefs when essential to advance the goal of informed EAB decision-making, but consistent with the limitations stated in Comment 3 above. Good cause could also include EAB discretion to extend the deadline for those cases the EAB believes are particularly complex and difficult to resolve within 60 days. TVA believes that establishing a decision deadline supports EPA's overall goal of improving the efficiency, effectiveness and predictability of the EAB's appeals process. TVA also supports EPA's proposal to limit extension requests to file briefs to a one-time 30-day extension.

6. TVA supports the proposal to set a twelve-year term for an EAB judge that the Administrator may renew at the end of that term or reassign the Judge to another position within EPA. This proposal allows EPA the benefit of EAB judges with mixed experience, from newly arriving judges with expertise in other areas of the Federal government to those who have served on the EAB for longer periods. A varied and diverse mix of EAB judges should facilitate sound and efficient decision making.
7. TVA believes that EPA should be allowed to issue dispositive legal interpretations on matters pending before the EAB or on any issue addressed by the EAB. This would be consistent with the EAB's role of being a fact-finder in the permit proceedings. However, we recommend that when EPA issues a dispositive interpretation, the parties to the matter should be given an opportunity to respond so that their responses are captured in the record for the permit proceeding before the EAB.