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Via electronic submission to  
TVA's NEPA Website  
<http://www.tva.gov/nepa>

Tennessee Valley Authority  
NEPA Rule Comments  
400 W. Summit Hill Drive 11D-K  
Knoxville, TN 37902

**RE: TVA, PROPOSED RULE, PROCEDURES FOR IMPLEMENTING THE  
NATIONAL ENVIRONMENTAL POLICY ACT, 82 FED. REG. 26,620  
(JUNE 8, 2017)**

Dear Mr. Higdon:

The undersigned energy and conservation groups (“Conservation Groups”), representing thousands of residents of the Tennessee Valley,<sup>1</sup> are writing to provide comments on the Tennessee Valley Authority’s (“TVA”) proposed changes to its implementing regulations for the National Environmental Policy Act (“NEPA”).

We are extremely concerned that TVA’s proposed changes undermine transparency, stifle public involvement in TVA’s decisions, and bestow upon TVA almost boundless discretion to decide whether and how it must review the effects of its activities on the people and environment throughout its seven-state service territory, which includes nearly all of Tennessee, and portions of Alabama, Georgia, Kentucky, Mississippi, North Carolina, and Virginia. The potential impacts of TVA’s decision-making on the public health and natural resources across this region cannot be overstated. TVA manages:

- 293,000 acres of public land and 11,000 miles of shorelines<sup>2</sup>
- 16,000 miles of transmission lines and 200,000 acres of rights of way<sup>3</sup>
- Generation resources that provide electricity for 9 million people, including:

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<sup>1</sup> The Tennessee Chapter Sierra Club alone has 46,000 members and supporters in Tennessee.

<sup>2</sup> Att. 1, TVA, *Environmental Stewardship*, <https://www.tva.gov/Environment/Environmental-Stewardship> (last visited Aug. 29, 2017).

<sup>3</sup> Att. 2, TVA, *Proposed Categorical Exclusions Supporting Documentation*, at 3-38 (June 2017).

- 8 fossil plants (41 active units)
- 3 nuclear plants (7 units)
- 29 hydro plants (109 units)
- 1 pumped storage hydroelectric plant (4 units)
- 9 natural gas combustion-turbine plants (87 units)
- 7 natural gas combined-cycle plants (11 units)
- 1 diesel-generator site (5 units)
- 14 solar energy sites
- 1 wind-energy site<sup>4</sup>

As detailed in the attached comments, TVA's proposed changes amount to an attempt to rewrite its way out of complying with NEPA in its management of these extensive resources. In many cases, TVA's proposed changes are inconsistent with the mandates of NEPA as interpreted by the Council on Environmental Quality, the federal agency charged with ensuring appropriate implementation of NEPA across all federal agencies. Moreover, while TVA claims that its proposal to expand the categories of activities excluded from environmental review will provide increased transparency, the proposed exclusions are written so broadly that they would apply to almost every activity the utility undertakes and threaten our communities' clean water, public lands, private property, and public power across the Valley.

The attached comments reflect evaluation of TVA's proposed rule by attorneys at the Southern Environmental Law Center and Sierra Club. We respectfully insist that TVA comply with its obligations under NEPA designed to create transparent, meaningful review of TVA's actions affecting the public health and environment in its seven-state service territory.

Sincerely,



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<sup>4</sup> Att. 3, TVA, *Our Power System*, <https://www.tva.gov/Energy/Our-Power-System> (last visited August 29, 2017).

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**PART I: COMMENTS ON PROPOSED CHANGES TO TVA’S PROCEDURES TO  
IMPLEMENT THE NATIONAL ENVIRONMENTAL POLICY ACT**

**I. Legal Framework**

**A. The purpose of the National Environmental Policy Act is to ensure informed decision-making by federal agencies like TVA.**

NEPA is “our basic national charter for protection of the environment.”<sup>5</sup> Other environmental statutes focus on particular media (like air, water, or land), specific natural resources (such as wilderness areas or endangered plants and animals), or discrete activities (such as mining, introducing new chemicals, or generating, handling, or disposing of hazardous substances). In contrast, NEPA applies broadly “to promote efforts which will prevent or eliminate damage to the environment.”<sup>6</sup>

NEPA has “twin aims. ‘First, it places upon [a federal] agency the obligation to consider every significant aspect of the environmental impact of a proposed action. Second, it ensures that the agency will inform the public that it has indeed considered environmental concerns in its decisionmaking process.’”<sup>7</sup>

To accomplish its goal of informed decision-making, NEPA requires agencies to disclose and analyze potential environmental impacts associated with any “major federal action,”<sup>8</sup> which means any action which has the potential to significantly affect the environment.<sup>9</sup> NEPA “emphasizes the importance of coherent and comprehensive up-front environmental analysis to ensure informed decisionmaking to the end that ‘the agency will not act on incomplete information, only to regret its decision after it is too late to correct.’”<sup>10</sup>

**B. The role of the Council on Environmental Quality is to ensure that TVA’s implementing procedures conform to NEPA and its regulations.**

The federal Council on Environmental Quality (CEQ) is charged with interpreting NEPA and ensuring the statute’s consistent implementation throughout executive branch federal

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<sup>5</sup> 40 C.F.R. § 1500.1(a).

<sup>6</sup> National Environmental Policy Act § 2, 42 U.S.C. § 4321.

<sup>7</sup> *Kern v. Bureau of Land Mgmt.*, 284 F.3d 1062, 1066 (9th Cir. 2002) (quoting *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 97 (1983)) (internal quotations and citations omitted, alteration in original).

<sup>8</sup> 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18.

<sup>9</sup> 40 C.F.R. §§ 1508.18; 1508.27.

<sup>10</sup> *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1216 (9th Cir. 1998).

agencies.<sup>11</sup> CEQ has promulgated regulations interpreting NEPA (“CEQ Regulations” or “Regulations”), which are binding on federal agencies, including TVA.<sup>12</sup> Thus, TVA’s implementing procedures must be consistent with NEPA and the CEQ Regulations.<sup>13</sup> This limitation on TVA’s NEPA implementing procedures also applies to TVA’s adoption of categorical exclusions (CE).<sup>14</sup>

To ensure consistency, CEQ requires that TVA obtain its concurrence after review “for conformity with [NEPA] and these regulations.”<sup>15</sup> Pursuant to bedrock principles of administrative law, in reviewing agency procedures pursuant to 40 C.F.R. § 1507.3, CEQ must adhere to the mandates of NEPA and its own regulations and guidance.

**C. TVA lacks authority to reinterpret NEPA and CEQ Regulations in its implementing procedures.**

The CEQ Regulations make clear that an implementing agency must limit itself to implementing, rather than interpreting, NEPA and the CEQ Regulations. To allow otherwise would be to undermine the purpose of the CEQ regulations, which is “to tell federal agencies what they must do to comply with the procedures and achieve the goals of the Act.”<sup>16</sup> The CEQ Regulations thus specify that TVA, as an implementing agency, “shall not paraphrase these [CEQ] regulations. They shall confine themselves to implementing procedures.”<sup>17</sup>

CEQ guidance further clarifies that implementing agencies, such as TVA, have no authority to redefine the terms and requirements set forth in the CEQ regulations. The rationale for this limitation is simple:

By Executive Order 11991, the President directed the Council to establish a single and definitive set of uniform standards for implementing NEPA government-wide. Therefore, while agencies may quote the regulations in their implementing procedures, they shall not attempt to restate or otherwise paraphrase the regulations (Section 1507.3(a)). Agencies shall

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<sup>11</sup> See *Andrus v. Sierra Club*, 442 U.S. 347, 358 (1979) (noting CEQ’s role in promulgating regulations to interpret NEPA and their binding effect on federal agencies); 40 C.F.R. § 1507.3 (setting forth process for CEQ review of agency implementing procedures).

<sup>12</sup> *Andrus*, 442 U.S. at 358

<sup>13</sup> *Sierra Club v. Bosworth*, 510 F.3d 1016, 1026-27 (9th Cir. 2007) (holding adoption of categorical exclusion invalid due to failure to properly assess significance and cumulative impacts, among other things).

<sup>14</sup> 40 C.F.R. § 1507.3; *Sherwood v. Tennessee Valley Auth.*, 590 F. App’x 451, 458 (6th Cir. 2014).

<sup>15</sup> 40 C.F.R. § 1507.3(a).

<sup>16</sup> 40 C.F.R. § 1500.1.

<sup>17</sup> *Id.*

confine themselves to procedures which make the standards established by the NEPA regulations effective in the context of their decisionmaking.<sup>18</sup>

For example, CEQ specifically prohibits agencies from redefining the term “significantly” in determining the appropriate level of environmental review for a particular class of action under 40 C.F.R. § 1507.3(b)(2).<sup>19</sup> Rather, CEQ explains, “[s]ection 1508.27 defines the term ‘significantly’ and agencies must follow this definition.”<sup>20</sup> This rationale applies with equal force to any term defined in the CEQ regulations.

## **II. TVA’s Proposed NEPA Rule is inconsistent with the requirements of NEPA and the CEQ Regulations.**

Throughout the Proposed NEPA Rule, TVA impermissibly paraphrases the CEQ Regulations and improperly constrains its obligations to comply with requirements set forth in NEPA and the CEQ Regulations. TVA’s impermissible paraphrasing throughout the Proposed NEPA Rule is arbitrary because it reduces the protections of the NEPA process by, for example, undermining the well-defined and understood terminology of a “significant” environmental impact with a new, undefined, and untested standard for “important” environmental impacts. Such paraphrasing creates ambiguity regarding whether TVA intends to identify, analyze, and mitigate “significant” impacts—as it is required to do under NEPA and the CEQ Regulations—or simply to dismiss any impacts or resources that TVA does not consider to be “important.”

This unnecessary ambiguity is exactly what CEQ was trying to avoid by prohibiting paraphrasing in the Regulations. Moreover, many of TVA’s proposed changes contradict, rather than implement, NEPA and the CEQ Regulations, as interpreted by CEQ. For these reasons, rather than simplifying TVA’s environmental review burden, the Proposed NEPA Rule will create confusion among TVA staff and the public and invite controversy and litigation.

### **A. TVA cannot define the term “controversial” as proposed in its Proposed NEPA Rule.**

In the Proposed NEPA Rule, TVA seeks to define the term “controversial” as “scientifically supported commentary that casts substantial doubt on the agency’s methodology

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<sup>18</sup> See Att. 4, Memorandum from the Council on Environmental Quality on Agency Implementing Procedures Under CEQ’s NEPA Regulations (January 19, 1979) [hereinafter CEQ, Implementing Guidance].

<sup>19</sup> See *id.*

<sup>20</sup> *Id.*

or data, but does not mean commentary expressing mere opposition.”<sup>21</sup> TVA’s proposed definition improperly intrudes on CEQ’s authority to interpret NEPA and is substantially narrower than previous judicial interpretations of the term. Moreover, TVA’s proposed definition provides TVA with limitless discretion to determine what constitutes “scientifically supported” commentary and what constitutes “substantial doubt.” For these reasons, TVA cannot define the term “controversial” as proposed.

In the CEQ Regulations, the term “controversial” is one of the factors agencies must consider when determining whether an action has the potential to “significantly” affect the environment.<sup>22</sup> The implementing agency’s “significance” determination is important in at least two contexts: (1) determining whether and when an agency must prepare an environmental assessment or an environmental impact statement;<sup>23</sup> and (2) determining when “extraordinary circumstances” prevent the application of a categorical exclusion to a normally excluded activity.<sup>24</sup>

In determining whether an action “significantly” affects the environment, CEQ requires an agency to consider both the context and intensity of the impact.<sup>25</sup> Among other things, with respect to intensity, CEQ requires an agency to consider “[t]he degree to which the effects on the quality of the human environment are likely to be highly controversial.”<sup>26</sup>

As explained above in Part I, Section I, the CEQ Regulations explicitly forbid agencies from paraphrasing the CEQ Regulations themselves.<sup>27</sup> Moreover, in guidance issued to assist agencies in developing implementing procedures, CEQ made clear that agencies “must follow” CEQ’s definition of “significantly.”<sup>28</sup> Thus, TVA cannot define a factor included in CEQ’s definition of “significantly” more narrowly than it has been interpreted by CEQ and judicial decisions. Yet TVA proposes to do precisely that.

The CEQ Regulations do not separately define “controversial.” Nor, in any of the agency implementing regulations we reviewed, have agencies included a stand-alone definition of “controversial.” The agencies that do discuss the term “controversial” in the context of specific

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<sup>21</sup> Att. 5, TVA, Procedures for Implementing the National Environmental Policy Act, 82 Fed. Reg. 26,620, 26,624 (Proposed June 8, 2017) (to be codified at 18 C.F.R. § 1318.40) [hereinafter TVA, Proposed NEPA Rule].

<sup>22</sup> See 40 C.F.R. § 1508.27.

<sup>23</sup> See 42 U.S.C. § 4332(C) (requiring detailed statement on “proposals for legislation and other major Federal actions significantly affecting the quality of the human environment”); 40 C.F.R. §§ 1507.3; 1501.4.

<sup>24</sup> See 40 C.F.R. § 1508.4 (“Any procedures under this section shall provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”)

<sup>25</sup> 40 C.F.R. § 1508.27(a)-(b).

<sup>26</sup> *Id.* at § 1508.27(b)(4).

<sup>27</sup> See Section Part I, Section I, above; 40 C.F.R. § 1507.3(a).

<sup>28</sup> See Section Part I, Section I, above; see also Council on Environmental Quality, Memorandum, Agency Implementing Procedures Under CEQ’s NEPA Regulations (January 19, 1979).

provisions of their implementing procedures tend to hew to the long-standing definition derived from judicial opinions: “Controversial” means “a substantial dispute as to the size, nature, or effect of the action.”<sup>29</sup>

Nothing in the judicial definition limits the “controversial” nature of impacts to “scientifically supported commentary” or “substantial doubt on the agency’s methodology or data.” Indeed, a substantial dispute about the size, nature, or effect of the action may exist without reference to the agency’s methodology or data, and may be based on simple facts on the ground, including but not limited to community concern, rather than “scientifically supported” commentary. Thus, TVA’s proposed definition is inconsistent with the CEQ Regulations as interpreted by the courts, and cannot be incorporated into the agency’s implementing procedures.

Even if TVA had authority to redefine “controversial,” its proposed definition provides too much discretion to the agency to determine whether a particular impact is “controversial.” TVA provides no guidance regarding the standard for “scientifically supported” commentary or what would constitute “substantial doubt” about TVA’s “methodology or data.” This is particularly troubling given the central role that “significance” determinations play in an agency’s public disclosure and analysis of environmental impacts of its actions.

For the public and decision-makers to be confident in TVA’s “significance” determinations, TVA must, like other agencies, follow CEQ’s definition of “significantly” and hew to the long-standing judicial definition of “controversial.” TVA must strike the definition of “controversial” from its Proposed NEPA Rule.

### **B. TVA’s definition of “extraordinary circumstances” also improperly redefines “controversial.”**

In its Proposed NEPA Rule, TVA seeks to amend its procedure for determining whether “extraordinary circumstances” exist that require reclassification of a particular action that would normally qualify for categorical exclusion. In particular, TVA proposes to delete a catch-all provision that requires TVA to consider whether the action has the potential to significantly impact “other environmentally significant resources.”<sup>30</sup> TVA also proposes to segregate the

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<sup>29</sup> *Rucker v. Willis*, 484 F.2d 158, 162 (4th Cir. 1973); *Hillsdale Env’l Loss Prevention, Inc. v. U.S. Army Corps of Eng’rs*, 702 F.3d 1156, 1181 (10th Cir. 2012); *Wetlands Action Network v. United States Army Corps of Eng’rs*, 222 F.3d 1105, 1122 (9th Cir. 2000), abrogated on other grounds by *Wilderness Soc. v. U.S. Forest Service*, 630 F.3d 1173 (9th Cir. 2011).

<sup>30</sup> Compare Att. 6, TVA, *Procedures for Compliance with the National Environmental Policy Act* (last updated Apr. 28, 2017) with Att. 5, TVA, Proposed NEPA Rule 82 Fed. Reg. 26,620 (to be codified at 18 C.F.R. pt. 1318).

consideration of whether an impact “is or may be highly controversial” from its overall “significance” determination.<sup>31</sup>

TVA’s Proposed NEPA Rule is inconsistent with the CEQ Regulations, which require the agency’s procedures for categorical exclusions to “provide for extraordinary circumstances in which a normally excluded action may have a significant environmental effect.”<sup>32</sup> By referring to “significant” environmental effects, the CEQ Regulations require an agency to import the definition of “significantly” into its “extraordinary circumstances” procedures. For the reasons set forth above, TVA’s definition of “controversial” cannot supersede CEQ’s as interpreted by the courts. Moreover, whether an impact is “controversial” is *part* of the “significance” determination and should not be segregated from that determination as TVA’s Proposed NEPA Rule purports to do, unless the agency makes clear that it will consider *all* of the context and intensity factors as required by NEPA and the CEQ Regulations. Finally, TVA’s exclusion of the catchall provision makes its procedures inconsistent with the CEQ Regulations, which contemplate that *any* significant environmental effect would trigger the need for an EA or an EIS, not just those limited to specific types of environmental resources.<sup>33</sup>

**C. TVA arbitrarily and inaccurately paraphrases the scope of analysis required in environmental assessments and environmental impact statements.**

In the Proposed NEPA Rule, TVA purports to define the “scope,” or information that it will include in EAs: “EAs should concisely communicate information and analyses about *important* environmental issues and *reasonable* alternatives.”<sup>34</sup> TVA’s proposed language improperly paraphrases and restricts the requirements set forth in the CEQ Regulations.<sup>35</sup> The CEQ Regulations provide:

Environmental assessment:

(a) Means a concise public document for which a Federal agency is responsible that serves to:

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<sup>31</sup> *Id.*

<sup>32</sup> 40 C.F.R. § 1508.4.

<sup>33</sup> *See also* Att. 7, Memorandum from Nancy H. Sutley, Chair, CEQ, on Establishing, Applying, and Revising Categorical Exclusions under the National Environmental Policy Act 6 (Nov. 23, 2010) [hereinafter CEQ, CE Guidance] (when adopting CEs, agency should evaluate whether its “extraordinary circumstances” procedures will adequately capture circumstances in which activity is likely to have a significant environmental impact).

<sup>34</sup> Att. 5, TVA, Proposed NEPA Rule 82 Fed. Reg. 26,625 (to be codified at 18 C.F.R. § 1318.300).

<sup>35</sup> *See generally* 40 C.F.R. §§ 1507.3; 1508.9.

(1) Briefly provide sufficient evidence and analysis for determining whether to prepare an environmental impact statement or a finding of no significant impact.

(2) Aid an agency's compliance with the Act when no environmental impact statement is necessary.

(3) Facilitate preparation of a statement when one is necessary.

(b) Shall include brief discussions of the need for the proposal, of alternatives as required by section 102(2)(E), of the environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.<sup>36</sup>

Under the CEQ Regulations, TVA is required to include brief discussions of the need for the proposal, alternatives, environmental impacts of the proposed action and alternatives, and a listing of agencies and persons consulted.

In the Proposed NEPA Rule, TVA mentions only “important environmental issues” and “reasonable alternatives,” omitting important components of the environmental assessment required by the CEQ Regulations. Further, TVA improperly restricts the range of environmental impacts it will discuss in its environmental assessments to what it deems “important environmental impacts,” rather than those impacts that are *significant*, as required by the CEQ Regulations.<sup>37</sup> In addition, the CEQ Regulations explicitly reference “alternatives required by section 102(2)(E),” rather than “reasonable alternatives.” This provision therefore improperly paraphrases the CEQ Regulations.<sup>38</sup>

Similarly, in the Proposed NEPA Rule, TVA purports to define the “scope” of information that it will include in environmental impact statements.<sup>39</sup> TVA’s proposed language improperly paraphrases and imposes restrictions on the requirements set forth in the CEQ Regulations.<sup>40</sup> The CEQ Regulations extensively describe the requirements to be included in an environmental impact statement in 40 C.F.R. Part 1502.<sup>41</sup> The Proposed NEPA Rule is inconsistent with these requirements, in, among other ways, its exclusion of the public at various stages of the process, as described further in Part I, Section III.C, below.

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<sup>36</sup> 40 C.F.R. § 1508.9.

<sup>37</sup> See 40 C.F.R. § 1501.4 (describing when preparing an environmental assessment is appropriate); § 1508.13 (defining “finding of no significant impact”).

<sup>38</sup> *Id.* § 1507.3.

<sup>39</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26626 (to be codified at 18 C.F.R. § 1318.400(c)-(e)).

<sup>40</sup> See generally 40 C.F.R. §§ 1507.3; 1508.9.

<sup>41</sup> See generally 40 C.F.R. §§ 1502.1-25.

To the extent that TVA desires to provide guidance to its NEPA staff and the public regarding the scope of analysis required in environmental impacts statements, it may quote from the CEQ Regulations, as long as it makes clear that it is quoting the Regulations.<sup>42</sup> TVA may not, however, “attempt to restate or otherwise paraphrase the regulations.”<sup>43</sup> This is a particularly important limitation on TVA’s authority as an implementing agency where, as here, TVA attempts to curtail its legal obligation to comply with NEPA by inaccurately summarizing or paraphrasing the CEQ Regulations.

**D. TVA arbitrarily and inaccurately paraphrases the alternatives analysis required in environmental assessments and environmental impact statements.**

In the Proposed NEPA Rule, TVA contemplates narrowly limiting what alternatives analysis it would perform to merely that of “key action alternatives.”<sup>44</sup> Not only is this language poorly defined and potentially sweeping in scope, but it is contrary to the requirements of NEPA.

Nowhere in its proposal does TVA explain what a “key action alternative” is, or how it differs from the sort of alternatives analysis TVA currently undergoes, or which NEPA requires. However, other language discussing alternatives analyses in TVA’s proposed regulatory changes may shed some light. In the Proposed NEPA Rule section discussing “Actions that will affect floodplains or wetlands,” TVA contemplates excluding from NEPA analysis situations where “there is no *practicable* alternative” to avoiding affecting floodplains and wetlands.<sup>45</sup> Similarly, TVA, in discussing public notice of proposed treatment for such actions, notes that TVA would “[b]riefly identify alternative actions considered and explain why a determination of *no practicable alternative* has been proposed.”<sup>46</sup> Likewise, TVA proposes to alter its policy on environmental reviews to make decisions that “concentrate on truly significant environmental issues, consider reasonable alternatives to the proposed action . . . and are practicable.”<sup>47</sup>

Critically, TVA proposes to define “practicable” as follows:

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<sup>42</sup> See Att. 4, CEQ, Implementing Guidance (“Agencies may quote from the regulations to provide a context for implementing procedures”).

<sup>43</sup> *Id.*

<sup>44</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,627 (to be codified at 1318.402(g)(1)).

<sup>45</sup> *Id.* at 26,629 (to be codified at 18 C.F.R. § 1318.602(a)(1)) (emphasis added).

<sup>46</sup> *Id.* at 26,630 (to be codified at 18 C.F.R. § 1318.603(b)(2)) (emphasis added).

<sup>47</sup> *Id.* at 26,624 (to be codified at 18 C.F.R. § 1318.10(c)).

Practicable, as used in Subpart G of this part, refers to the capability of an action being performed within existing constraints. The test of what is practicable depends on the situation involved and should include an evaluation of all pertinent factors, such as environmental impact, economic costs, statutory authority, legality, technological achievability, and engineering constraints.<sup>48</sup>

Accordingly, TVA is proposing to limit its alternative analysis according to a basket of different factors, with the ultimate objective of eliminating from scrutiny anything TVA deems to not be “key.” Not only does this series of semi-overlapping definitions fail to actually define precisely what TVA would consider a “key” alternative (or even a “practicable” one), it is quite potentially very different from CEQ’s regulations, which focus on “reasonable” alternatives.<sup>49</sup>

For example, “reasonable” alternatives could quite readily not be ones that TVA views as “key”—such as an alternative considering the environmental impacts of retiring a polluting power plant, rather than extending its life via costly retrofits. In such a situation, TVA may well determine that plant retirement is not a “key” alternative (or, through the byzantine welter of definitions it proposes, “practicable”) despite the fact that it is nonetheless a reasonable alternative to consider. Indeed, the language TVA proposes for inclusion in changes to its implementing regulations could allow TVA to artificially constrain the alternatives analysis in such a way as to remove alternatives TVA does not necessarily desire. Given that the entire point of NEPA is to require agencies to consider the environmental impacts of the projects they wish to undertake, in light of alternatives that *they might not otherwise consider*, TVA’s proposal to so constrain the analysis is highly troubling.

As such, in any final Rule that TVA issues, TVA should simply adopt CEQ’s formulation, or define its alternatives analysis in a way that does not impermissibly paraphrase the CEQ regulations to narrow the scope TVA’s obligation to consider reasonable alternatives, in contravention of NEPA and the CEQ Regulations.

**E. Contrary to the requirements of NEPA and the CEQ Regulations, TVA proposes to prepare environmental impact statements only for a very narrow category of major Federal actions.**

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<sup>48</sup> *Id.* at 26,624-25 (to be codified at 18 C.F.R. § 1318.40).

<sup>49</sup> *See, e.g.*, 40 C.F.R. § 1500.2 (noting that federal agencies “shall to the fullest extent possible . . . [u]se the NEPA process to identify and assess the reasonable alternatives to proposed actions . . .”); *id.* at § 1502.14 (noting that agencies shall “[r]igorously explore and objectively evaluate all reasonable alternatives” and must “[i]nclude reasonable alternatives not within the jurisdiction of the lead agency.”).

In the Proposed NEPA Rule, TVA proposes only three categories of its extensive activities across seven states and thousands of acres and miles of private and public land that will “normally” trigger the preparation of an environmental impact statement. These three categories include (1) new dams or navigation locks; (2) “new major power generating facilities proposed at sites not previously used for industrial purposes”; and (3) major actions with “highly controversial” environmental impacts.<sup>50</sup> In so doing, TVA is making an exception that swallows the rule, contrary to the intent of the Act.

The CEQ Regulations require TVA to identify “[s]pecific criteria for and identification of those typical classes of action . . . which normally do require environmental impact statements.”<sup>51</sup> Pursuant to NEPA, an agency is required to prepare an environmental impact statement for any “major Federal action[ ] significantly affecting the quality of the human environment.”<sup>52</sup> The CEQ Regulations further define both “major federal actions” and “significantly,” and expressly recognize the reinforcing relationship between the two terms: “Major reinforces but does not have a meaning independent of significantly.”<sup>53</sup> Thus, TVA should, in its implementing procedures, identify classes of action that will “significantly” affect the environment, and therefore “normally” require the preparation of an EIS.

At a minimum, such classes of action should include the categories identified in the CEQ Regulations as “major federal actions.”<sup>54</sup> This would include, among other things, the development or significant amendment of policies and plans that cover a broad range of actions or have significant geographic scope. A brief review of TVA’s website reveals the following examples<sup>55, 56</sup>:

- [2015 Rate Change](#)
- [Diesel-fueled Generation in TVA Demand Response Program](#)
- [Floating Houses](#)
- [Integrated Resource Plan](#)
- [Natural Resource Plan](#)
- [Reservoir Land Management Plans](#)

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<sup>50</sup> Att. \_\_\_\_, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26626 (to be codified at 18 C.F.R. § 1318.400(a).

<sup>51</sup> 40 C.F.R. §§ 1507.3(b)(2)(i).

<sup>52</sup> 42 U.S.C. § 4332(2)(C).

<sup>53</sup> 40 C.F.R. §§ 1508.18; 1508.27.

<sup>54</sup> 40 C.F.R. §1508.18(b).

<sup>55</sup> Att. 8, TVA, *Environmental-Reviews*, <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews> (last visited August 29, 2017).

<sup>56</sup> Att. 9, TVA, *Transmission System Vegetation Management Program*, <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited August 29, 2017).

- [Shoreline Management Policy](#)
- [TVA Solar Photovoltaic Projects](#)
- [Updates to Eight Reservoir Land Management Plans and the Comprehensive Valley-wide Land Plan](#)
- [Transmission System Vegetation Management Program](#)

Under the Proposed NEPA Rule, none of these activities would necessarily fall under the categories that normally require environmental impact statements, unless TVA deemed their impacts “highly controversial.” Pursuant to the CEQ Regulations, TVA should identify these “typical classes of action” and provide “specific criteria for” them as actions “which normally do require environmental impact statements.”

Moreover, while the three classes of action identified by TVA (new dams, new power plants on greenfields, and highly controversial actions) indisputably should require preparation of an environmental impact statement, they are overly restrictive in scope. For example, the construction of new power generating facilities should require preparation of an EIS regardless of whether they are being constructed on previously developed, industrial land. Further, while we agree that actions with “highly controversial” impacts warrant automatic preparation of an EIS, we disagree with how TVA has defined the term “controversial,” as explained in Part I, Section II.A above.

**F. The Proposed NEPA Rule’s implementation of programmatic NEPA review is inconsistent with NEPA and the CEQ Regulations.**

Contrary to the requirements of NEPA and CEQ Regulations and guidance, TVA’s proposed implementing regulations for programmatic NEPA reviews would authorize the agency to begin acting prior to completing review, and the public will be barred from weighing in on those actions. Specifically, TVA’s proposed regulation states,

Ongoing, existing, or previously planned and approved actions that may be within the scope of a programmatic review may continue during the programmatic review period.<sup>57</sup>

Programmatic NEPA review is a vital aspect of NEPA implementation and a key opportunity for public engagement in agency decision making. For an agency like TVA, which manages over 293,000 acres of land and 11,000 miles of shoreline, programmatic reviews permit agencies and the stakeholders to engage with big picture questions of agency policy choices and

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<sup>57</sup> 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.503(c)).

their environmental effects.<sup>58</sup> Programmatic NEPA reviews provide program-level review of policies and projects with broad geographic scope. Agencies then “tier” project- and site-specific analysis to their programmatic review.

Under the Proposed NEPA Rule, however, TVA would begin undertaking the project- and site-specific activities without having completed the broad programmatic review required under NEPA. Moreover, TVA also proposes to exclude many of the same project- and site-specific activities from NEPA analysis by classifying them as categorical exclusions.<sup>59</sup>

TVA’s proposal to allow interim actions to occur while the agency is conducting programmatic reviews is in direct contradiction to the CEQ Regulations and guidance.<sup>60</sup> CEQ Regulations explicitly prohibit interim actions during programmatic analyses, except where three criteria are present: (1) the interim action is justified independently of the programmatic EIS; (2) it is accompanied by an adequate EIS of its own; *and* (3) it will not prejudice the ultimate decision on the programmatic EIS by determining subsequent development or limiting alternatives.<sup>61</sup>

CEQ’s programmatic guidance further outlines these three criteria. The first criterion may apply where the action could occur irrespective of whether or how the program subject to the programmatic EIS goes forward, for example, when an agency is legally obligated to carry out a proposed interim action.<sup>62</sup> The second criterion generally requires an EIS for the proposed interim action.<sup>63</sup> The third criterion applies when the proposed interim action would not effectively block an agency from considering reasonable alternatives.<sup>64</sup> Further explaining the third criteria, CEQ urges agencies to distinguish interim actions from ongoing actions.<sup>65</sup> This distinction, however, does not change the underlying rule that these actions may not occur unless all three criteria are met. Rather, this example simply clarifies that ongoing operations will likely not block the objective consideration of reasonable alternatives and will generally satisfy the third criterion of this exception.<sup>66</sup> It does not, as TVA proposes, assume that any and all ongoing activities can continue without meeting all three criteria as set out in CEQ’s regulations and programmatic guidance.

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<sup>58</sup> Att. 8, TVA, *Transmission System Vegetation Management Program*.

<sup>59</sup> See Part II, Section IV, below .

<sup>60</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (Proposed June 8, 2017) (to be codified at 18 C.F.R. § 1318.503(c)).

<sup>61</sup> 40 C.F.R. § 1506.1(c); CEQ Programmatic Guidance, at 37–39.

<sup>62</sup> Att. 10, Memorandum from Michael Boots, Council on Environmental Quality on Effective Use of Programmatic NEPA Reviews 38 (Dec. 18, 2014) [hereinafter CEQ, Programmatic Guidance].

<sup>63</sup> Att. 10, CEQ, CE Programmatic Guidance, 38.

<sup>64</sup> Att. 10, CEQ, CE Programmatic Guidance, 38.

<sup>65</sup> Att. 10, CEQ, CE Programmatic Guidance, 39.

<sup>66</sup> Att. 10, CEQ, CE Programmatic Guidance, 39.

To remedy these issues, TVA must amend its proposed regulations so that they comply with CEQ regulations and guidance. It should incorporate the language from CEQ's regulations:

While work on a required program environmental impact statement is in progress and the action is not covered by an existing program statement, agencies shall not undertake in the interim any major Federal action covered by the program which may significantly affect the quality of the human environment unless such action:

- (1) Is justified independently of the program;
- (2) Is itself accompanied by an adequate environmental impact statement;  
and
- (3) Will not prejudice the ultimate decision on the program. Interim action prejudices the ultimate decision on the program when it tends to determine subsequent development or limit alternatives.<sup>67</sup>

In addition to TVA's flawed approach to interim actions during programmatic reviews, TVA also fails to incorporate vital aspects of CEQ's programmatic guidance, specifically guidance related to improving public involvement and transparency during programmatic environmental reviews. CEQ's guidance responds to a report from an interagency task force that reviewed the federal government's implementation of NEPA—the "NEPA Task Force."

The Task Force found that programmatic NEPA analyses were particularly vulnerable to perceptions of agencies hiding the ball or playing a "shell game" to block meaningful public engagement on both broad programmatic and project- or site-specific analyses.<sup>68</sup> These reviews fall prey to situations where public involvement is too early to raise discrete, localized issues in broader programmatic analysis and then too late to raise them in any subsequent tiered analysis.<sup>69</sup>

Because of the apparent "shell game" of programmatic reviews and tiering, CEQ suggests that agencies clearly state how a programmatic review influences subsequent tiered reviews.<sup>70</sup> Moreover, CEQ encourages robust public participation, including extended comment periods, to ensure that the public is able to engage on both programmatic and project- or site-specific tiered analyses.<sup>71</sup>

CEQ has instructed agencies to consider whether programmatic analyses actually "segment" the overall program from subsequent individual actions, thereby unreasonably

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<sup>67</sup> 40 C.F.R. § 1506.1(c).

<sup>68</sup> Att. 10, CEQ, CE Programmatic Guidance, 8 n. 10.

<sup>69</sup> Att. 10, CEQ, CE Programmatic Guidance, 25.

<sup>70</sup> Att. 10, CEQ, CE Programmatic Guidance, 24.

<sup>71</sup> Att. 10, CEQ, CE Programmatic Guidance, 25.

constricting the scope of environmental review at both levels.<sup>72</sup> CEQ's guidance tells agencies to clearly outline which decisions are supported by the programmatic NEPA document, which decisions are deferred, and the time-frame or triggers for tiered NEPA review.<sup>73</sup>

To incorporate this guidance from CEQ, TVA should require programmatic NEPA reviews to explicitly outline (1) what actions are covered in the programmatic review, (2) what actions will be reviewed in subsequent, tiered analyses, and (3) the timeline for these subsequent reviews. Moreover, TVA should be required to identify whether these tiered analyses would be exempted because the project- or site-specific activities fall under a categorical exclusion.<sup>74</sup> In these circumstances, TVA must allow public comment and engagement on these project- or site-specific activities during programmatic review. If the programmatic review has been completed for an activity that would fall under a categorical exclusion, TVA should at least issue an environmental assessment of the action and allow for public notice and comment.

**G. The Proposed NEPA Rule's implementation regarding records of decision is inconsistent with NEPA and the CEQ Regulations.**

TVA's proposed EIS procedures are written in a way that would allow TVA to begin acting before a ROD is publicly available. The regulatory language states that "[u]ntil a ROD is made available to the public, *normally* no action should be taken to implement an alternative that would have adverse environmental impacts or limit the choice of reasonable alternatives."<sup>75</sup> TVA cannot qualify this prohibition so that it has the discretion so that it can take action without issuing a ROD. CEQ's regulations unequivocally prohibit action until an agency issues a ROD.<sup>76</sup> TVA must remove "normally" from Section 1318.405(e).

**H. The Proposed NEPA Rule's implementation regarding adopting the environmental reviews of other agencies is inconsistent with NEPA and the CEQ Regulations.**

The Proposed NEPA Rule would allow TVA to adopt another agency's final EIS without providing an opportunity for the public to comment on the EIS:

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<sup>72</sup>Att. 10, CEQ, CE Programmatic Guidance, 16 (citing *Piedmont Env'tl Council v. FERC*, 558 F.3d 304, 3016 (4th Cir. 2009)).

<sup>73</sup>Att. 10, CEQ, CE Programmatic Guidance, 10.

<sup>74</sup>See Part II, Sections III and IV, below.

<sup>75</sup>Att. 5, TVA, Proposed NEPA Rule, 82 Fed Reg. at 26,627 (to be codified at 18 C.F.R § 1318.405(d)).

<sup>76</sup>40 C.F.R. § 1506.1(a).

(b) If TVA determines that the EIS or a portion thereof adequately addresses TVA's proposed action, it must make this determination and the adopted EIS available on its public Web site. If the other agency's EIS does not adequately assess its proposed action, TVA may choose to supplement the EIS in accordance with the process used to supplement other EISs (see 40 CFR 1506.3).

(c) If TVA cooperated in the preparation of an EIS that TVA determines adequately addresses its proposed action, TVA may make a decision about its proposed action 30 days or later after notice of availability of the [final EIS] was published in the Federal Register.

(d) If TVA did not cooperate in the preparation of an EIS that TVA determines adequately addresses its proposed action and that it proposes to adopt, NEPA compliance staff will transmit notice of its adoption to EPA for publication of a notice of availability and circulate the [final EIS] for public comment.<sup>77</sup>

This proposal runs counter to the CEQ Regulations and guidance. An agency writing implementing regulations may supplement CEQ regulations, but not rewrite them to serve their own purposes.<sup>78</sup> Moreover, the implementing agency's procedures must be consistent with NEPA and the CEQ Regulations as interpreted by CEQ.<sup>79</sup>

The CEQ Regulations permit agencies to adopt the environmental reviews of other agencies in certain, defined circumstances: where the other agency's EIS meets the standards for an adequate statement.<sup>80</sup> However, rather than adopting only EISs that comply with NEPA's requirements, TVA proposes to decide whether to adopt another agency's EIS on the basis of whether it "adequately address[es] the TVA action."<sup>81</sup> Thus, TVA's proposed regulations turn on whether the other agency's EIS "adequately addresses its proposed action" and whether TVA cooperated in the preparation of the EIS.

Neither of these factors are part of the CEQ Regulations. In fact, these factors contradict the Regulations, which require TVA to evaluate whether the other agency's analysis meets the standards for an adequate EIS. TVA should change its implementing regulations to implement, not supplant, the CEQ Regulations. TVA should require that "the actions covered by the original

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<sup>77</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.407(b)-(d)).

<sup>78</sup> See Part I, Section I, above.

<sup>79</sup> See *id.*

<sup>80</sup> 40 C.F.R. § 1506.3(a).

<sup>81</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.407(b)).

environmental impact statement and the proposed action are substantially the same” and that the EIS “meet the standards for an adequate statement under CEQ regulations.”<sup>82</sup>

Even if another agency’s EIS does not adequately address TVA’s action, TVA proposes to adopt that EIS and supplement it, rather than conducting its own EIS. The CEQ Regulations do not permit this type of adoption and supplementation.<sup>83</sup> Rather, they provide a discrete opportunity for an agency to adopt another agency’s EIS where the proposed actions are parallel and where the EIS meets the standards for an adequate EIS.<sup>84</sup> There is no circumstance where an EIS that inadequately addresses a proposed action can be said to meet the standards for an EIS because by definition the EIS would not be analyzing the proposed action or its potential effects and alternatives. In these circumstances, TVA must conduct its own EIS. Therefore, TVA should remove this language from its proposed implementing regulations: “If the other agency’s EIS does not adequately assess its proposed action, TVA may choose to supplement the EIS in accordance with the process used to supplement other EISs.”<sup>85</sup>

Following a trend throughout the Proposed NEPA Rule and further discussed in Part I, Section III below, TVA proposes to block public comment by not providing appropriate public notice and comment when adopting another agency’s EIS, decreasing public transparency in TVA’s NEPA implementation. CEQ requires an agency to treat another agency’s EIS as a draft and recirculate it for public comment.<sup>86</sup> TVA, on the other hand, would permit itself to circulate a final EIS even if it did not cooperate in the preparation of the EIS, and even where the EIS does not cover the proposed action.<sup>87</sup> In this situation, the public may not even be aware of a proposed activity, and would be unable to provide meaningful comments on the activity, reasonable alternatives, and environmental effects. Moreover, even if TVA cooperates with the agency that wrote the EIS, CEQ requires the TVA first “conclude[ ] that its comments and suggestions have been satisfied,”<sup>88</sup> whereas TVA proposes no such requirements, instead only adding a timeline for issuing a record of decision (ROD) after making the final EIS available on its website.<sup>89</sup> To remedy its implementing regulations, TVA should delete its proposed language and quote the CEQ Regulations requiring agencies to treat another agency’s EIS as a draft and recirculate it for public comment.

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<sup>82</sup> 40 C.F.R. § 1506.3.

<sup>83</sup> 40 C.F.R. § 1506.3.

<sup>84</sup> 40 C.F.R. § 1506.3(a).

<sup>85</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.407(b)).

<sup>86</sup> 40 C.F.R. § 1506.3(b).

<sup>87</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.407(d)).

<sup>88</sup> 40 C.F.R. § 1506.3(c).

<sup>89</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (to be codified at 18 C.F.R. § 1318.407(c)).

**I. The Proposed NEPA Rule’s procedures for supplementing EAs and EISs are inconsistent with NEPA and the CEQ Regulations.**

In the Proposed NEPA Rule, TVA improperly paraphrases CEQ Regulations regarding when supplemental EISs must be prepared.<sup>90</sup> The CEQ Regulations require an agency to supplement a draft or final EIS if the agency makes substantial changes in the proposed action that are relevant to environmental concerns, or if significant new circumstances or information arises relating to environmental concerns regarding the proposed action or its impacts.<sup>91</sup> TVA should quote this language as required by the CEQ Regulations and guidance, as discussed in Part I, Section I above. The requirements for supplementing EISs apply to EAs.<sup>92</sup> Thus, in keeping with the goals of NEPA and implementing procedures, TVA should also quote the standard set forth in 40 C.F.R. § 1502.9 in its analogous provision for supplementing EAs.<sup>93</sup>

TVA also proposes to limit its obligation to supplement EAs and EISs to circumstances where “there are important decisions remaining to be made.”<sup>94</sup> Under well-settled case law, however, an agency must supplement its EIS as long as any part of its *major federal action remains to occur*.<sup>95</sup> This distinction makes sense, because the point of supplementing the information is to allow the agency a chance to reconsider its decision in light of new information. If the standard were whether an agency had already chosen its course of action, such reconsideration would never occur. The same rationale applies to supplementing EAs.<sup>96</sup>

The Proposed NEPA Rule procedures for supplementing EISs also remove a provision from the current procedures that states that “TVA will make [significant new information concerning action modifications, alternatives, or probable environmental effects] available to the public.”<sup>97</sup> TVA’s implementing procedures should make clear that pursuant to the CEQ

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<sup>90</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26627 (to be codified at 18 C.F.R. 1318.406.) ; see also Part I, Section I, above.

<sup>91</sup> 40 C.F.R. § 1502.9(c)(1).

<sup>92</sup> See *Western Watersheds Project v. Bureau of Land Management*, 721 F.3d 1264, 1277–78 (10th Cir. 2013); *Price Road Neighborhood Assoc., Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1509–10 (9th Cir. 1997).

<sup>93</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26626 (to be codified at 18 C.F.R. § 1318.304(a)).

<sup>94</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26626 and 26627 (to be codified at 18 C.F.R. § 1318.304(a) and 1318.406).

<sup>95</sup> See *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 374 (1989) (If there remains “major Federal actio[n]” to occur, and if the new information is sufficient to show that the remaining action will “affec[t] the quality of the human environment” in a significant manner or to a significant extent not already considered, a supplemental EIS must be prepared.).

<sup>96</sup> See *Western Watersheds Project v. Bureau of Land Management*, 721 F.3d 1264, 1277–78 (10th Cir. 2013); *Price Road Neighborhood Assoc., Inc. v. U.S. Dep’t of Transp.*, 113 F.3d 1505, 1509–10 (9th Cir. 1997).

<sup>97</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620, 26,627 (to be codified at 18 C.F.R. § 1318.406); Att. 6, TVA, *Procedures for Compliance with the National Environmental Policy Act* (last updated Apr. 28, 2017).

Regulations, it is obligated to circulate a supplemental EIS in the same manner as a draft and final statement.<sup>98</sup> NEPA requires that “relevant information will be made available to the larger audience that may also play a role in both the decision making process and the implementation of that decision.”<sup>99</sup> That obligation is no different in the context of supplemental analysis.

The Proposed NEPA Rule procedures for supplementing EAs similarly do not make this information available to the public.<sup>100</sup> Yet the same rationale that applies to circulating supplemental EISs applies equally to supplemental EAs. Procedures implementing NEPA “must insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken.”<sup>101</sup> When preparing an EA, an agency must provide the public with sufficient environmental information to permit them to weigh in and inform the agency decision making process.<sup>102</sup> When an agency does not make this information available to the public, it fails to fulfill NEPA’s public disclosure requirements.<sup>103</sup>

#### **J. The Proposed NEPA Rule’s mitigation procedures are inconsistent with NEPA and the CEQ Regulations.**

In TVA’s proposed implementing regulations, it seeks to remove any requirement to comply with the mitigation commitments it makes in its RODs and FONSI. Specifically, Section 1318.501(e) states:

Circumstances may arise that warrant modifying or deleting previously made [mitigation] commitments. The decision to modify or delete the [mitigation] commitment will be made by the NEPA compliance staff in consultation with TVA legal counsel, after considering the environmental significance of such a change.<sup>104</sup>

TVA’s proposal flies in the face of NEPA, CEQ regulations, and case law that make it clear that when an agency promises the public that it will comply with mitigation measures, it must follow through.<sup>105</sup> This proposal is even more troubling considering TVA’s practice of

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<sup>98</sup> 40 C.F.R. § 1502.9(c)(4).

<sup>99</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

<sup>100</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620, 26,626 (to be codified at 18 C.F.R. § 1318.304).

<sup>101</sup> 40 C.F.R. § 1500.1(b).

<sup>102</sup> *Bering Strait Citizens for Responsible Resource Dev. V. U.S. Army Corps of Eng’rs*, 524 F.3d 938, 953 (9th Cir. 2008).

<sup>103</sup> See *WildEarth Guardians v. Montana Snowmobile Ass’n*, 790 F. 3d 920, 925 (9th Cir. 2015).

<sup>104</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,628 (Proposed June 8, 2017) (to be codified at 18 C.F.R. § 1318.501(e)).

<sup>105</sup> 40 C.F.R. § 1505.3; *Friends of Animals v. Sparks*, 200 F. Supp. 3d 1114 (D. Mont. 2016); *Lee v. U.S. Air Force*, 220 F. Supp. 2d 1129, 1236 (D.N.M. 2002), *aff’d*, 354 F.3d 1229 (10th Cir. 2004) (explaining that agencies are “legally bound by the NEPA decision document and were “obligated to act as promised under 40 C.F.R. § 1505.3

issuing mitigated FONSI in lieu of conducting EISs and the utility's unfounded proposal to permit mitigated categorical exclusions.<sup>106</sup> This proposal would allow TVA to use a mitigated FONSI to avoid developing an EIS, and then simply release itself from the required mitigation in the FONSI. Because this proposed implementing procedure violates NEPA and the CEQ Regulations, TVA must remove it and commit itself to completing and complying with mitigation measures that it commits to in NEPA documents.

While amending its implementing regulations, TVA should ensure that it is incorporating and complying with CEQ guidance specifically on mitigation and monitoring.<sup>107</sup> TVA should clearly describe which mitigation factors in a FONSI are added so that the proposed activity does not have a significant impact.<sup>108</sup> In those instances, TVA must also ensure that the public has ample opportunity to weigh in on the mitigation and the potential effects of the activity with and without the proposed mitigation.<sup>109</sup>

In terms of ensuring that mitigation commitments are implemented, TVA should establish public processes and internal procedures to ensure that mitigation commitments made on the basis of any NEPA analysis are carefully documented and that relevant funding, permitting, and other agency approvals and decisions are made conditional on performance of these mitigation commitments.<sup>110</sup> TVA should also commit to mitigation monitoring, particularly where it relies on an EA and mitigated FONSI.<sup>111</sup>

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and are "subject to all recourse contemplated by federal law and . . . regulations" for failure to comply); *Sierra Club v. Jacobs*, 2005 WL 6247793, at \*7 (S.D. Tex. Sept. 30, 2005) (holding that any mitigation measures set out in an EIS are "directly binding" on the U.S. Forest Service pursuant to 40 C.F.R. § 1505.3); *Tyler v. Cisneros*, 136 F.3d 603, 608 (9th Cir. 1998) (finding that an agency must comply with mitigation measures agreed to by the agency in the NEPA review process).

<sup>106</sup> TVA, Calhoun, Georgia - Area Power System Improvements EA and FONSI (Apr. 26, 2016); TVA, Ashland 161-kV Delivery Point EA and FONSI (June 7, 2016); Selmer-West Adamsville 161-kV Transmission Line and Switching Station (Jan. 6, 2015); Union-Tupelo No.3 161-kV Transmission Line (Oct. 9, 2014); Putnam-Cumberland, Tennessee - Improve Power Supply Project EA (Nov. 13, 2013). Furthermore, TVA's current use of mitigated FONSI goes beyond the guidance of CEQ which only allows for mitigated FONSI where "the proposal itself so integrates mitigation from the beginning that it is impossible to define the proposal without including the mitigation." Att. 11, Memorandum from the Council on Environmental Quality on Forty Most Asked Questions Concerning CEQ's National Environmental Policy Regulations at 29 (March 23, 1981) [hereinafter CEQ, Forty Questions]. As CEQ explains, where the introduction of mitigation does not alter the nature of the overall proposal, the agency should still continue the EIS process. *Id.*

<sup>107</sup> Att. 12, Memorandum, Nancy H. Sutley, CEQ Chair, to Heads of Federal Depts. and Agencies, Appropriate Use of Mitigation and Monitoring and Clarifying the Appropriate Use of Mitigated Findings of No Significant Impact 2 (Jan. 14, 2011) [hereinafter CEQ Mitigation Guidance].

<sup>108</sup> Att. 12, CEQ, Mitigation Guidance, 7.

<sup>109</sup> Att. 12, CEQ, Mitigation Guidance, 7-8.

<sup>110</sup> Att. 12, CEQ, Mitigation Guidance, 8.

<sup>111</sup> Att. 12, CEQ, Mitigation Guidance, 10.

Finally, TVA should implement CEQ guidance that encourages providing public access to mitigation monitoring information.<sup>112</sup> TVA should make publicly available proactive releases of mitigation monitoring reports and other supporting documents as well as responses to public inquiries regarding mitigation.<sup>113</sup>

In sum, TVA must remove Section 1318.501(e) from its implementing regulations and comply with the requirements of NEPA and CEQ in developing its mitigation procedures.

**K. The Proposed NEPA Rule's procedures regarding identifying extraordinary circumstances are inconsistent with NEPA and CEQ guidance.**

In the Proposed NEPA Rule, TVA proposes several changes to its procedures governing the extraordinary circumstances under which an action that would normally qualify as a categorical exclusion must not be categorically excluded. At the same time, TVA also proposes to categorically exclude more and more of its activities, so that the only way the public might learn of them is if TVA unilaterally determines that an extraordinary circumstance exists.

Alarming, TVA adds language that would authorize it to mitigate extraordinary circumstances that are present and subsequently apply the categorical exclusion.<sup>114</sup> Allowing an agency to mitigate extraordinary circumstances improperly circumvents NEPA's public participation requirements and gives the agency unfettered discretion to decide—behind closed doors—whether the mitigation is adequate. NEPA requires more.

CEQ guidance on categorical exclusions states that “agency NEPA implementing procedures should clearly describe the manner in which an agency applies extraordinary circumstances and the circumstances under which additional analysis in an EA or an EIS is warranted.”<sup>115</sup> This guidance also requires an agency's extraordinary circumstances to provide sufficient parameters to limit categorical exclusions.<sup>116</sup> Moreover, of the agency implementing procedures compiled on the CEQ website,<sup>117</sup> TVA's proposed procedures are the only ones that reference mitigating extraordinary circumstances.

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<sup>112</sup> Att. 12, CEQ, Mitigation Guidance, 13.

<sup>113</sup> Att. 12, CEQ, Mitigation Guidance, 14.

<sup>114</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620, 26,625 (to be codified at 18 C.F.R. § 1318.201 (a)).

<sup>115</sup> Att. 7 CEQ, CE Guidance, 5-6.

<sup>116</sup> See *id.*

<sup>117</sup> Att. 13, CEQ, *Federal Agency NEPA Implementing Procedures*, [https://ceq.doe.gov/docs/laws-regulations/Federal\\_Agency\\_NEPA\\_%20Implementing\\_Procedures\\_15July2013.pdf](https://ceq.doe.gov/docs/laws-regulations/Federal_Agency_NEPA_%20Implementing_Procedures_15July2013.pdf) (last visited July 12, 2017) [hereinafter CEQ, NEPA Implementing Procedures].

TVA also proposes to add a provision that “the mere presence of one or more of the resources under paragraph (a)(1) of this section does not preclude use of a categorical exclusion.”<sup>118</sup> Instead, TVA asserts that the determination of whether extraordinary circumstances exists depends on the existence of a “cause-effect” relationship between a proposed action and the potential effect on the resources and on the degree of this potential effect.<sup>119</sup>

Nothing in NEPA or the CEQ Regulations authorizes such a limitation on identifying extraordinary circumstances. Instead, the statute and regulations require TVA to engage in an analysis of whether an action will significantly affect the environment, applying a range of context and intensity factors, not a simple cause and effect test.

Consistent with this understanding, of the agency implementing procedures compiled on the CEQ website,<sup>120</sup> TVA’s proposed procedures are the only ones that would explicitly require a cause-effect relationship to find that an action does not fall into a categorical exclusion. Three sets of procedures, those of the Federal Aviation Administration, the Federal Emergency Management Agency, and the U.S. Coast Guard, specify that the agency must evaluate whether there are extraordinary circumstances in light of the action’s effects on the environment, but they do not require a cause-effect relationship.<sup>121</sup>

**L. The Proposed NEPA Rule’s procedures regarding emergency actions are inconsistent with NEPA and the CEQ Regulations.**

TVA proposes to commandeer NEPA’s provisions for emergency actions so that it may avoid complying with NEPA requirements whenever “unforeseen situations” occur. Its proposed regulation on emergency situations would allow TVA to consolidate, modify, or omit NEPA

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<sup>118</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,625 (to be codified at 18 C.F.R. § 1318.201(b)).

<sup>119</sup> *Id.*

<sup>120</sup> Att. 13, CEQ, NEPA Implementing Procedures.

<sup>121</sup> *See* Att. 14, Order 1050.1E, CHG 1, Federal Aviation Administration, Environmental Impacts: Policies and Procedures (Mar. 20, 2006) (“The presence of one or more of the following circumstance(s) in connection with a proposed action is not necessarily a reason to prepare an EA or EIS. The determination of whether a proposed action may have a significant environmental effect is made by considering any requirements applicable to the specific resource”); Att. 15, Directive 108-1, FEMA, Environmental Planning and Historic Preservation Responsibilities and Program Requirements (Aug. 22, 2016) (“A determination of whether an action that is normally excluded requires additional evaluation because of extraordinary circumstances focuses on the action’s potential effects and considers the environmental significance of those effects in terms of both context (i.e., local, state, regional, Tribal, national, or international) and intensity.”); Att. 16, Commandant Instruction M16475.1D, U.S. Coast Guard, National Environmental Policy Act Implementing Procedures and Policy for Considering Environmental Impacts (Nov. 29, 2000) (“The simple existence of any of the situations as described in (1)-(10) above is not necessarily a reason to prepare an EA or EIS. The determination that a CE is inappropriate and more environmental analysis is needed, or that an EA or EIS is needed, must be based on the potential significance of the proposed action’s effects on the environment.”).

procedures where “emergencies *or unforeseen situations*” occur.<sup>122</sup> Moreover, the use of this exception could be undiscoverable because the required documentation for these situations is “within the discretion of [TVA’s NEPA] official.”<sup>123</sup> There is no requirement that TVA physically or electronically document its use of this exception.

CEQ, while allowing leniency in emergency situations, explains that emergency situations must relate to immediate threats to human health, safety, or valuable natural resources.<sup>124</sup> TVA’s “unforeseen situations” is clearly broader than the emergency situations contemplated by CEQ. Thus, TVA should amend its proposal so that it quotes CEQ’s regulations and guidance, limiting emergency situations to those with immediate threats to human health, safety, or valuable natural resources, not simply “unforeseen situations.”

CEQ guidance on the use of NEPA in emergencies emphasizes that even in these dire situations, agencies should continue their efforts to notify and inform the affected public.<sup>125</sup> TVA’s proposed rule, however, would make it so there may be no discoverable documentation if TVA’s use of this exception to NEPA, let alone any proactive notice or involvement of the public.<sup>126</sup> TVA should involve the public during decision making to the extent that it does not exacerbate a dangerous situation, and should at least notify the public of the emergency and its response. At the very least, TVA must require electronic documentation of its use of this exception.

### **III. The Proposed NEPA Rule reduces transparency rather than encouraging public notice and participation, in contravention of NEPA and the CEQ Regulations.**

The core purpose of NEPA is to “[e]ncourage and facilitate public involvement in decisions which affect the quality of the human environment.”<sup>127</sup> Agencies must “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.”<sup>128</sup> Thus, “NEPA procedures must insure that environmental information is *available to public officials and citizens before decisions are made and before actions are taken.*”<sup>129</sup> Yet throughout

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<sup>122</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,629 (to be codified at 18 C.F.R. § 1318.510(a)).

<sup>123</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,629 (to be codified at 18 C.F.R. § 1318.510(d)).

<sup>124</sup> Att. 17, Memorandum, Executive Office of the President, CEQ, on Emergencies and the National Environmental Policy Act 1 (2010); 40 C.F.R. § 1506.11.

<sup>125</sup> Att. 17, Memorandum, Executive Office of the President, CEQ, on Emergencies and the National Environmental Policy Act 2 (2010).

<sup>126</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,629 (Proposed June 8, 2017) (to be codified at 18 C.F.R. § 1318.510(d)).

<sup>127</sup> 40 C.F.R. § 1500.1(d).

<sup>128</sup> 40 C.F.R. § 1506.6(a).

<sup>129</sup> 40 C.F.R. § 1501.1(d) (emphasis added).

the Proposed NEPA Rule, TVA cuts the public out of the process, pushing decision making behind closed doors and thereby continuing to reduce transparency afforded to the public.

**A. The Proposed NEPA Rule’s procedures for environmental assessments discourage early public involvement in projects and are contradictory.**

TVA proposes multiple changes to its implementing procedures that would stifle public involvement in the process for developing EAs. In the proposed implementing procedures for EAs, TVA proposes to determine whether to allow public comment on the basis of the public’s involvement through other processes or their “expressed interest.”<sup>130</sup> This regulation replaces TVA’s current procedures for public involvement in EAs, where TVA bases the level of public involvement on whether it is appropriate for facilitating timely and meaningful public input to the EA process.<sup>131</sup>

TVA’s proposal is contrary to the CEQ Regulations, which requires agencies to consider whether public comment is “practicable,” not whether they have already been involved.<sup>132</sup> As defined in the Merriam-Webster dictionary, practicable means “capable of being put into practice or of being done or accomplished.”<sup>133</sup> Whether the public has already been involved in the process for the project does not weigh on whether something is capable of being done, put into practice, or accomplished.

Moreover, TVA has a history of selectively engaging with preferred public constituencies, such as their customers, and then using that so-called “public” participation as an excuse for avoiding public comment on EAs. For example, TVA’s EA for its 2015 rate change was issued as a final EA without the opportunity for public comment.<sup>134</sup> In the FONSI, TVA explained that it had developed the rate change in consultation with its “customers,” *i.e.*, local power companies and direct-serve industrial customers.<sup>135</sup> Such limited engagement with select constituencies does not and cannot substitute for the genuine public participation required by NEPA. Public participation is particularly important when the interests of TVA’s self-selected

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<sup>130</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,625 (Proposed June 8, 2017) (to be codified at 18 C.F.R. § 1318.301(a)).

<sup>131</sup> Att. 6, TVA, *Procedures for Compliance with the National Environmental Policy Act* (last updated Apr. 28, 2017).

<sup>132</sup> 40 CFR. § 1501.4(b).

<sup>133</sup> Att. 18, Practicable, Merriam-Webster Online Dictionary, <https://www.merriam-webster.com/dictionary/practicable> (last visited Aug. 29, 2017).

<sup>134</sup> Att. 19, TVA, Refining the Wholesale Pricing Structure, Products, Incentives and Adjustments for Providing Electricity to TVA Customers, Final Environmental Assessment (July, 2015) [hereinafter TVA, Rate Change EA].

<sup>135</sup> Att. 19 (a), TVA, Refining the Wholesale Pricing Structure, Products, Incentives and Adjustments for Providing Electricity to TVA Customers, Finding of No Significant Impact (July, 2015) [hereinafter TVA, Rate Change FONSI].

constituencies may not align with those of the general public and other stakeholders, such as with rate changes.

TVA's restrictive standard would also create a chilling effect on early public involvement, which directly conflicts with CEQ's implementing regulations and guidance.<sup>136</sup> In CEQ's guidance on coordination, it emphasizes involving the public early and often in the NEPA process, identifying how decision making is improved through meaningful coordination with stakeholders.<sup>137</sup> Instead of encouraging early public participation and involvement in the NEPA process, TVA's proposed regulation would incentivize public participants to avoid any early involvement in fear of losing their opportunity to comment on a draft EA.

In addition, TVA's proposed rules regarding the public's opportunity to comment on EAs contradict themselves. Section 1318.301(c) states, "EAs prepared for actions listed in § 1318.400(a) will be circulated for public review and comment."<sup>138</sup> Section 1318.400(a) sets out actions that will normally require an EIS. Section 1318.400(b) provides the contradiction, saying that where TVA decides that an action described in § 1318.400(a) does not need an EIS, the agency must discuss the basis for this decision *in a document that is made available to the public upon request*.<sup>139</sup> Under § 1318.301(c), the EA will be circulated to the public for review and comment, but under § 1318.400(b), the public has to request the document containing the basis for the agency's decision not to prepare an EIS (normally provided for in an EA), and no public comment occurs. TVA must fix this contradiction and require public comment for situations where it is issuing an EA but would normally be required to create an EIS.

**B. The Proposed NEPA Rule's procedures for circulating findings of no significant impacts for public comment are inconsistent with the CEQ Regulations and guidance.**

TVA's proposed implementing regulations for FONSI are similarly inadequate and contrary to the CEQ Regulations. TVA provides that it will allow public comment on a draft FONSI in the limited instances where TVA does not allow public comment on an EA. Further, even if TVA doesn't permit comment on an EA, it proposes to avoid a public comment period on a FONSI unless one of three circumstances occur: (1) the proposed action is or is closely similar to an action listed in the section describing actions that normally will require an EIS; (2) TVA

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<sup>136</sup> 40 C.F.R. § 1500.2(d) (encouraging public involvement in decisions that affect the quality of the human environment, not only those that could have a significant effect);

<sup>137</sup> See generally Att. 20, CEQ Guidance on Collaboration in NEPA (2007).

<sup>138</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,625 (to be codified at 18 C.F.R. § 1318.301(c)).

<sup>139</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,626 (to be codified at 18 C.F.R. § 1318.400(b)).

has previously announced it would conduct an EIS for the proposed project; or (3) the nature of the proposed action is one without precedent.<sup>140</sup>

TVA's proposal runs counter to CEQ guidance, only incorporating a few of the circumstances where a FONSI should be made available for public comment. First, CEQ does not limit the availability of public comment on FONSI for situations where the agency did not release a draft EA for public review. Instead, CEQ guidance explains that a FONSI should be made available for public review in the following cases: (1) the proposal is a borderline case, i.e., when there is a reasonable argument for preparation of an EIS; (2) it is an unusual case, a new kind of action, or a precedent setting case, such as an even minor development in a pristine area; (3) there is either scientific or public controversy over the proposal; (4) the proposed action would be located in a floodplain or wetland; and (5) the proposal integrates mitigation from the beginning so that it is impossible to define the proposal without including the mitigation, and the agency relies on mitigation measures in determining that the overall effects would not be significant.<sup>141</sup>

TVA should bring its regulations into line with CEQ guidance. It should remove the additional requirement that a draft FONSI will only be sent out for public comment in the event that there was no public comment period on the EA. Moreover, rather than cherry-picking a few of the situations where CEQ would require public comment on a FONSI, TVA should incorporate all of them.

**C. The Proposed NEPA Rule's procedures for developing environmental impact statements give TVA unfettered discretion and deprive the public of input into key portions of the NEPA process, including scoping, alternatives analysis, and RODs.**

The Proposed NEPA Rule's procedures for developing EISs would provide TVA with unfettered discretion and would undermine or block public engagement in the NEPA process. TVA proposes to make key decisions about action alternatives and environmental issues before initiating the public scoping process. TVA's proposal would also give TVA NEPA compliance staff unfettered discretion to determine whether public scoping meetings should be held.

CEQ's handbook on collaborative NEPA reviews describes scoping as an early and open process meant to identify the significant issues that may need to be addressed when considering a proposed action.<sup>142</sup> CEQ emphasizes the need to keep meetings open and to collaborate during

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<sup>140</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,626 (to be codified at 18 C.F.R. § 1318.303(d)).

<sup>141</sup> Att. 11, CEQ, Forty Questions.

<sup>142</sup> Att. 20, Council on Environmental Quality, *Collaboration in NEPA: A Handbook for NEPA Practitioners* 20-21 (Oct. 2007) [hereinafter CEQ, NEPA Handbook].

the scoping process to ensure that the EIS adequately addresses the issues of importance to affected stakeholders.<sup>143</sup>

As explained by CEQ, the scoping process should include interested parties in the scoping process, rather than pre-determining action alternatives, environmental issues, and the schedule for EIS preparation behind closed doors, without public input.<sup>144</sup> By allowing TVA staff to predetermine these key aspects of an EIS, the scoping process would be fundamentally narrowed by TVA's proposal. TVA must amend its implementing regulations to remove Section 1318.402(a) because it violates CEQ guidance and undermines the EIS scoping process.

In addition to allowing its staff to predetermine key aspects of an EIS behind closed doors, TVA also proposes to stifle public input by making the decisions on whether to hold public scoping meetings completely discretionary.<sup>145</sup> The proposed regulations would permit TVA's staff to determine whether public scoping meetings should be held, but do not include any factors that staff must consider when making that decision.

In contrast, the CEQ Regulations require public hearings or public meetings during the scoping process whenever appropriate or where required by statute.<sup>146</sup> CEQ's guidance highlights scoping meetings as a key method for involving the public and improving the NEPA process. For example, CEQ spotlights the National Park Service's use of scoping meetings across the country during its EIS scoping for the Colorado River Management Plan as a perfect example of proper EIS scoping.<sup>147</sup> As CEQ explains, a collaborative approach that engages the public improves the quality of decision-making and increase public trust and confidence in agency decisions.<sup>148</sup> By permitting TVA's staff to decide arbitrarily whether to hold public scoping meetings, the proposed regulations make it possible for TVA to decide not to hold these meetings for any reason whatsoever. TVA should instead require public scoping meetings whenever they are appropriate and wherever they are statutorily required. In its implementing procedures, TVA should identify statutorily-required scoping and propose factors for consideration of when scoping meetings are "appropriate," taking into account the underlying goals and purposes of NEPA and the scoping process.

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<sup>143</sup> Att. 21, Memorandum from Executive Office of the President, CEQ, to General Counsels, NEPA Liaisons, and Participants in Scoping at 20 (April, 1981).

<sup>144</sup> Compare 40 C.F.R. § 1501.7(a) with Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,626 (to be codified at 18 C.F.R. § 1318.402(a)).

<sup>145</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,626 (to be codified at 18 C.F.R. § 1318.402(c)).

<sup>146</sup> 40 C.F.R. § 1506.6(c).

<sup>147</sup> Att. 20, NEPA Handbook 19, 21, 60.

<sup>148</sup> Att. 20, NEPA Handbook 1 (citing CEQ, NEPA Task Force Report to the Council on Environmental Quality—Modernizing NEPA Implementation (Sept. 2003)).

TVA also proposes to make NEPA documents, such as draft EISs, final EISs, and supplemental EISs and EAs, available “to the public upon request” rather than as a matter of course.<sup>149</sup> TVA proposes to make it completely discretionary for the agency to extend the comment period on a draft EIS, or even to address public comments on the draft EIS.<sup>150</sup> This discretion should be qualified by including factors that the agency must weigh and consider when making these decisions about public involvement in the EIS process.

#### **IV. The Proposed NEPA Rule Does Not Comply with Executive Mandates to Take Into Account Impacts Related to Floodplains and Wetlands**

The Proposed NEPA Rule includes a subpart to implement TVA’s obligations under Executive Order No. 11,988 (Floodplain Management), as amended by Executive Order 13,690 (Establishing a Federal Flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input), and Executive Order No. 11,990 (Protection of Wetlands).<sup>151</sup> These executive orders are intended to protect federal public lands and federally-funded projects from impacts related to flooding, and to ensure that federal agencies adequately take into account in their decision-making the risks and environmental harms associated with developing projects in floodplains and wetlands.<sup>152</sup>

On August 15, 2017, President Donald J. Trump issued an Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process

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<sup>149</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,626 (to be codified at 18 C.F.R. § 1318.400(b)); *id.* at 26,627 (to be codified at 18 C.F.R. § 1318.403(d), (f) (making a draft EIS available on TVA’s website and “by other means upon request to TVA” and making “[m]aterials” publicly available only in restricted ways); *id.* (to be codified at 18 C.F.R. § 1318.404(e)); *id.* 26,627 (to be codified 18 C.F.R. § 1318.406) (removing requirement that “TVA . . . make such information [supplemental EIS] available to the public”). Section 1318.403(f) is particularly concerning because TVA did not provide a large number of EAs and EISs it relied upon in this rulemaking to the Conservation Groups until two business days prior to the close of this comment period, despite multiple requests under FOIA and requests for expedited treatment. *See* Part I, Section VI, above. The lack of timely availability of these public documents argues in favor of *increased* public access rather than the unfettered discretion proposed in the Proposed NEPA Rule.

<sup>150</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. at 26,627 (to be codified at 18 C.F.R. § 1318.404(e)) (“TVA may increase or extend the public comment period *in its discretion*.” (emphasis added)); *id.* (to be codified at 18 C.F.R. § 1318.404(c)) (“The FEIS *should* address all *substantive* comments on the DEIS” (emphasis added)). CEQ, on the other hand, requires agencies to respond to comments in their final EIS. 40 C.F.R. § 1502.9(b).

<sup>151</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,629 (to be codified at 18 C.F.R. § 1318.600(a)).

<sup>152</sup> *See* Att. 22, Floodplain Management, Exec. Order No. 11,988, 42 Fed. Reg. 26,951 (May 24, 1977) [hereinafter Exec. Order 11,988], as amended by Att. 23, Establishing a Federal flood Risk Management Standard and a Process for Further Soliciting and Considering Stakeholder Input, Exec. Order No. 13,690, 80 Fed. Reg. 6,425 (Feb. 4, 2015) [hereinafter Exec. Order 13,690], and Att. 24, Protection of Wetlands, Exec. Order No. 11,990, 42 Fed. Reg. 26,961 (May 24, 1977) [hereinafter Exec Order 11,990].

for Infrastructure (“Trump Infrastructure EO”).<sup>153</sup> Section 6 of the Trump Infrastructure EO revoked Executive Order 13,690, and its future remains uncertain.<sup>154</sup> At a minimum, TVA remains obligated to implement Executive Orders 11,988 and 11,990. Accordingly, our comments below address TVA’s obligations under Executive Orders 11,988 and 11,990 and other existing federal standards.

### **A. The Proposed NEPA Rule Improperly Sidelines the Public in TVA’s Decision-Making Regarding Floodplains and Wetlands**

Executive Orders 11,988 and 11,990 set a high bar for public involvement in planning process for federal projects that impact floodplains and wetlands, requiring that agencies “provide opportunity for early public review” of any plans or proposals for actions in floodplains or wetlands, “including the development of procedures to accomplish this objective for Federal actions whose impact is not significant enough to require the preparation of an environmental impact statement under section 102(2)(C) of the National Environmental Policy Act of 1969, as amended.”<sup>155</sup>

Contrary to these requirements, TVA’s proposed rule states that “[p]ublic notice of actions affecting floodplains or wetlands is not required if the action is categorically excluded under § 1318.200.”<sup>156</sup> TVA’s misapplication of Executive Orders 11,988 and 11,990 render the public comment requirements of those orders mere surplusage. The orders do not require the bare minimum public involvement already mandated by NEPA and its implementing authorities for *any* environmental impact. Rather, the orders recognize that floodplains and wetlands are special, unique, and uniquely controversial resources in which to conduct major development and federal infrastructure projects. Development of the floodplain and wetlands impact the broader public, especially downstream, and the mandates of Executive Orders 11,988 and 11,990 ensure they will have an opportunity for public engagement about those impacts for each such

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<sup>153</sup> Att. 25, Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure Projects, Exec. Order No. 13,807, 82 Fed. Reg. 40,463 (Aug. 24, 2017) [hereinafter Exec. Order 13,807].

<sup>154</sup> *Id.* Conservation Groups note that in the aftermath of Hurricane Harvey and the destruction it has wrought on the Texas and Louisiana coastlines, President Trump is reported to be reconsidering his revocation of Executive Order 13,690. *See* [https://www.washingtonpost.com/politics/after-harvey-the-trump-administration-reconsiders-flood-rules-it-just-rolled-back/2017/09/01/c3a051ea-8e56-11e7-8df5-c2e5cf46c1e2\\_story.html?utm\\_term=.ab418d55b55c](https://www.washingtonpost.com/politics/after-harvey-the-trump-administration-reconsiders-flood-rules-it-just-rolled-back/2017/09/01/c3a051ea-8e56-11e7-8df5-c2e5cf46c1e2_story.html?utm_term=.ab418d55b55c).

<sup>155</sup> Att. 22, Exec. Order No. 11,988 Sec. 2 at (a)(4); Att. 24, Exec. Order No. 11,990 Sec. 2 at (b).

<sup>156</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620, 26,629 (to be codified at 18 C.F.R. § 1318.603).

project, even if ordinary NEPA procedures outside of floodplains and wetlands would not require it.

TVA's attempt to circumvent public participation in its decision-making regarding actions affecting floodplains or wetlands is particularly alarming given the impermissibly broad scope of the categorical exclusions it has proposed.<sup>157</sup> Many of these categorical exclusions are expressly intended to apply to actions that will indisputably affect floodplains and wetlands, including, but not limited to, CE 22 (Dispersed Recreation); 23 (Public Use Areas); CE 24 (Use of TVA Property); CE 25 (Property Transactions); CE 26 (Section 26A Permitting Approvals); CE 27 (TVA Shoreline Actions); CE 28 (Modifications to Land Use Allocations in TVA Plans); and CE 29 (Wetlands, Riparian & Aquatic Ecosystem Improvements).<sup>158</sup> Moreover, as discussed above, TVA's proposed "extraordinary circumstances" procedure would allow TVA to adopt mitigation of impacts to floodplains and wetlands without public notice or review and without triggering environmental review requirements.<sup>159</sup> These restrictions on public review directly contradict the requirements of the relevant executive orders. TVA must hew to the mandates of Executive Orders 11,988 and 11,990 and alter its regulations to provide for public review of *all* actions that will affect floodplains and wetlands.

#### **B. TVA Must Use an Informed Science-Based Approach to Evaluate the Impacts of Its Actions on *All* Floodplains and Wetlands.**

NEPA requires TVA to apply current and reliable science to evaluate the environmental effects of its projects on natural resources, including floodplains and wetlands.<sup>160</sup> Consistent with this NEPA obligation, the most recently-promulgated Federal Flood Risk Management Standard directs federal agencies to use "the best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding based on climate science" to determine flood risks.<sup>161</sup> Failure to abide by these standards would expose TVA infrastructure to increasing long term risks and place the agency out of step with modern engineering practice. TVA should amend its regulation to require an "informed science approach that uses the best-available, actionable hydrologic and hydraulic data and methods that integrate current and future changes in flooding risk incorporating long-term projections based on the best available science."

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<sup>157</sup> See Part II, Section II.D and III, below.

<sup>158</sup> See Part III, below.

<sup>159</sup> See Part I, Sections II.B and K, above.

<sup>160</sup> See 40 C.F.R. 1500.1(b) ("Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."); see also 40 C.F.R. §1502.24 .

<sup>161</sup> Att. 26, U.S. Dep't Energy, Guidelines for Federal Flood Risk Management Standard, <https://energy.gov/sites/prod/files/2015/02/f19/FederalFloodRiskManagementStandard.pdf> (last visited Aug. 29, 2017).

Similarly, in carrying out TVA's activities, Executive Order 11,990 requires the federal utility to consider the following "factors relevant to a proposal's effect on the survival and quality of the wetlands:"

(a) public health, safety, and welfare, including water supply, quality, recharge and discharge; pollution; flood and storm hazards; and sediment and erosion;

(b) maintenance of natural systems, including conservation and long term productivity of existing flora and fauna, species and habitat diversity and stability, hydrologic utility, fish, wildlife, timber, and food and fiber resources; and

(c) other uses of wetlands in the public interest, including recreational, scientific, and cultural uses.<sup>162</sup>

The Proposed NEPA Rule would require only that TVA analyze "[t]he effect of the proposed action on natural and beneficial floodplain and wetland values,"<sup>163</sup> without any additional specificity regarding the full range of factors required to be considered under Executive Order 11,990. The Proposed NEPA Rule does not give TVA staff specific enough guidance to ensure the thorough wetlands analysis required by Executive Order 11,990. Moreover, TVA should apply a similar informed, science-based approach to wetlands evaluation as it will apply to floodplain evaluations.

The Proposed NEPA Rule would also exempt actions that are categorically excluded from floodplains or wetlands evaluation if TVA staff finds (1) there is no practicable alternative that will avoid affect the floodplains or wetlands and all practicable efforts to minimize impacts are incorporated; and (2) the impacts on the floodplain or wetland would be minor.<sup>164</sup> As a preliminary matter, this exemption from floodplains or wetlands evaluation is inconsistent with the requirements of the relevant executive orders, which are concerned with *all* actions affecting floodplains and wetlands. Further, it is unclear how TVA will determine whether an action can be categorically excluded and make the required findings *in the absence* of a floodplains or wetlands evaluation. This is particularly concerning given the broad scope of actions TVA proposes to categorically exclude, as discussed below in Parts II and III, and its proposal to mitigate its way out of "extraordinary circumstances" based on floodplain or wetlands impacts.

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<sup>162</sup> Att. 24, Exec. Order 11,990 (May 24, 1977), as amended by Att. 27, Elimination of Unnecessary Executive Orders and Technical Amendments to Others, Exec. Order No. 12608, 52 Fed. Reg. 34,617, (September 14, 1987).

<sup>163</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,629 (to be codified at 18 C.F.R. § 1318.602(b)(1)).

<sup>164</sup> *Id.*

For these reasons, TVA must subject *all* actions that affect floodplains or wetlands to a floodplains or wetlands evaluation.

**C. TVA Must Implement Executive Order 11,988's Directives for the Management of Flood Risk in Federal Infrastructure.**

The Proposed NEPA Rule appears to ignore directives for management of federal infrastructure under Section 3 of Executive Order 11,988, including requirements to meet the requirements of the National Flood Insurance Program, floodproof new or reconstructed federal infrastructure, preferentially by elevating structures rather than filling in land, and advise buyers and restrict uses of property sold by TVA in the floodplain. As a federal agency with an affirmative obligation to manage the shorelines and floodplains of lakes and rivers across the region, TVA's regulations, more than any other federal agency should require compliance with these common sense obligations.

**V. TVA has not provided adequate time for the public to review its far-ranging Proposed NEPA Rule.**

The Proposed NEPA Rule touches on nearly every aspect of TVA's NEPA procedures and nearly every aspect of the federal agency's activities covering its seven-state service territory. According to TVA, it took TVA staff at least four years to develop the Proposed NEPA Rule.<sup>165</sup> During those four years, TVA has maintained two Federal Advisory Committee Act (FACA) stakeholder committees, one charged with advising TVA on natural resource policy issues and the other charged with advising TVA on energy policy issues.<sup>166</sup> To the best of our knowledge, neither FACA committee was consulted during TVA's NEPA rule revision process. Nor, to the best of our knowledge, did TVA informally seek significant stakeholder input prior to publishing the Proposed NEPA Rule. This is surprising given the fact that the NEPA Proposed Rule has significant implications for public and stakeholder input into both TVA's stewardship and energy decision-making processes.

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<sup>165</sup> Att. 2, TVA, CE Support Documentation, 1-2.

<sup>166</sup> See Att. 28, TVA, *Our Public Advisory Councils*, <https://www.tva.com/About-TVA/Our-Public-Advisory-Councils> (last visited August 29, 2017); Att. 29, TVA, *Regional Energy Resources Council*, <https://www.tva.com/About-TVA/Our-Public-Advisory-Councils/lerc> (last visited August 29, 2017); Att. 30, TVA, *Contact RERC Members*, <https://www.tva.com/About-TVA/Our-Public-Advisory-Councils/lerc/Contact-RERC-Council-Members> (last visited August 29, 2017); Att. 31, TVA, *Regional Resources Stewardship Council*, <https://www.tva.com/About-TVA/Our-Public-Advisory-Councils/Regional-Resource-Stewardship-Council> (last visited August 29, 2017); Att. 32, TVA, *Contact RRSC Council Members*, <https://www.tva.com/About-TVA/Our-Public-Advisory-Councils/Regional-Resource-Stewardship-Council/Contact-RRSC-Council-Members> (last visited August 29, 2017); Att. 33, *RRSC Meetings*, <https://www.tva.gov/About-TVA/Our-Public-Advisory-Councils/Regional-Resource-Stewardship-Council/RRSC-Meetings> (last visited August 29, 2017).

TVA initially provided the public with a mere 60 days to review and comment on the far-ranging Rule.<sup>167</sup> Several conservation and energy nonprofit organizations, including but not limited to the Sierra Club, Southern Alliance for Clean Energy, and Southern Environmental Law Center, requested an additional 60 days to review the Proposed NEPA Rule.<sup>168</sup> The bases for this request were:

- 1) These changes represent the first time TVA has revisited its own NEPA procedures in over 30 years and will affect how TVA conducts environmental analysis across an incredibly broad range of activities, establishing procedures that will likely remain in place over the next 10–20 years. Thus, it is critical that the public have sufficient time to review and offer comments on TVA’s proposed changes.
- 2) The current comment period is inadequate to allow for thorough and meaningful public review and analysis of over 400 pages of proposed rule language and supporting documents. Given the complexity and wide-range of activities covered by the proposed NEPA changes, additional time for public review should be added to the current comment period.
- 3) TVA is proposing to add 31 additional Categorical Exclusions, more than doubling the number of categories of activities conducted by the agency that would be exempt from public disclosure and environmental review. The complexity and range of topics covered by the proposed new Categorical Exclusions, as well as proposed changes to TVA’s current Categorical Exclusions, are identified by TVA as affecting the following program areas<sup>169</sup>:
  - a. Education and Information Sharing
  - b. Public Health and Safety
  - c. Transmission Projects/Maintenance
  - d. Existing Plant Acquisition
  - e. Recreation Management
  - f. Natural Resource Stewardship
  - g. Facilities Management
  - h. Road Maintenance

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<sup>167</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620 (to be codified at 18 C.F.R. pt. 1318).

<sup>168</sup> Att. 34, Letter from Angela Garrone, Research Attorney, Southern Alliance for Clean Energy, to Matthew Higdon, NEPA Specialist, TVA (July 7, 2017).

<sup>169</sup> Att. 2, TVA, CE Support Documentation, 2-1.

- i. Property Access
  - j. Waste
  - k. Renewable Energy
  - l. Economic Development
  - m. Rate Structure
- 4) In addition to dramatically expanding the scope of activities that would be exempt from environmental review, the proposal would amend significant portions of TVA's existing NEPA procedures. The proposal also purports to implement the requirements of an executive order addressing treatment of wetlands and floodplains. Each of these components of the proposal has the potential to substantially impact the interests of the public in informed environmental decision-making as well as the clean water, clean air, and public lands in the states served by TVA.
- 5) TVA is a public power entity that is not subject to review of any public service commission or other third party energy regulator, a unique situation that leaves NEPA review as one of the few processes in place that allows for transparency and public engagement. According to TVA, it began consideration of these changes as far back as 2013, seeking guidance from a team of environmental and legal professionals.<sup>170</sup> The public must have enough time to complete its own legal and environmental review and the current comment period is insufficient to allow for such review.

In response, TVA extended the public comment period for 30 days.<sup>171</sup> The extension granted by TVA is inadequate to allow the public to evaluate the implications of the Proposed NEPA Rule, particularly given that TVA itself took years to develop the Rule without consulting stakeholders, has now given the public a mere ninety days, with the requested extension, to provide comments on thousands of pages of information. And, as described below, TVA has also refused to provide public documents in a timely manner so that the public can conduct informed review of the Rule and provide meaningful comments.

**VI. Neither TVA nor CEQ have not provided adequate documentation to the public to evaluate the basis for TVA's Proposed NEPA Rule.**

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<sup>170</sup> Att. 2, TVA, CE Support Documentation, 1-1.

<sup>171</sup> Att. 35, TVA, Proposed Rule: Extension of Comment Period, 82 Fed. Reg. 35,133 (to be codified at 18 C.F.R. pt. 1318).

In support of its proposal to dramatically curtail public involvement and give itself nearly limitless discretion to determine whether and when environmental review is necessary under NEPA, TVA provides a scant three pages of rationale in the Federal Register.<sup>172</sup>

With respect to its proposed categorical exclusions, TVA provides an approximately 300 page document that purports to substantiate 50 categorical exclusions, including 31 new exclusions (“Supporting Documentation”).<sup>173</sup> The Supporting Documentation relies heavily upon a significant number of TVA categorical exclusion checklists, environmental assessments, and environmental impact statements that are not reasonably publicly available.<sup>174</sup> The Supporting Documentation also relies upon categorical exclusions adopted by other agencies, for many of which the records supporting their adoption are not publicly available.<sup>175</sup>

In an attempt to obtain public records prior to the expiration of the comment period, the Southern Environmental Law Center (SELC) submitted an expedited request pursuant to the federal Freedom of Information Act (FOIA) on June 28, 2017.<sup>176</sup> TVA granted expedited treatment of the request on July 11, 2017,<sup>177</sup> expressing doubt that it would be able to provide the requested documents before the original deadline for submittal of public comments. After granting an extension of the public comment period, TVA provided some documents, largely heavily redacted emails,<sup>178</sup> responsive to the expedited request on July 28, 2017, while invoking Exemption 5 of the FOIA to withhold nearly 500 pages of documents.<sup>179</sup> TVA made no attempt to segregate exempt from non-exempt material in those nearly 500 pages.

In addition, TVA unreasonably narrowly construed the scope of SELC’s request and refused to timely provide the primary sources that supported the proposed procedures TVA had submitted to CEQ. On July 19, 2017, SELC sent TVA an email clarifying the scope of the expedited request.<sup>180</sup> On July 31, 2017, TVA responded, refusing to acknowledge the scope of

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<sup>172</sup> See Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,620-23 (Proposed June 8, 2017) (to be codified at 18 C.F.R. pt. 1318).

<sup>173</sup> See generally TVA, *Proposed Categorical Exclusions Supporting Documentation* (June 2017).

<sup>174</sup> Att. 36, Memorandum from Southern Environmental Law Center on Survey of Publicly-Available EAs and EISs, (Aug. 4, 2017).

<sup>176</sup> Att. 37, Letter from Amanda Garcia, Staff Attorney, Southern Environmental Law Center, to Denise Smith, FOIA Officer, TVA (June 28, 2017).

<sup>177</sup> Att. 38, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (July 11, 2017).

<sup>178</sup> Att. 39, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (July 28, 2017); Att. 40, Attachments to Letter from Denise Smith, FOIA Officer, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (July 28, 2017).

<sup>179</sup> Att. 39, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (July 28, 2017).

<sup>180</sup> Att. 41, E-mail from Amanda Garcia, Staff Attorney, Southern Environmental Law Center, to Denise Smith, FOIA Officer, TVA (July 19, 2017).

the original request, treating the request for primary sources as new request and placing it on “Track 3,” TVA’s slowest track for response.<sup>181</sup>

Due to the urgency of obtaining the information before the comment deadline, SELC submitted a second expedited request to obtain the previously requested information.<sup>182</sup> TVA denied expedited treatment of that request, in effect arguing that in the Federal Register and Supporting Documentation, it had already provided the public with the information it wanted the public to see.<sup>183</sup> TVA claimed:

The comprehensive supporting documentation that TVA has publicly available on its website and in the Federal Register includes a voluminous amount of information sufficient to allow public understanding of and comment on the proposed changes.<sup>184</sup>

With two business days remaining prior to the close of the comment period, SELC received a CD containing additional environmental assessments and environmental impact statements cited in the Supporting Documentation.<sup>185</sup> The documents include thousands of pages. TVA still has not provided any of the categorical exclusion checklists that it relied upon in the Supporting Documentation.<sup>186</sup>

Despite the fact that TVA should have already compiled the information requested for its administrative record as well as CEQ’s review, TVA relegated SELC’s request to “Track 3,” which means it may be several months before TVA discloses all of the relevant public documents upon which it purportedly relied for its proposed categorical exclusions.<sup>187</sup>

In short, TVA has relied upon the alleged “voluminous” amount of information that is available on its website to delay disclosure of public information. The volume of currently available information is completely irrelevant; the question is whether the public has had timely and reasonable access to the *relevant* information by which to evaluate TVA’s proposal—and the relevant information includes all of the public information upon which the agency has relied in developing and supporting the Proposed NEPA Rule. TVA has not provided the relevant

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<sup>181</sup> Att. 42, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (July 31, 2017); *see also* 18 C.F.R. § 1305.1(b)(3) (noting Track 3 designation will usually result in longest response times).

<sup>182</sup> Att. 43, Letter from Amanda Garcia, Staff Attorney, Southern Environmental Law Center, to Denise Smith, FOIA Officer, TVA (July 31, 2017).

<sup>183</sup> Att. 44, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (Aug. 9, 2017).

<sup>184</sup> *Id.*

<sup>185</sup> Att. 45, Letter from Denise Smith, FOIA Officer, TVA, to Amanda Garcia, Staff Attorney, Southern Environmental Law Center (Aug. 30, 2017).

<sup>186</sup> *Id.*

<sup>187</sup> *Id.*; *see also* 18 C.F.R. § 1305.1(b)(3) (noting Track 3 designation will usually result in longest response times).

information in a timely manner, and therefore has hindered public scrutiny of the Proposed NEPA Rule.

SELC also submitted a similar FOIA request to CEQ on June 28, 2017.<sup>188</sup> Although the 20 working day deadline for responding to SELC's request has long-since expired,<sup>189</sup> CEQ has not responded to SELC's request. On August 29, 2017, SELC sent a letter to CEQ seeking the legally required response to its FOIA request.<sup>190</sup> SELC has not yet received a response.

Without access to the relevant public records, the public is not able to fully evaluate whether TVA's Proposed NEPA Rule is supported by the evidence upon which it has relied. As explained in detail throughout this letter, all of the reasonably available evidence points to the contrary.

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<sup>188</sup> Att. 46, E-mail from Amanda Garcia, Staff Attorney, Southern Environmental Law Center, to Freedom of Information Officer, CEQ (June 28, 2017).

<sup>189</sup> Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) and (a)(6)(A).

<sup>190</sup> Att. 47, Letter from Amanda Garcia, Staff Attorney, Southern Environmental Law Center, to Freedom of Information Officer, CEQ (Aug. 29, 2017)

## **PART II: COMMENTS ON TVA’S PROPOSED CHANGES TO ITS CATEGORICAL EXCLUSIONS**

### **I. Legal Framework**

#### **A. To adopt a categorical exclusion, TVA must define the activity with specificity and demonstrate that it will not individually or cumulatively result in significant effects on the environment.**

In certain narrowly prescribed circumstances, an agency may promulgate a “categorical exclusion” that exempts the covered activity from the requirement to perform environmental review. An agency must set forth “specific criteria for and identification of” actions that it proposes to categorically exclude from environmental review.<sup>191</sup> A categorical exclusion is appropriate only when a category of activity does not “individually or cumulatively have a significant effect on the human environment.”<sup>192</sup>

In 2010, CEQ issued specific guidance for the adoption of categorical exclusions in implementing procedures.<sup>193</sup> The guidance explains that the text of a categorical exclusion “should clearly define the eligible category of actions, as well as any physical, temporal, or environmental factors that would limit its use.”<sup>194</sup>

The guidance also makes clear that the mere fact that an agency has previously issued findings of no significant impact for a particular activity is inadequate to support the adoption of a categorical exclusion for that activity.<sup>195</sup> Rather, the agency must demonstrate through monitoring and other evidence that the activity in fact had no significant impact.<sup>196</sup> The same limitation applies to activities that have “independent utility” and were analyzed within a broader EIS, and are now proposed for categorical exclusion.<sup>197</sup>

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<sup>191</sup> 40 C.F.R. § 1507.3(b)(2); *see also* Att. 4, CEQ, Implementing Guidance; *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007) (rejecting adoption of categorical exclusion where agency failed to include specific limitations on its scope).

<sup>192</sup> 40 C.F.R. § 1508.4; *Sierra Club*, 510 F.3d at 1026 (requiring agency’s “significance” determination regarding a proposed CE to be a reasoned decision based on an adequate record and holding agency’s failure to, among other things, adequately consider cumulative impacts, was arbitrary and capricious).

<sup>193</sup> Att. 7, CEQ, CE Guidance, at 1.

<sup>194</sup> *Id.* at 5.

<sup>195</sup> *Id.* at 7.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.* at 7-8.

With respect to the benchmarking of a proposed categorical exclusion against those of other agencies, the guidance again advises caution in drawing comparisons.<sup>198</sup> To rely on another agency's categorical exclusion, an agency should consider: "(1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidelines (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place."<sup>199</sup>

In its 2010 guidance, CEQ expressly recognized the potential for abuse of categorical exclusions: "If used inappropriately, categorical exclusions can thwart NEPA's environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review."<sup>200</sup>

**II. TVA's supporting documentation for its proposed CEs fails across the board to demonstrate that the actions proposed to be included will not individually or cumulatively have significant effects on the environment.**

**A. TVA's supporting documentation does not take the required hard look at the potential direct and indirect environmental effects of the individual and cumulative application of the CEs.**

TVA's analysis of the direct, indirect, individual, and cumulative effects of the application, both individually and cumulatively, of the proposed CEs is categorically inadequate. Of the CEs that include analysis of the CE's environmental effects,<sup>201</sup> TVA's analysis is conclusory, ignoring, among other things, effects on endangered and threatened species and their habitats, ecologically important natural areas, as well as climate change and water quality impacts. For example, in the EAs cited as support for CE 32, TVA conditioned its finding of no significant impact on the application of mitigation measures for threatened and endangered bat species, but failed to consider or even mention the effects that applying CE 32 would have on

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<sup>198</sup> *Id.* at 9.

<sup>199</sup> *Id.*

<sup>200</sup> Att. 7, CEQ, CE Guidance, 3.

<sup>201</sup> Proposed CEs 2–10, 12, 14, 18, 20, 23–26, 46 include no discussion or analysis of environmental effects. Att. 2, TVA, CE Support Documentation, 3-7 to 3-13, 3-23, 3-36, 3-71, 3-84, 3-100 to 3-104, 3-299 (June 2017).

these bats.<sup>202</sup> The individual and cumulative application of each CE (and all CEs cumulatively applied) would have significant environmental effects. TVA must consider and provide public notice and comment on those effects before it can finalize these CEs.

Courts have repeatedly explained that during NEPA analysis, agencies must take a “hard look” at the environmental impacts of their proposed actions.<sup>203</sup> This “hard look” prohibits “[g]eneral statements about ‘possible effects’ and ‘some risk’ . . . absent a justification regarding why more definitive information could not be provided.”<sup>204</sup> CEQ requires TVA to include a thorough analysis of the direct, indirect, and cumulative impacts of the application of each CE.<sup>205</sup> Direct impacts occur at the same time and place as the action.<sup>206</sup> Indirect impacts are reasonably foreseeable and occur later in time or at a farther removed distance.<sup>207</sup> Cumulative impacts result from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions.<sup>208</sup>

Throughout the supporting documentation for its CEs, TVA discusses only direct actions, ignoring both indirect and cumulative actions. This analysis cannot be characterized as a “hard look.” Before excluding all of these activities from public review, TVA must provide the analysis that it will forego if it categorically excludes them.

**B. The supporting documentation fails to provide any analysis of the potential for cumulatively significant effects on any of the 50 proposed CEs.**

Each individual CE in the Proposed NEPA Rule, when applied cumulatively over time and geographic scope, could have a significant environmental effect. CEQ defines “significant”

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<sup>202</sup> See, Att. 2, TVA, CE Support Documentation 3-169 (citing for support Putnam-Cumberland, *Tennessee—Improve Power Supply Project*, Environmental Assessment (chemical and mechanical ROW maintenance) (Nov. 13, 2013) (only removing Indiana bat roosting habitat between Oct 15 and April 1); Union-Tupelo No. 3 161kV Transmission Line EA (chemical and mechanical ROW maintenance) (Oct, 9, 2014) (only removing Indiana and/or northern long-eared bat habitat between Dec 1 and March 15)); Selmer-West Adamsville 161-kV Transmission Line and Switching Station (chemical and mechanical ROW maintenance) (Jan. 6, 2015) (contributing money to the Indiana Bat Conservation Fund and only removing roosting habitat between Oct 15 and March 31)); *id.* at 3-171 (reviewing the effects that applying this CE would have on fish and wildlife without any mention on threatened and endangered bats).

<sup>203</sup> *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 340 (1989).

<sup>204</sup> *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

<sup>205</sup> Att. 7, CEQ, CE Guidance 5. (urging agencies to “consider whether the cumulative effects of multiple small actions ‘would cause sufficient environmental impact to take the actions out of the categorically excluded class’”).

<sup>206</sup> *Id.* § 1508.8(a).

<sup>207</sup> *Id.* § 1508.8(b).

<sup>208</sup> *Id.* § 1508.7

to include considerations of the “context” and “intensity” of the action.<sup>209</sup> “Context” requires that the significance of an action be analyzed in the contexts of society as a whole, the affected region, and the affected interests.<sup>210</sup> “Intensity” refers to the severity of impacts.<sup>211</sup> Here, the impacts of cumulatively applying each individual CE, as well as the cumulative effect of applying all of the CEs, are likely to be significant in terms of both “context” and “intensity.” For example, as explained in more detail in Part II.D and Part III, many of the proposed CEs lack specificity that would limit their repeated application throughout TVA’s territory. Moreover, many of TVA’s proposed CEs may “adversely affect an endangered or threatened species or its habitat that has been determined to be critical.”<sup>212</sup>

Despite the high likelihood of each CE’s cumulative significance, TVA’s Proposed Categorical Exclusions Supporting Documentation (“Supporting Documentation”) is utterly devoid of any cumulative impact analysis. TVA appears to assume, without analysis, that if the activity proposed for exclusion does not have individually significant impacts, it will *a fortiori* not have cumulatively significant impacts, either. This assumption is contrary to CEQ Regulations, which expressly observe that “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.”<sup>213</sup>

For example, stakeholders have challenged TVA’s failure to conduct an EIS for its management of transmission infrastructure, which includes the actions in proposed CE 15–20.<sup>214</sup> As demonstrated in *Sherwood v. TVA*, the policy and decisions surrounding timber harvesting and tree clearing require an EIS.<sup>215</sup> Having conceded an EIS is necessary, TVA has proposed to prepare a programmatic EIS for its transmission-related vegetation management activities.<sup>216</sup> In the Proposed NEPA Rule, however, TVA is proposing to categorically exclude (CE 15–19) nearly all of the actions it will take to implement the policy challenged in *Sherwood*.<sup>217</sup> This proposal improperly places the cart before the horse, concluding—on the basis of no analysis—that TVA’s transmission-related activities will not have cumulatively significant impacts, even

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<sup>209</sup> 40 C.F.R. § 1508.27.

<sup>210</sup> *Id.*

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> 40 C.F.R. § 1508.7.

<sup>214</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

<sup>215</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

<sup>216</sup> Att. 9, TVA, *Transmission System Vegetation Management Program*, <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited August 29, 2017).

<sup>217</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15) (June 2017); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19).

though it has already admitted that the cumulative impact of these activities require it to conduct a programmatic EIS.

Another example comes from TVA's proposal to categorically exclude all of its implementing actions for its Natural Resource Plan. In proposed CEs 22–32, TVA proposes to categorically exclude the activities it takes to implement its wetlands, terrestrial ecosystem, forest, invasive species, and recreational lands management programs.<sup>218</sup> As TVA itself has recognized, the cumulative effects of actions taken under these CEs require an EIS—most recently, the Natural Resource Plan programmatic EIS. TVA conducted the Natural Resource Plan EIS because of the significant environmental effects that arise from the cumulative actions taken under proposed CE 22–32.<sup>219</sup> If the program that creates a framework for these actions requires an EIS, then individual actions taken to implement that framework likely would also have cumulatively significant impacts, requiring additional environmental analysis. TVA's Proposed NEPA Rule would undermine the agency's obligation to disclose and analyze these significant cumulative impacts.

For this reason alone, TVA has failed to provide the required documentation and analysis necessary to support its proposed categorical exclusions. TVA must provide the required cumulative impact analysis before adopting any CEs.

### **C. TVA does not analyze the climate-related impacts of any of the proposed CEs.**

In each and every section analyzing the potential environmental effects of its 50 proposed categorical exclusions, TVA omits any consideration of these activities' effects on greenhouse gas (“GHG”) emissions and climate change. However, NEPA requires that agencies consider these effects.<sup>220</sup> The proposed CEs have the potential to have a significant effect on climate change when applied individually and cumulatively. For example, TVA proposes to categorically exclude in-kind replacement of electricity turbines, the installation of combined heat and power or cogeneration systems (generally natural gas generators), and modifications of

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<sup>218</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* 3-166 (CE 32).

<sup>219</sup> Att. 48, TVA, Natural Resources Plan, Final EIS (July 2011) [hereinafter Natural Resource Plan EIS].

<sup>220</sup> *Sierra Club v. FERC*, Case No. 16-1329, slip op. 24-27 (August 22, 2017), [https://www.cadc.uscourts.gov/internet/opinions.nsf/2747D72C97BE12E285258184004D1D5F/\\$file/16-1329-1689670.pdf](https://www.cadc.uscourts.gov/internet/opinions.nsf/2747D72C97BE12E285258184004D1D5F/$file/16-1329-1689670.pdf); *Sierra Club v. FERC*, 2016 WL 6915536 (D.C. Cir. 2016) (unpublished opinion); *Ctr. Biological Diversity v. Nat'l Highway Traffic Safety Admin. (NHTSA)*, 528 F.3d 1172, 1200 (9th Cir. 2008); *High Country Conservation Advocates v. U.S. Forest Serv.*, 52 F. Supp. 1174, 1191 (D. Colo. 2014); see also Att. 48 (a), CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act Handbook* 2, 7, 9, 13, 24 (Jan. 1997).

its electricity rate structure, each of which when applied individually and cumulatively (and all of which applied together) would have significant direct and indirect effects on greenhouse gas emissions and climate change. However, these effects are not considered (or, in some cases, even mentioned) in the Proposed NEPA Rule.

Similarly, NEPA requires that agencies consider the effects of climate change on a project or proposal.<sup>221</sup> Actions taken under some of the proposed CEs have the potential to be significantly affected by climate change. For example, in CE 26, TVA proposes to categorically exclude the “installation of minor shoreline structures or facilities,” and in CE 22 TVA proposes to categorically exclude the “development of dispersed recreation sites.” The actions described in these proposed CEs, which in many cases would occur along the shoreline and in floodplains, have the potential to be significantly affected by increased storms and flooding that occur as a result of climate change, particularly on a cumulative basis.<sup>222</sup> However, these effects are not considered or even mentioned in the Proposed NEPA Rule.

Finally, in its analysis of the cumulative effects, TVA must consider the effect that climate change has had and is having on the affected environment. “The impact of greenhouse gas emissions on climate change is precisely the kind of cumulative impacts analysis that NEPA requires agencies to conduct.”<sup>223</sup> For example, this analysis is vital when considering the cumulative effects of the actions covered by the transmission CEs (CE 15–20) because these projects would significantly affect federally protected bats.<sup>224</sup>

As an illustration, when considering the cumulative effects of applying CE 16, TVA must consider the incremental impact of the action when added to the effects of climate change on these bats.<sup>225</sup> However, TVA does not even mention climate change (or bats for that matter) when discussing the effects of CE 16 on wildlife.<sup>226</sup> If TVA applies CE 16 even once, it could

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<sup>221</sup> *Nat'l Wildlife Fed'n v. Nat'l Marine Fisheries Serv.*, 184 F. Supp. 3d 861, 875-876 (D. Or. 2016) (environmental analysis insufficient where it did not include analysis of effects of climate change on physical environment as it related to endangered fish population).

<sup>222</sup> See also Part I, Section IV, above, regarding TVA’s treatment of floodplains and wetlands generally, including the requirement under NEPA to employ robust scientific analysis.

<sup>223</sup> *Ctr. for Biological Diversity v. Natl. Hwy. Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008); Att. 48 (a), CEQ, *Considering Cumulative Effects Under the National Environmental Policy Act Handbook 2*, 7, 9, 13, 24 (Jan. 1997).

<sup>224</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20).

<sup>225</sup> *Id.* § 1508.7.

<sup>226</sup> See Att. 2, TVA, CE Support Documentation, 3-54 to 3-57.

clear over 180 acres of forest, which could contain over 79,000 mature trees.<sup>227</sup> These 79,000 trees serve as foraging habitat for the endangered Indiana bat and threatened northern long-eared bat.<sup>228</sup> The U.S. Fish and Wildlife Service has identified climate change as one of the threats to these species.<sup>229</sup> TVA must consider whether the incremental addition of habitat loss, combined with climate change effects, cause significant environmental effects. However, nowhere in its analysis of the environmental effects of applying this or any of the CEs does TVA include the required cumulative analysis of climate change on the affected environment. TVA must conduct this analysis and submit it for public notice and comment before finalizing its CEs.

**D. Lack of specificity in the descriptions of proposed categorical exclusions would allow activities with individually and cumulatively significant environmental effects to fall within exclusions.**

Many of the proposed CEs lack the specificity required by the CEQ Regulations and guidance.<sup>230</sup> For example, many CEs contain language stating they are “generally” limited to only 10-acre, 125-acre, or 250-acre plots of land, or are limited to “minor” actions.

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<sup>227</sup> CE 16 would permit TVA to clear a 10-mile (52,800-foot) by 150-foot area, an area of about 181 acres, for a right-of-way. See Att. 2, TVA, CE Support Documentation, 3-47. We calculated the number of trees per acre using the analysis of the University of Tennessee in a recent report on White Pines. Att. 49, University of Tennessee, *Tree Crops for Marginal Farmland: White Pine with Financial Analysis* 8 (2000), <https://extension.tennessee.edu/publications/Documents/PB1462.pdf> (last visited August 30, 2017) (using the 10-foot by 10-foot spacing estimate of 435 trees/acre).

<sup>228</sup> See TVA, Ashland 161-kV Delivery Point, Environmental Assessment and Finding of No Significant Impact (June 7, 2016).

<sup>229</sup> Att. 50, Wildcat Wind Farm, LLC, *Indiana Bat and Northern Long-eared Bat Habitat Conservation Plan* (May 12, 2016).

<sup>230</sup> 40 C.F.R. § 1507.3(b)(2); Att. 7, CEQ, CE Guidance.

**Table 1. TVA's Unreasonably Broad Language in Categorical Exclusions**

Broad Language	Categorical Exclusions
<b>“minor” action or impacts</b>	11 (health and safety) 13 (preliminary site studies) 14 (research and development) 17 (existing transmission infrastructure)* 24 (use of TVA property) 25 (property transactions) 26 (Section 26a permitting approvals) 27 (TVA shoreline actions)* 28 (modifications to land use allocations in TVA plans) 36 (facilities-based, routine, in-kind activities)* 42 (road improvements)* 47 (modifications to rate structure and associated contracts) 49 (economic development)*
<b>“generally” X acres, miles, or megawatts (MW)</b>	15 (rights-of-way maintenance) 16 (new transmission infrastructure) 17 (existing transmission infrastructure)* 19 (transmission line retirement and rebuilding) 22 (dispersed recreation)* 23 (public use areas)* 27 (TVA shoreline actions)* 29 (wetlands, riparian, and aquatic ecosystem improvements)* 30 (land management and stewardship)* 31 (forest management)* 32 (invasive plant management)* 33 (cultural resource protection)* 37 (facilities-based upgrades and modifications)* 38 (siting, construction, and operation of buildings) 40 (demolition and destruction of structures) 43 (TVA property access)* 45 (renewable energy sources at existing facilities) 49 (economic development)*
<b>“not limited to”</b>	18 (telecommunications and smart grid) 22 (dispersed recreation)* 23 (public use areas)* 29 (wetlands, riparian, and aquatic ecosystem improvements)* 30 (land management and stewardship)* 31 (forest management)* 32 (invasive plant management)* 33 (cultural resource protection)* 36 (facilities-based, routine, in-kind activities)* 37 (facilities-based upgrades and modifications)* 42 (road improvements)* 43 (TVA property access)* 48 (assistance for energy and water programs) 49 (economic development)*

\* Denotes a CE with more than one type of discretionary language

In its guidance on CEs, CEQ explains that the categories for actions should be limited by both their terms and extraordinary circumstances.<sup>231</sup> CEQ advises agencies that the *text of their CEs* must clearly define the eligible category of actions, as well as any physical, temporal, or environmental factors that would constrain its use.<sup>232</sup> TVA's proposed CEs' text, however, is as clear as mud, with the use of discretionary, subjective terms, such as "minor" or "generally."

TVA itself acknowledges the subjectivity of its proposed use of discretionary terms like "minor," "limited," "small," "routine," and "small-scale."<sup>233</sup> TVA proposes that rather than placing explicit limits on its discretion, it will engage in a "significance" determination to ascertain whether a proposed action is "minor" or "limited." TVA's rationale employs circular logic: TVA will consider an activity minor and categorically excluded unless TVA unilaterally determines that it is significant.<sup>234</sup> In contrast to TVA's proposal, the CEQ Regulations require categorical exclusions to be used for activities that the agency has specifically defined in a manner to ensure that they will almost never significantly affect the environment.<sup>235</sup>

Rather than using such broad, subjective terms, TVA must clearly define and limit the actions to which each CE applies. TVA's CE drafting is particularly concerning given that TVA also proposes to keep a tight rein on what qualifies as an "extraordinary circumstance," as argued above in Part I, Sections II.B and K, and that TVA does not consistently require any documentation or public notice of its use of CEs. Taken individually and cumulatively, these proposals would allow TVA to make decisions about almost all of its activities behind closed doors, with no oversight by the public. This proposal contradicts the purpose and role of NEPA in agency decision making. Therefore, TVA must reconsider its proposal and ensure that the CEs are the exception, not the rule.

In addition to correcting its CEs to comply with CEQ regulations and guidance, TVA should also proactively incorporate CEQ's guidance on CEs. CEQ advises agencies to limit the geographic applicability of a CE to a specific region or environmental setting,<sup>236</sup> rather than

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<sup>231</sup> Att. 7, CEQ, CE Guidance, 2.

<sup>232</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>233</sup> Att. 2, TVA, CE Support Documentation, 2-2 ("TVA recognizes that these descriptors are subjective and does not propose to define these terms.").

<sup>234</sup> We note that TVA's determination regarding what constitutes a "minor" activity has been questioned by the Court of Appeals for the Sixth Circuit. See *Help Alert Kentucky, Inc. v. Tennessee Valley Authority*, 191 F.3d 452, \*4 (6<sup>th</sup> Cir. 1999) (unpublished opinion) ("TVA's conclusion that the logging activity in the work areas at issue is 'minor' strikes us as somewhat more problematic.")

<sup>235</sup> See 40 C.F.R. §§ 1507.3(b)(2)(ii); 1508.4; Att. 7, CEQ, CE Guidance 2.

<sup>236</sup> Att. 7, CEQ, CE Guidance, 5.

across the 293,000 acres of land and 11,000 miles of shoreline for which TVA is responsible.<sup>237</sup> CEQ recommends that where appropriate, agencies limit the frequency with which a CE is used in a particular area,<sup>238</sup> rather than permitting a CE to be used contiguously across thousands of acres of land and miles of shoreline.<sup>239</sup> Therefore, TVA should include limits on the contiguous application of each CE, and should limit the geographic availability of each CE, without use of the term “generally,” as required to ensure that sensitive resources are not significantly affected.

Finally, TVA itself has described the misuse of CEs by its staff. TVA cites many examples where its review of the application of a CE to a particular project demonstrated how TVA staff were “unclear which of the current CEs are appropriately applied” for specific actions.<sup>240</sup> In these instances, TVA explains that staff incorrectly applied a CE to an action that *should not have exempted that activity*.<sup>241</sup> Now, rather than providing clear and defined CE text to guide its staff, TVA proposes broad and unwieldy language that is sure to lead to continued confusion.

Specific examples of broad CE language will be outlined in the sections below.

#### **E. TVA’s cited EAs and EISs do not support TVA’s proposed categorical exclusions.**

Throughout TVA’s supporting documentation for its proposed CEs, TVA cites to existing EAs and EISs as support for concluding that activities that would fall under the proposed CE would not have significant environmental effects.<sup>242</sup> However, these examples are often defective because they include and condition findings of no significant impact on mitigation factors, demonstrate the need for broader environmental review, or show TVA’s attempts to avoid tiering site- and project-specific analyses to its programmatic reviews.<sup>243</sup> CEQ guidance

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<sup>237</sup> Att. 1, TVA, Environmental Stewardship.

<sup>238</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>239</sup> None of the proposed CEs limit their contiguous use, thus, TVA may segregate the 293,000 acres of land and 11,000 miles of shoreline into 10 mile, 100 acre, or 250 acre parcels when applying CEs.

<sup>240</sup> *See, e.g.*, Att. 2, TVA, CE Support Documentation, 3-23.

<sup>241</sup> *Id.*

<sup>242</sup> *See, e.g.*, Att. 2, TVA, CE Support Documentation, 3-30 (citing TVA’s experience with relevant TVA EAs and EISs for CE 13). Note that TVA also cites to CE checklists (CEC) that are not publicly available. AWLX submitted a FOIA request and request for expedited treatment. However, TVA was unable to provide the CECs prior to the end of the comment period. Therefore, undersigned groups are unable to comment on whether the CECs support TVA’s proposed CEs.

<sup>243</sup> Conservation Groups note that these defects are apparent from the EAs and EISs that were made available on TVA’s website. Many of the EAs and EISs are not publicly available, and TVA did not timely provide its CE

explains that agency's previous EAs and EISs are useful for analyzing the environmental effects of a proposed CE. However, there are requirements for that analysis.

Where a cited FONSI or ROD includes mitigation measures, an agency must ensure that these measures are an "integral component" of the actions included in the CE.<sup>244</sup> Many of TVA's cited NEPA documents include mitigation.<sup>245</sup> We have created a table of the mitigation measures adopted in each of the FONSIs and RODs to which we timely had access.<sup>246</sup> However, none of the corresponding CEs include such mitigation or other inherent limitations on their application.

TVA proposes to allow itself to mitigate activities and then apply CEs. But even if TVA includes mitigation, its proposed implementing regulations would allow TVA to release itself from any mitigation commitments.<sup>247</sup> If TVA goes forward with its proposal, it must comply with CEQ guidance and make the mitigation from cited FONSIs and RODs an "integral component" of its proposed CEs.

CEQ also demands that when citing an EIS for support, an agency must ensure that the EIS specifically addresses the environmental effects of the independent proposed action and determines that those effects are not significant.<sup>248</sup> The cited EISs to which the undersigned groups had reasonable access do not encompass all of the actions that would be included in the proposed CEs. Moreover, they do not specifically address the direct, indirect, individual, and cumulative effects of applying the proposed CEs individually and cumulatively. Nor does TVA direct the public to the relevant portion of the EAs and EISs that provides this detailed and specific analysis.

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supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above.

<sup>244</sup> Att. 7, CEQ, CE Guidance, 7.

<sup>245</sup> *See, e.g., TVA, Calhoun, Georgia—Area Power System Improvements, Finding of No Significant Impact* (Apr. 26, 2016) ("This finding of no significant impact is contingent upon adherence to the mitigation measures described.").

<sup>246</sup> Att. 36, Memorandum from Southern Environmental Law Center on Survey of Publicly-Available EAs and EISs, (Aug. 4, 2017). The Southern Environmental Law Center compiled this table during the comment period based on the NEPA documents publicly available on TVA's website. SELC filed FOIA requests for the remaining documents, but our request for expedited treatment was twice denied. Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above.

<sup>247</sup> *See* Part I, Section II.J, above.

<sup>248</sup> CEQ, CE Guidance, 7–8.

This defect is particularly salient for the CEs that cite to programmatic documents, because those programmatic documents assume that a tiered EA or EIS would perform the required level of analysis for the actions that are covered by a CE.<sup>249</sup> As CEQ explicitly states in its CE guidance document, CEs should not be established or used for any segment or interdependent part of a larger proposed action.<sup>250</sup>

Specific examples will be outlined in the comments below.

**F. The benchmarking examples cited by TVA do not support the CEs as written.**

In the Supporting Documentation, TVA frequently relies on its purported “benchmarking” of a CE against CEs adopted by other agencies. As noted above, CEQ guidance advises caution in relying on other agencies’ CEs. CEQ explains that, in order to rely on another agency’s categorical exclusion, an agency should consider: “(1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidelines (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.”<sup>251</sup>

The Supporting Documentation provides none of this contextual information. As described in Part III below, in most cases, the contextual information would counsel *against* adoption of the CE. The Supporting Documentation relies primarily on the plain language of other agencies’ CEs. But in most cases, not even the plain language of other agencies’ CEs supports TVA’s broadly worded CEs. TVA frequently omits the specificity other agencies have added to bring their CEs into alignment with NEPA and the CEQ Regulations.

For these reasons, TVA’s benchmarking exercise is a hollow one. Other agencies’ CEs provide little, if any, support for TVA’s proposed CEs.

**III. TVA’s proposed CEs segment activities in a manner that avoids NEPA review of activities that, considered together, would require an environmental assessment or environmental impact statement.**

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<sup>249</sup> Att. 51, TVA, Natural Resource Plan Record of Decision, 76 Fed. Reg. 57,100 (Sept. 15, 2011) [hereinafter TVA, Natural Resources Plan ROD] (promising to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”).

<sup>250</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>251</sup> *Id.*

In the Proposed NEPA Rule, TVA effectively segments broader actions so that it can avoid environmental review of those activities. Many of the proposed CEs should be considered together because of their similar scope, activity, or purpose. *See* Table 2.

**Table 2. TVA’s Proposed Segmentation of Agency Actions Subject to NEPA Review**

<b>Binding Characteristic</b>	<b>Related CEs</b>
<b>Transmission Development and Maintenance</b> - Activities that tier to TVA’s Transmission System Vegetation Management Program	15 (rights of way maintenance) 16 (new transmission infrastructure) 17 (existing transmission infrastructure) 18 (telecommunications and smart grid) 19 (transmission line retirement and rebuilding) 20 (transmission transactions)
<b>Road Development and Management</b> -	41 (road maintenance) 42 (road improvements) 43 (TVA property access)
<b>Natural Resource Management</b> - Activities that tier to TVA’s Natural Resource Plan	22 (dispersed recreation) 23 (public use areas) 24 (use of TVA property) 25 (property transactions) 26 (section 26a permitting approvals) 27 (TVA shoreline actions) 28 (modifications to land use allocations in TVA plans) 29 (wetlands, riparian, and aquatic ecosystems improvements) 30 (land management and stewardship) 31 (forest management) 32 (invasive plant management) 33 (cultural resources protection)
<b>Electricity Regulation</b> - Activities that tier to TVA’s Integrated Resource Plan	21 (power plant acquisition) 36 (facilities-based, routine, in-kind activities) 37 (facilities-based upgrades and modifications) 38 (siting, construction, and operation of buildings) 40 (demolition and disposal of structures) 44 (waste management and cleanup) 45 (renewable energy sources at existing facilities) 46 (small hydropower systems) 47 (modifications to rate structure and associated contracts)

NEPA requires environmental reviews to analyze “[c]onnected actions,” which are actions that (1) automatically trigger other actions that may require environmental review; (2) cannot or will not proceed unless other actions are taken previously or simultaneously; and (3) are interdependent parts of a larger action and depend on the larger action for their justification. NEPA also requires environmental reviews to analyze “[s]imilar actions,” which when viewed with other reasonably foreseeable or proposed agency actions have the similarities

that provide a basis for evaluating their environmental consequences together, such as common timing or geography.<sup>252</sup> Impermissible segmentation occurs where a major federal action breaks off a small part of a broader action to escape application of the NEPA process.<sup>253</sup> The hallmark examples of improper segmentation are (1) where one proposed component action would be meaningless or obsolete without the other action, and (2) where completing one proposed component action force a larger or related project to go forward notwithstanding the environmental consequences.<sup>254</sup> Moreover, regionally applied activities generally require a cumulative environmental review.<sup>255</sup>

Many of these CEs include actions that are at least “similar” if not also “connected.” TVA could not maintain transmission line infrastructure without first constructing those lines. They apply to a set region, TVA’s service territory. And they have been or are being analyzed in a programmatic document, meaning they are interdependent parts of a larger action. The natural resource management CEs cite to the Natural Resource Plan, the programmatic analysis to which these implementing actions would normally tier but instead are covered by these proposed CEs.

TVA’s proposed CEs permit the impermissible segmentation of activities that, when taken together, would require NEPA review. Therefore, these CEs should be abandoned, and TVA should analyze their underlying actions in grouped NEPA analyses, tiering to the relevant programmatic EIS.

#### **IV. TVA may not create CEs for activities that would normally tier to programmatic EAs and EISs.**

TVA proposes to engage in the exact “shell game” that CEQ has been working to avoid for programmatic NEPA analyses.<sup>256</sup> In the Proposed NEPA Rule, TVA fails to prevent situations where the public is too early to raise issues in the broader programmatic analysis and then too late to raise them in any subsequent tiered analysis, as advised by CEQ guidance.<sup>257</sup> And with its proposed CEs, TVA is making it impossible for the public to engage on project- and site-specific actions. *See* Table 3.

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<sup>252</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>253</sup> *Tenn. Env’tl Council*, 32 F. Supp. 3d at 890.

<sup>254</sup> *Hirt v. Richardson*, 127 F. Supp. 2d 833, 842 (W.D. Mich. 1999) (citing *Maryland Conservation Council v. Gilchrist*, 808 F.2d 1039 (4th Cir.1986); *Bragg v. Robertson*, 54 F.Supp.2d 635, 649 (S.D.W.Va.1999)).

<sup>255</sup> *Id.* (citing *Kleppe v. Sierra Club*, 427 U.S. 390, 410 (1976); *Pub. Serv. Co. v. Andrus*, 825 F.Supp. 1483, 1501 (D. Idaho 1993)).

<sup>256</sup> Att. 10, CEQ Programmatic Guidance, 8, n. 10.

<sup>257</sup> Att. 10, CEQ Programmatic Guidance, 25.

**Table 3. TVA's NEPA Shell Game**

<b>Programmatic NEPA Analysis</b>	<b>CEs Implementing Programmatic Activity</b>
<b>Natural Resource Plan EIS (2011)</b>	22 (dispersed recreation) 23 (public use areas) 24 (use of TVA property) 25 (property transactions) 26 (section 26a permitting approvals) 27 (TVA shoreline actions) 28 (modifications to land use allocations in TVA plans) 29 (wetlands, riparian, and aquatic ecosystem improvements) 30 (land management and stewardship) 31 (forest management) 32 (invasive plant management) 33 (cultural resources protection)
<b>Shoreline Management Initiative EIS (1999)</b>	27 (TVA shoreline actions) 28 (modifications to land use allocations in TVA plans) 29 (wetlands, riparian, and aquatic ecosystem improvements) 33 (cultural resources protection)
<b>TVA Solar Photovoltaic Projects Programmatic EA (2014)</b>	45 (renewable energy sources at existing facilities)
<b>Integrated Resource Plan EIS (2015)</b>	16 (new transmission infrastructure) 17 (existing transmission infrastructure) 19 (transmission line retirement and rebuilding) 20 (transmission transactions) 45 (renewable energy sources at existing facilities) 46 (small hydropower systems) 48 (assistance for energy and water programs)
<b>Transmission System Vegetation Management Program (ongoing)</b>	16 (new transmission infrastructure) 17 (existing transmission infrastructure) 19 (transmission line retirement and rebuilding) 20 (transmission transactions)

CEQ CE guidance prohibits an agency from avoiding project- or site-specific NEPA analysis by categorically excluding these activities.<sup>258</sup> TVA's proposed CEs would categorically exclude nearly all of the implementing activities that would normally tier to program-level environmental analyses. For example, the CEs for the development of recreation areas, installation of shoreline structures, modifications to land use plans, and actions at wetlands, riparian, and aquatic ecosystems all cite to TVA's Natural Resource Plan EIS as support for the

<sup>258</sup> Att. 7, CEQ, CE Guidance, 5.

CEs.<sup>259</sup> The Natural Resource Plan EIS provided a programmatic review “evaluat[ing] various approaches to management of biological, cultural, water, and recreation resources; public engagement; and reservoir lands planning.”<sup>260</sup> The plan explicitly states that TVA will “[c]onduct[e] site and/or activity-specific environmental reviews of its actions to implement the [natural resource plan].”<sup>261</sup> As demonstrated above, TVA’s proposed CE 22–33 all implement the Natural Resource Plan and would now go without site- and project-specific NEPA analysis under TVA’s proposal, even though TVA promised to conduct this analysis in its programmatic EIS.

In addition to these examples, TVA is also proposing to allow itself to apply mitigated CEs. Mitigated CEs would allow TVA to add mitigation measures to avoid “extraordinary circumstances” so that a CE would still apply. Combining this allowance with TVA’s other proposals, TVA can:

- Conduct a programmatic NEPA analysis, analyzing only broad, big-picture environmental effects;
- Determine that its implementing actions could have significant environmental effects or includes extraordinary circumstances;
- Mitigate those significant environmental effects or extraordinary circumstances;
- Categorically exclude these actions (so long as they fit within a unreasonably broadly defined CE category, even if the proposed action might have significant environmental effects or extraordinary circumstances);<sup>262</sup>
- Remove the mitigation requirements.

Thus, in the Proposed NEPA Rule, TVA has created the exact “shell game” that CEQ has worked to avoid in NEPA implementation.

Other examples are highlighted in the below sections.

**V. TVA should ensure that the application of all categorical exclusions is documented and made publicly available on TVA’s website.**

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<sup>259</sup> Att. 2, TVA, CE Support Documentation, 3-4 (CE 1); *id.* at 3-94

<sup>260</sup> Att. 51, TVA, Natural Resource Plan, ROD.

<sup>261</sup> Att. 48 TVA, Natural Resource Plan EIS vol. 1, at 118.

<sup>262</sup> Even if they don’t neatly fit in one of these categories, TVA has admitted that staff have *still* applied an inappropriate CE to these types of activities. *See, e.g.*, Att. 2, TVA, CE Support Documentation, 3-23, 3-48, 3-93, 3-140.

TVA proposes not to require any documentation of the application of a CE. In its most recent CE guidance, CEQ explains that agencies should consider whether CEs warrant documentation, which TVA has already done in its current operations.<sup>263</sup> However, even though TVA explains that it is already documenting the use of CEs, and already storing them electronically, it states that it is not promulgating any documentation requirements and it is not making TVA's ENTRAC database—which holds its CE documentation—publicly available.<sup>264</sup> TVA's promise that employees will document these CEs is an empty one. Thus, TVA should promulgate documentation requirements for the application of any and all of its CEs. Furthermore, Conservation groups request that TVA make this documentation and ENTRAC publicly available on its website, and establish a register for interested parties to supply contact information to be notified of any actions in sufficient time to participate in the process.

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<sup>263</sup> See Att. 2, TVA, CE Support Documentation, 3-46 (explaining that staff would normally complete a CE checklist in TVA's ENTRAC database for the application of CE 15).

<sup>264</sup> See, e.g., Att. 2, TVA, CE Support Documentation, 3-100.

### **PART III: COMMENTS ON SPECIFIC PROPOSED CATEGORICAL EXCLUSIONS**

The analyses and attachments discussed in Parts I and II, above, provide important context and explication for the analyses presented in this section for each individual proposed CE. Accordingly, the analyses and attachments discussed in Parts I and II are incorporated by reference into the analysis of each CE discussed in this Part.

#### **I. CE 6—Electricity Contracts**

TVA proposes to amend an existing CE that categorically excludes “contracts or agreements for the sale, purchase, or interchange of electricity.” The amended text of CE 6 would read: “Transactions (contracts or agreements) for the sale, purchase, or interchange of electricity not resulting in the construction and operation of new generating facilities or major modifications to existing generating facilities and associated electrical transmission infrastructure.”

Proposed CE 6 lacks the specificity required by NEPA and the CEQ Regulations to ensure that no significant environmental impacts will occur as a result of application of the CE.<sup>265</sup> In particular, CE 6 does not contain language that would ensure that relevant environmental impacts—specifically greenhouse gas (GHG) and conventional air pollution—would not occur as the result of a particular decision to enter into a contract or cumulative decisions to enter into contracts for the sale or purchase of electricity. Instead, CE 6 focuses solely on whether the sale or purchase would result in new physical infrastructure, a metric that would not adequately evaluate potentially relevant air and GHG emissions and other impacts or provide sufficient guidance to TVA staff to do so. Nor does TVA’s proposed “extraordinary circumstances” procedure provide such guidance.<sup>266</sup>

The failure to include limits on GHG and air emissions is particularly troubling because of the changing nature of the utility marketplace, in which utilities frequently purchase generation owned by third parties. Indeed, in its 2015 Integrated Resource Plan, TVA evaluated a strategy in which its capacity additions derived primarily from power purchase agreements for natural gas and renewable energy.<sup>267</sup>

Moreover, the initial choice whether to enter into a particular contract or agreement itself may have direct and indirect environmental impacts, including but not limited to carbon and conventional air pollution impacts. By proposing to categorically exclude electricity contracts without limiting application to situations where the contract will definitively *not* have such

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<sup>265</sup> See Part II, Section II. D, above.

<sup>266</sup> See Part I, Sections II.B and K; Part II, Section II.D, above.

<sup>267</sup> Att. 52, TVA, *Integrated Resource Plan* at 61, 83-84 (2015).

impacts, TVA undermines the requirement that agencies consider reasonable alternatives to a proposed action—the component that CEQ calls “the heart of the environmental impact statement.”<sup>268</sup> It is not sufficient to claim—without support—that the emissions and other impacts would occur anyway because some other party would purchase the electricity.<sup>269</sup> Yet this claim is implicit in TVA’s conclusion that CE 6 would not have individually or cumulatively significant effects.

TVA provides no support for its proposed CE 6 derived from its own CECs, EAs, or EISs. Nor does TVA provide any support for its proposed CE 6 based on benchmarking other agency’s CEs.

TVA should promulgate documentation requirements that would require that application of CE 21 be documented and be made publicly available on TVA’s website.<sup>270</sup>

TVA should adjust CE 6 so that it complies with the requirements of NEPA, including making it applicable only to contracts or agreements that do not result in *any* increases of GHG or conventional air pollution or other impacts in addition to the existing infrastructure-oriented limitation, or TVA should withdraw both the existing CE and proposed CE 6.

## II. CE 15—Rights of Way Management

In CE 15, TVA proposes to categorically exclude the tree removal, vegetation management, and access road construction that it undertakes when maintaining rights-of-way for transmission and utility lines.<sup>271</sup> This proposal would not limit or define which trees (called “danger trees”) TVA can remove nor does it limit or define “routine” vegetation management.<sup>272</sup> The proposed CE would “generally” allow TVA to construct a road of no more than one mile outside of the right-of-way.<sup>273</sup> In addition, although not set out in the language of CE 15, TVA also includes erosion control and bank stabilization in its description of activities that this CE covers.<sup>274</sup>

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<sup>268</sup> 40 C.F.R. § 1502.14.

<sup>269</sup> See *Montana Environmental Information Center v. U.S. Office of Surface Mining*, 2017 WL 3480262, \*15 (August 14, 2017) (conclusion that there would be no effects from air emissions because other coal would be burned instead was “illogical” and “places [the agency’s] thumb on the scale by inflating the benefits of the action while minimizing its impacts”).

<sup>270</sup> See Part II, Section II. V, above.

<sup>271</sup> Att. 2, TVA, CE Support Documentation, 3-38.

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.* at 3-43. If TVA wishes to cover erosion control and bank stabilization under this CE, it must make that explicit in the language of the CE. Moreover, it must limit the geographic scope of these activities and take a “hard look” their environmental effects.

With such unreasonably broad language,<sup>275</sup> this CE could apply to all of TVA's 16,000 miles of transmission lines, 100,000 transmission line structures, over 200,000 acres of rights-of-way, and more than 500 substations.<sup>276</sup> For comparison, Interstate 95 is approximately 1,900 miles long, about one-tenth the length of TVA's existing transmission system.<sup>277</sup> CE 15 would apply to all of the tree removal, vegetation management, and access road construction across this massive area.

CE 15 does not limit the scope of tree removal or vegetation management that TVA would be permitted to categorically exclude.<sup>278</sup> Arguably, the language of the CE would permit TVA to remove so-called danger trees and manage the vegetation on all 200,000 acres of rights-of-way, the size of about 3.6 million average-sized homes.<sup>279</sup> However, as demonstrated by *Sherwood v. TVA*, TVA has conceded that it must conduct an EIS for such broad tree clearing and vegetation management practices, and certainly cannot categorically exclude these activities, because of their significant direct, indirect, and cumulative effects.<sup>280</sup> Trimming a few branches off a tree may have an insignificant environmental effect, but doing the same for all of the trees within a 200,000 acre area would cause significant, long-lasting effects on the environment, especially threatened and endangered bat species.

Moreover, TVA's proposal to "generally" limit road construction to no more than one mile is meaningless and arbitrary.<sup>281</sup> By including "generally," TVA permits itself to construct roads that exceed one mile whenever it wants. TVA does not explain whether any distance must separate these 1-mile roads. And TVA does not explain how limiting the roads to one mile or less leads to insignificant effects. Because under the proposed CE language TVA could construct contiguous roads of any length, one next to the other, the application of this CE could have significant direct, indirect, and cumulative environmental effects.<sup>282</sup>

TVA's cited EAs and EISs do not support CE 15 because they are mitigated FONSI's, and the proposed CE does not substantially integrate these mitigation measures into its language.<sup>283</sup>

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<sup>275</sup> See Part II, Section II.D (Specificity), above.

<sup>276</sup> Att. 2, TVA, CE Support Documentation, 3-38.

<sup>277</sup> Interstate 95 is approximately 1,900 miles long. Wikipedia, Interstate 95, Aug. 24, 2017, [https://en.wikipedia.org/wiki/Interstate\\_95](https://en.wikipedia.org/wiki/Interstate_95).

<sup>278</sup> Att. 2, TVA, CE Support Documentation, 3-38.

<sup>279</sup> See Washington Grown, What Does an Acre Look Like?, <http://www.wagrown.com/what-does-an-acre-look-like> (last visited Aug. 29, 2017).

<sup>280</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017). Indeed, as discussed further below, TVA has already conducted scoping for a proposed EIS. TVA, Transmission System Vegetation Management Program, <https://www.tva.gov/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited Aug. 29, 2017).

<sup>281</sup> Att. 2, TVA, CE Support Documentation, 2-38.

<sup>282</sup> See Part II, Sections II.A-C.

<sup>283</sup> See Part II, Section E.

Moreover, the voltage of a transmission line has direct implications on the environmental impact of that line.<sup>284</sup> Because of the voltage of the transmission lines reviewed in the cited EAs, these documents do not support CE 15's proposal to manage rights-of-way for all voltages. It is essential for TVA to provide NEPA documentation supporting the maintenance of rights-of-way for the specific voltages that it proposes to cover under this CE. Specifically,

- Calhoun, Georgia—Area Power System Improvements EA, Ashland 161-kV Delivery Point EA, Selmer-West Adamsville 161-kV Transmission Line and Switching Station EA, Union-Tupelo No.3 161-kV Transmission Line EA, and Putnam-Cumberland, Tennessee—Improve Power Supply Project EA make their FONSI's contingent on adherence to mitigation measures for wetland, state-listed plants, threatened and endangered bats, and protected turtles;<sup>285</sup>

As CEQ sets forth, if an agency cites to FONSI's that include mitigation measures, the agency must ensure that these measures are an “integral component” of the actions included in the CE.<sup>286</sup> Here, the mitigation measures in the cited FONSI's seek to safeguard wetlands, state-listed plants, and protected bats and turtles as well as their habitats,<sup>287</sup> but CE 15 includes none of these mitigation measures.<sup>288</sup> To remedy this error, TVA must make the mitigation measures in the cited CEs “integral component[s]” of its CE language.

TVA's discussion and analysis of the environmental effects of activities applicable to CE 15 is far from a “hard look,” as it includes only conclusory statements with no analysis or cited scientific evidence supporting TVA's conclusions.<sup>289</sup> Instead, TVA cites to its own NEPA analyses, even though they are mitigated FONSI's, to suggest there will not be not significant environmental effects.<sup>290</sup>

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<sup>284</sup> *Id.* at 3-47.

<sup>285</sup> TVA, *Calhoun, Georgia - Area Power System Improvements*, EA and FONSI (Apr. 26, 2016); TVA, *Ashland 161-kV Delivery Point* EA and FONSI (June 7, 2016); TVA, *Selmer-West Adamsville 161-kV Transmission Line and Switching Station* (Jan. 6, 2015); TVA, *Union-Tupelo, No.3 161-kV Transmission Line*, (Oct. 9, 2014); TVA, *Putnam-Cumberland, Tennessee - Improve Power Supply Project*, EA (Nov. 13, 2013). Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above; *see also* Part II, Sections II.E, III-IV.

<sup>286</sup> Att. 7, CEQ, CE Guidance, 7.

<sup>287</sup> TVA, *Calhoun, Georgia - Area Power System Improvements* EA and FONSI (Apr. 26, 2016); TVA, *Ashland 161-kV Delivery Point* EA and FONSI (June 7, 2016); TVA, *Selmer-West Adamsville 161-kV Transmission Line and Switching Station* (Jan. 6, 2015); TVA, *Union-Tupelo No.3 161-kV Transmission Line* (Oct. 9, 2014); TVA, *Putnam-Cumberland, Tennessee - Improve Power Supply Project* EA (Nov. 13, 2013).

<sup>288</sup> Att. 2, TVA, CE Support Documentation, 3-38. In fact, TVA does not even mention these protected species and habitats in its analysis of CE 15's environmental effects. *Id.* at 3-42 to 3-44.

<sup>289</sup> *See* Part II, Section II.A-C, above.

<sup>290</sup> *See* Part II, Section II.E, above.

Further, although these FONSI include mitigation for protected bats, turtles, wetlands, and plants, TVA does not even mention the effects that applying CE 15 would have on these resources.<sup>291</sup> Although TVA claims that “[i]n several cases, a FONSI was reached based on mitigating measures to address impacts not associated with maintenance actions,”<sup>292</sup> the utility does not state that mitigation was unnecessary for maintenance actions in all cases. TVA does not specifically explain whether or when mitigation *was* necessary for maintenance actions and how proposed CE 15 would not include those cases. Nor would TVA’s proposed “extraordinary circumstances” procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>293</sup>

Additionally, all of the transmission CEs have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation, the cumulative effects of climate on the environment, and the effects that climate change would have on new and existing transmission infrastructure.<sup>294</sup>

**Table 4. Environmental Effects of Existing Transmission Lines Based on TVA Estimates<sup>295</sup>**

	<b>10-miles of transmission lines</b>	<b>16,000-miles of transmission lines</b>
<b>Land use impacts</b>	122 acres affected	195,200 acres affected
<b>Wetlands Impacts</b>	12 acres affected	24,000 acres affected
<b>Forested Wetlands Impacts</b>	0.3 acres affected	480 acres affected
<b>Stream Impacts</b>	15 stream crossings	24,000 stream crossings

<sup>291</sup> See Att. 2, TVA, CE Support Documentation, 3-42 to 3-44.

<sup>292</sup> Att. 2, TVA, CE Support Documentation, 3-42.

<sup>293</sup> See Part I, Sections II.B and K and Part II, Section II.D, above.

<sup>294</sup> See Att. 53, Nat’l Ass’n Clean Air Agencies, *Implementing EPA’s Clean Power Plan: A Menu of Options* 18-1 to 18-16 (2015) [hereinafter NACAA, *Implementing EPA’s CPP*]; see also Part II, Section II.C.

<sup>295</sup> Att. 52, TVA, 2015 IRP, 193.

<b>Forested Stream Impacts</b>	1 stream crossings	160 stream crossings
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The cited benchmarking examples do not support the broad language and application of CE 15.<sup>296</sup> To rely on another agency’s categorical exclusion, an agency should consider: “(1) characteristics of the actions; (2) methods of implementing the actions; (3) frequency of the actions; (4) applicable standard operating procedures or implementing guidelines (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.”<sup>297</sup>

TVA cites DOE’s CE on the construction of transmission lines as an example, but ignores the major differences between TVA’s and DOE’s transmission systems and service territories.<sup>298</sup> DOE’s CE applies to actions with completely different characteristics, implementation, frequency, timing, and context.<sup>299</sup> Unlike TVA, DOE’s authority to construct transmission lines is extremely limited: Federal law authorizes DOE to coordinate the Federal authorizations needed for siting *other* entities interstate electric transmission projects;<sup>300</sup> designate energy corridors on federal lands;<sup>301</sup> and construct transmission necessary for demonstration projects.<sup>302</sup> TVA, on the other hand, builds and manages a transmission system that currently covers an 80,000-acre service area, including 16,000 miles of transmission lines, 513 substations, over 200,000 acres of rights-of-way.<sup>303</sup>

The distinction between DOE’s and TVA’s transmission-related actions is definite. Therefore, TVA cannot use DOE’s transmission CEs as benchmarking examples, or at least, should recognize the difference between the two agency’s activities and explain why despite these differences, TVA’s CEs will similarly cause insignificant environmental effects. Moreover, the cited DOE CEs do not permit the activities that TVA proposes to cover in this CE.<sup>304</sup> TVA

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<sup>296</sup> See Part II, Section II.F, above.

<sup>297</sup> Att. 7, CEQ, CE Guidance, 9.

<sup>298</sup> Att. 2, TVA, CE Support Documentation, 3-58.

<sup>299</sup> Att. 7, CEQ, CE Guidance, 9.

<sup>300</sup> Energy Policy Act of 2005 (EPA) § 1221(a), 16 U.S.C. § 824p(h); Att. 54, U.S. Dep’t Energy, *Coordination of Federal Transmission Permitting on Federal Lands (216(h))*, <https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/coordination> (last visited Sept. 5, 2017).

<sup>301</sup> EPA 2005 § 368, 16 U.S.C. § 824p(a); Att. 55, U.S. Dep’t Energy, *Energy Corridors on Federal Lands*, <https://energy.gov/oe/services/electricity-policy-coordination-and-implementation/transmission-planning/energy> (last visited Sept. 5, 2017).

<sup>302</sup> See 42 U.S.C. § 16215(a).

<sup>303</sup> See Att. 2, TVA, CE Support Documentation, 3-58.

<sup>304</sup> *Id.* at 3-42 to 3-43.

adds “maintenance of existing transmission line assets” to the activities under the proposed CE, but this activity is not identified in the DOE CE, not described in the background on the CE, and not discussed elsewhere in this CE’s supporting documentation.

Similarly, the actions of the Federal Highway Administration (FHWA) are patently different from TVA’s transmission CEs. FHWA’s cited CE also includes much more specificity and explicitly limits its application to portions of rights-of-way that “have not been disturbed or that are not maintained for transportation purposes.”<sup>305</sup> Therefore, to be supported by the FHWA CE, TVA would need to incorporate the limiting language from that CE. Even then, TVA must analyze FHWA’s CE to see if it sufficiently aligns with the characteristics of CE 15’s actions, the methods of implementing CE 15’s actions, the frequency of CE 15’s actions, the FHWA’s applicable standard operating procedures or implementing guidelines (including extraordinary circumstances); and timing and context of CE 15, including the environmental settings in which the actions take place.<sup>306</sup>

TVA is also preemptively introducing CE 15 as a means to avoid tiering to the programmatic EIS that it is preparing as a result of *Sherwood*.<sup>307</sup> As CEQ has explained, TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>308</sup> That is exactly what TVA proposes to do here.<sup>309</sup>

In addition to avoiding tiering, CE 15 is part of a string of proposed CEs that deal with different aspects of constructing, maintaining, transferring, purchasing, and retiring transmission infrastructure.<sup>310</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>311</sup> TVA could not maintain transmission line infrastructure without first constructing those lines. These transmission CEs apply to a set region: TVA’s service territory. And the actions exempted under these CEs have been or are being analyzed in a programmatic document, meaning they are interdependent parts of a larger action. Therefore, TVA must consider these transmission activities together, which would require tiered EAs or EISs. TVA cannot categorically exclude them.

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<sup>305</sup> *Id.* at 3-44

<sup>306</sup> Att. 7, CEQ, CE Guidance, 9.

<sup>307</sup> See Att. 9, TVA, *Transmission System Vegetation Management Program*, <https://www.tva.gov/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited Aug. 29, 2017).

<sup>308</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>309</sup> See Part II, Section III and IV, above.

<sup>310</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20).

<sup>311</sup> See Part II, Section III and IV, above; see also 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

As argued above, TVA should promulgate documentation requirements that would require that application of CE 15 be documented and be made publicly available on TVA's website.

TVA should either adjust CE 15 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

### III. CE 16—New Transmission Infrastructure

TVA currently has over 16,000 miles of transmission lines, 513 substations, over 200,000 acres of rights-of-way, all covering 80,000 square miles of service territory.<sup>312</sup> And each year, TVA has been adding about 150 miles of new transmission lines, the distance of almost six marathons, along with the accompanying rights-of-ways, substations, and switching stations.<sup>313</sup>

CE 16 would allow TVA to construct new transmission line infrastructure in increments of “generally” 10 miles, as long as they “generally” require no more than 125 acres of new rights-of-way, no more than 1 mile of new access road construction, and support facilities that physically disturb no more than 10 acres.<sup>314</sup> The inclusion of the term “generally” means that the explicit 10-mile limitation is meaningless.<sup>315</sup> Even if the 10-mile limit had a meaning, TVA provides no rationale for why a 10-mile transmission line does not have significant environmental effects, while an 11-mile transmission line would. Furthermore, without limiting the contiguous application of CE 16, TVA could simply break up a 150-mile, 1,000-mile, 10,000-mile stretch of new transmission infrastructure into 10-mile increments and categorically exclude all of its activities. Although in its description, TVA maintains it would limit the length of 500 kV transmission lines to less than 10 miles because of these lines require wider rights-of-way, nothing in the CE's language reflects this limitation.<sup>316</sup>

The application of this CE across TVA's 80,000 square mile service territory would have significant direct, indirect, and cumulative environmental effects.<sup>317</sup> TVA explains that the construction of new transmission infrastructure requires the removal of most trees and shrubs across the entire new right-of-way. For a 10-mile 500-kV line (which requires a 150-foot corridor), clearing a new right-of-way could mean removing over 79,000 mature trees.<sup>318</sup> Extend

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<sup>312</sup> Att. 2, TVA, CE Support Documentation, 3-47.

<sup>313</sup> *Id.*

<sup>314</sup> Att. 2, TVA, CE Support Documentation, 3-47.

<sup>315</sup> See Part II, Section II.D (Specificity), above.

<sup>316</sup> *Id.* at 3-49.

<sup>317</sup> See Part II, Section II.A-C, above.

<sup>318</sup> We calculated the square feet of 10-mile (52,800 foot) right-of-way corridor for a 500-kV line: 150 ft X 52800 ft = 7920000 ft<sup>2</sup>. We converted the square feet back into acres: 7920000 ft<sup>2</sup>/43560 = 181.82 acres. Then we calculated the number of trees per acre using the analysis of the University of Tennessee in a recent report on White Pines

that to the approximately 150-miles that TVA has been adding annually, and under this CE, TVA could clear nearly 1.2 million mature trees per year without any of its activities requiring NEPA analysis.<sup>319</sup> TVA’s own estimates show that applying a CE to new 10-mile transmission lines would have significant individual and cumulative effects. See Table 5.

**Table 5. Environmental Effects of New Transmission Lines Based on TVA Estimates<sup>320</sup>**

	<b>10-mile transmission line</b>	<b>150-mile transmission line</b>
<b>Land use impacts</b>	122 acres affected	1830 acres affected
<b>Forest Cleared</b>	56 acres cleared (>24,300 trees)	840 acres cleared (>365,000 trees)
<b>Wetlands Impacts</b>	7 acres affected	105 acres affected
<b>Forested Wetlands Impacts</b>	4 acres affected	60 acres affected
<b>Stream Impacts</b>	34 stream crossings	510 stream crossings
<b>Forested Stream Impacts</b>	12 stream crossings	180 stream crossings

If, as TVA concedes, it must prepare an EIS for tree clearing and vegetation management practices for *existing* transmission infrastructure, it must do the same for constructing new

using the 10-foot by 10-foot spacing estimate. UT, *Tree Crops for Marginal Farmland: White Pine with Financial Analysis* 8 (2000), <https://extension.tennessee.edu/publications/Documents/PB1462.pdf>. 181.82 acres X 435 trees/acre = 79090 trees.

<sup>319</sup> Using the same calculations described in note 319, assuming that the transmission lines are 500-kW lines.

<sup>320</sup> Att. 52, TVA, 2015 IRP, 193

transmission infrastructure, because of this activity's significant direct, indirect, and cumulative effects.<sup>321</sup> Moreover, TVA should demonstrate that these additional transmission lines are necessary and that no-wires alternatives would be ineffective.<sup>322</sup> Additionally, all of the transmission CEs have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation.<sup>323</sup>

TVA's cited EAs and EISs do not support CE 16 because they are mitigated FONSI, and the proposed CE does not substantially integrate these mitigation measures into its language.<sup>324</sup> Moreover, the EAs described by TVA similarly do not support proposed CE 16—e.g., all four EAs involve 161-kV lines, which would require smaller rights-of-way than a 500-kV line.<sup>325</sup> Specifically,

The Calhoun, Georgia—Area Power System Improvements, Ashland 161-kV Delivery Point EA, Memphis Regional Megasite Power Supply, Selmer-West Adamsville 161-kV Transmission Line and Switching Station, Union-Tupelo No.3 161-kV Transmission Line, Putnam-Cumberland, Tennessee—Improve Power Supply Project, Montpelier 161kV Transmission Line, New 161kV Transmission Line Tap to Spencer, Red Hills-Kosciusko 161-kV Transmission Line, Rugby-Sunbright Power Supply Improvements FONSI are contingent on adherence to mitigation measures for wetland, state-listed plants, threatened and endangered bats, and protected turtles.<sup>326</sup> As CEQ sets forth, if an agency cites to FONSI that include mitigation measures, the agency must ensure that these measures are an “integral component” of the actions included in the CE.<sup>327</sup> Here, the mitigation measures in the cited FONSI seek to safeguard wetlands, state-listed plants, and protected bats and turtles as well as their habitats,<sup>328</sup>

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<sup>321</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

<sup>322</sup> FERC Order 1000, 136 FERC ¶ 61,051 (July 21, 2011).

<sup>323</sup> Att. 53, NACAA, Implementing EPA's CPP, 18-1 to 18-16.

<sup>324</sup> See Part II, Section II.E, above.

<sup>325</sup> See Section II, Part II.E, above; TVA CE Supporting Documentation, 3-53 to 3-54. Note that none of these EAs were publicly available, and Conservation Groups received copies of them with less than two business days to review and comment on the specifics of these documents.

<sup>326</sup> TVA, Calhoun, Georgia - Area Power System Improvements EA and FONSI (Apr. 26, 2016); TVA, Ashland 161-kV Delivery Point EA and FONSI (June 7, 2016); Memphis Regional Megasite Power Supply EA (Feb. 16, 2016); Selmer-West Adamsville 161-kV Transmission Line and Switching Station (Jan. 6, 2015); Union-Tupelo No.3 161-kV Transmission Line (Oct. 9, 2014); Putnam-Cumberland, Tennessee – Improve Power Supply Project EA (Nov. 13, 2013); Montpelier 161kV Transmission Line EA (Feb. 24, 2017); New 161kV Transmission Line Tap to Spencer EA (Feb. 18, 2016); Red Hills-Kosciusko 161-kV Transmission Line EA (Jan. 25, 2017); Rugby-Sunbright Power Supply Improvements EA (Feb. 16, 2017). Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV.

<sup>327</sup> Att. 7, CEQ, CE Guidance, 7.

<sup>328</sup> See TVA, Calhoun, Georgia - Area Power System Improvements EA and FONSI (Apr. 26, 2016); TVA, Ashland 161-kV Delivery Point EA and FONSI (June 7, 2016); Memphis Regional Megasite Power Supply EA (Feb. 16,

but CE 16 includes none of these mitigation measures in its text.<sup>329</sup> To remedy this error, TVA must make the mitigation measures in the cited CEs “integral component[s]” of its CE language.

TVA did not take a “hard look” at the environmental effects of activities applicable to CE 16. It includes conclusory statements with no analysis or cited scientific evidence supporting TVA’s conclusions.<sup>330</sup> TVA cites to its own NEPA analyses, even though they are mitigated FONSIIs, so that there are not significant environmental effects.<sup>331</sup> In the case of wildlife effects, TVA cites no authority for its conclusion that the application of this CE individually and cumulatively will have no significant effect on the state- and federally protected species cited in the mitigated FONSIIs.<sup>332</sup> TVA similarly ignores any cumulative effects of applying the proposed CE. Nor would TVA’s proposed “extraordinary circumstances” procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>333</sup>

Moreover, TVA provides no analysis of climate effects, even though the activities that apply to CE 16 would have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation, the cumulative effects of climate on the environment, and the effects that climate change would have on new and existing transmission infrastructure.<sup>334</sup> Before finalizing this CE and moving these activities behind closed doors, TVA must conduct the required environmental analysis of direct, indirect, individual, and cumulative effects.

The cited benchmarking examples do not support the broad language and application of CE 16. TVA cites DOE’s CE on the construction of powerlines as an example, but ignores the major differences between TVA’s and DOE’s transmission systems and service territories, as described above.<sup>335</sup> While DOE’s discrete transmission construction projects may not have significant indirect, direct, individual, or cumulative effects, TVA’s construction of contiguous 10-mile transmission lines, and the accompanying rights-of-way and substations, would have significant individual, cumulative, direct, and indirect effects. Therefore, DOE’s CE is an inappropriate benchmark for TVA’s proposed CE 16.

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2016); Selmer-West Adamsville 161-kV Transmission Line and Switching Station (Jan. 6, 2015); Union-Tupelo No.3 161-kV Transmission Line (Oct. 9, 2014); Putnam-Cumberland, Tennessee – Improve Power Supply Project EA (Nov. 13, 2013); Montpelier 161kV Transmission Line EA (Feb. 24, 2017); New 161kV Transmission Line Tap to Spencer EA (Feb. 18, 2016); Red Hills-Kosciusko 161-kV Transmission Line EA (Jan. 25, 2017); Rugby-Sunbright Power Supply Improvements EA (Feb. 16, 2017).

<sup>329</sup> Att. 2, TVA, CE Support Documentation, 3-47. In fact, TVA does not even mention these protected species and habitats in its analysis of CE 16’s environmental effects. *Id.* at 3-54 to 3-57.

<sup>330</sup> See Part II, Section II.A-C, above.

<sup>331</sup> See Part II, Section II.E, above.

<sup>332</sup> See Att. 2, TVA, CE Support Documentation, 3-56.

<sup>333</sup> See Part I, Sections II.B and K, and Part II, Section D, above.

<sup>334</sup> See Att. 2, NACAA, Implementing EPA’s CPP; see also Part II, Section II.C.

<sup>335</sup> *Id.* at 3-58. See Part III, Section II (CE 15); Part II, Section II.D, above.

Similarly, the cited CE from BTOP involves different activities, with different characteristics.<sup>336</sup> BTOP's CE covers constructing buildings that affect no more than 5 acres (without inclusion of a discretionary term like "generally").<sup>337</sup> The Rural Utility Service CE includes more restrictive and specific limits on the application of its CE, such as the length restriction based on the transmission line's voltage.<sup>338</sup> FERC's CE similarly limits the permissible length of a new transmission line eligible for this CE based on the line's voltage.<sup>339</sup> However, FERC goes further by applying the CE to new lines on new rights-of-way that are only one mile or less, rather than TVA's proposed 10 miles.<sup>340</sup>

TVA is also introducing CE 16 as a means to avoid tiering to the programmatic EIS required after *Sherwood* and the EIS for TVA's 2015 IRP.<sup>341</sup> TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>342</sup>

In addition to avoiding tiering, CE 16 is part of a string of proposed CEs that deal with different aspects of constructing, maintaining, transferring, purchasing, and retiring transmission infrastructure.<sup>343</sup> These activities are sufficiently "connected" and "similar" to require TVA to consider them together, as argued above.<sup>344</sup> Therefore, TVA must consider these transmission activities together, which would require tiered EAs or EISs. TVA cannot categorically exclude them.

As argued above, TVA should promulgate documentation requirements that would require that application of CE 16 be documented and be made publicly available on TVA's website.

TVA should either adjust CE 16 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

#### **IV. CE 17—Existing Transmission Infrastructure**

TVA proposes CE 17 as a means to categorically exclude its maintenance and management of all of TVA's 16,000 miles of existing transmission lines, 100,000 transmission

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<sup>336</sup> *Id.* at 3-58.

<sup>337</sup> *Id.*

<sup>338</sup> *Id.* at 3-59.

<sup>339</sup> *Id.*

<sup>340</sup> *Id.*

<sup>341</sup> See Att. 9, TVA, *Transmission System Vegetation Management Program*, <https://www.tva.gov/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited Aug. 29, 2017); see also Part II, Section III and IV., above.

<sup>342</sup> CEQ, CE Guidance, 5; see also Part II, Section III and IV, above.

<sup>343</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20); see also Part II, Section III and IV, above..

<sup>344</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env't'l Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

line structures, over 200,000 acres of rights-of-way, and more than 500 substations.<sup>345</sup> It would permit TVA to categorically exclude its modifications, repairs, and maintenance all existing infrastructure, without limitation on these activities' geographic scope or environmental effects.<sup>346</sup> Under CE 17, TVA could exclude any "minor" addition to existing infrastructure, including transmission line uprates which would require TVA to broaden rights-of-way.<sup>347</sup> Moreover, adjacent and outside of TVA's 200,000 acres of rights-of-way, TVA could construct roads that are "generally" no more than one mile without NEPA review.<sup>348</sup>

TVA must set forth "specific criteria for and identification of" actions that it proposes to categorically exclude from environmental review.<sup>349</sup> However, in CE 17, TVA includes unreasonably broad, discretionary terms that permit TVA to uprate all 16,000 miles of transmission lines, ten-times the length of I-95, as long as it finds this action is "minor."<sup>350</sup> As argued above, TVA's use of "minor" provides it unfettered discretion. The language of the CE also permits TVA to categorically exclude *any and all* changes, repairs, and maintenance on its existing transmission infrastructure.<sup>351</sup> Further, the inclusion of the term "generally," as argued above, removes any meaning from the one-mile limit on road construction.<sup>352</sup> Similar to other CEs, TVA arbitrarily determines there are no significant effects for one-mile roads, without explanation or support. Again, TVA does not limit this CE's contiguous application to roads of any length, one next to the other. The broadness of CE 17's language is demonstrated by TVA's own statement that CE 17 would apply to changes and repairs to "communications-related equipment and structures" even though this CE includes no mention of communications-related infrastructure, focusing instead on electricity transmission infrastructure.<sup>353</sup>

Conservation Groups were unable to determine whether TVA's cited CECs or EAs sufficiently support CE 17 because none were timely made available by TVA.<sup>354</sup> However, assuming these documents are similar to the other "supporting" EAs to which undersigned groups do have access, the EA likely include mitigation measures to ensure that the actions (which would now be covered by CE 17) do not have significant environmental effects, thereby

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<sup>345</sup> Att. 2, TVA, CE Support Documentation, 3-62.

<sup>346</sup> *Id.*

<sup>347</sup> *Id.* TVA demonstrated that higher-voltage lines require wider rights-of-way and therefore have more significant environmental effects. *Id.* at 3-47.

<sup>348</sup> *Id.* at 3-62.

<sup>349</sup> 40 C.F.R. § 1507.3(b)(2); *see also* Att. 4, CEQ, Implementing Guidance; *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007) (rejecting adoption of categorical exclusion where agency failed to include specific limitations on its scope); *see also* Part II, Section II.D, above.

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> *Id.*

<sup>353</sup> *Compare id.* at 3-65 to *id.* at 3-62.

<sup>354</sup> *See* Part I, Section I.VI, above.

requiring an EIS. As CEQ sets forth, if an agency cites to FONSIIs that include mitigation measures, the agency must ensure that these measures are an “integral component” of the actions included in the CE.<sup>355</sup> Thus, assuming the cited EAs include mitigation measures, TVA must make these measures “integral component[s]” of CE 17.

The EAs described by TVA similarly do not support proposed CE 17.<sup>356</sup> For example, all three described EAs involve transmission lines with 161-kV or less.<sup>357</sup> Where the voltage of a transmission line has direct implications on the environmental impact of that line, it is essential for TVA to provide examples supporting the specific voltages that it proposes to cover under this CE.<sup>358</sup>

TVA failed to take a “hard look” at the environmental effects of the individual and cumulative application of CE 17 because it includes only conclusory statements with no analysis or cited scientific evidence supporting TVA’s conclusions.<sup>359</sup> TVA assumes argues that rights-of-way are already developed, even though uprates of existing transmission lines require TVA to broaden rights-of-way into undeveloped and undisturbed woodlands.<sup>360</sup> The FONSIIs cited for CE 16 all demonstrated that tree clearing for rights-of-way have individual and cumulative effects on protected bat, plant, and turtle species.<sup>361</sup> Here, TVA provides no evidence that the same is not true for widening rights-of-way.<sup>362</sup> Additionally, all of the transmission CEs have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation, the cumulative effects of climate on the environment, and the effects that climate change would have on new and existing transmission infrastructure.<sup>363</sup>

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<sup>355</sup> Att. 7, CEQ, CE Guidance, 7.

<sup>356</sup> See Section II, Part II.E, above.

<sup>357</sup> Att. 2, TVA, CE Support Documentation, 3-64 to 3-65.

<sup>358</sup> *Id.* at 3-47.

<sup>359</sup> See Part II, Sections II.A-C, above.

<sup>360</sup> Att. 2, TVA, CE Support Documentation, 3-66; *id.* at 3-47.

<sup>361</sup> See TVA, *Calhoun, Georgia - Area Power System Improvements* EA and FONSI (Apr. 26, 2016); TVA, *Ashland 161-kV Delivery Point* EA and FONSI (June 7, 2016); TVA, *Memphis Regional Megasite Power Supply* EA (Feb. 16, 2016); TVA, *Selmer-West Adamsville 161-kV Transmission Line and Switching Station* (Jan. 6, 2015); TVA, *Union-Tupelo No.3 161-kV Transmission Line* (Oct. 9, 2014); TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project* EA (Nov. 13, 2013); TVA, *Montpelier 161kV Transmission Line* EA (Feb. 24, 2017); TVA, *New 161kV Transmission Line Tap to Spencer* EA (Feb. 18, 2016); TVA, *Red Hills-Kosciusko 161-kV Transmission Line* EA (Jan. 25, 2017); TVA, *Rugby-Sunbright Power Supply Improvements* EA (Feb. 16, 2017). Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above.

<sup>362</sup> See Att. 2, TVA, CE Support Documentation, 3-66.

<sup>363</sup> See Att. 54, Nat’l Ass’n Clean Air Agencies, *Implementing EPA’s Clean Power Plan: A Menu of Options* 18-1 to 18-16 (2015) [hereinafter NACAA, *Implementing EPA’s CPP*]; see also Part II, Section II.C.

Nor would TVA's proposed "extraordinary circumstances" procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>364</sup>

The cited benchmarking examples do not support the broad language and application of CE 17. TVA did not consider the (1) characteristics of the other agencies' actions; (2) methods of implementing those actions; (3) frequency of those actions; (4) applicable standard operating procedures or implementing guidelines (including extraordinary circumstances); and (5) timing and context, including the environmental settings in which the actions take place.<sup>365</sup> As described above, the transmission actions of DOE are distinct from TVA's and therefore DOE's CEs are inappropriate benchmarks.<sup>366</sup> Moreover, the cited CEs are much more restrictive than CE 17, and do not permit the breadth of actions TVA proposes to cover under CE 17.<sup>367</sup> BTOP's cited CE, and TVA's accompanying discussions, focus on telecommunications even though the CE language and title focus exclusively on electricity transmission.<sup>368</sup> Similarly, DHS's CE covers none of the activities proposed in CE 17, and TVA does not discuss how this divergent example supports CE 17.<sup>369</sup> Therefore, these benchmarking examples do not support CE 17.

CE 17, similar to those above, would permit TVA to avoid tiering to the programmatic EIS for TVA's IRP, and TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>370</sup>

In addition to avoiding tiering, CE 17 is part of a string of proposed CEs that deal with different aspects of constructing, maintaining, transferring, purchasing, and retiring transmission infrastructure.<sup>371</sup> These activities are sufficiently "connected" and "similar" to require TVA to consider them together, as argued above.<sup>372</sup> Therefore, TVA must consider these transmission activities together, which would require tiered EAs or EISs. TVA cannot categorically exclude them.

As argued above, TVA should promulgate documentation requirements that would require that application of CE 17 be documented and be made publicly available on TVA's website.

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<sup>364</sup> See Part I, Sections II.A and K and Part II, Section II.D, above.

<sup>365</sup> Att. 7, CEQ, CE Guidance, 9; see also Part II, Section II.C.

<sup>366</sup> Att. 2, TVA, CE Support Documentation, 3-67.

<sup>367</sup> *Id.*

<sup>368</sup> *Id.* at 3-68.

<sup>369</sup> *Id.* at 3-69.

<sup>370</sup> Att. 7, CEQ, CE Guidance, 5; see also Part II, Section III and IV, above.

<sup>371</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20).

<sup>372</sup> 40 C.F.R. § 1508.25(a)(1)-(2); *Tenn. Env't'l Council v. TVA*, 32 F. Supp. 3d 876, 889-90 (E.D. Tenn. 2014); see also Part II, Sections III and IV, above..

TVA should either adjust CE 17 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## V. CE 18—Telecommunications and Smart Grids

In its changes to CE 18, TVA proposes to expand the scope and types of activities covered by the CE, leading to cumulatively significant environmental effects. In addition to the current activities covered by this CE, TVA would allow itself to install fiber optics, electricity transmission control devices, and supporting towers.<sup>373</sup> There is no limit to the length, geographic scope, or environmental impacts that these activities can have under the CE.<sup>374</sup>

The proposed CE text does not set forth “specific criteria for and identification of” the actions that it proposes to categorically exclude.<sup>375</sup> The CE does not limit to the length of fiber optic wire installations permitted, the number of support towers, the scope of the activities, or the environmental effects resulting from these actions. Under the CE’s current language, TVA could cover its 80,000-mile service territory with fiber optic wires and build thousands of support towers, all while avoiding NEPA review and under the protection of CE 18. TVA’s proposed CE 18 cannot be called specific in any way.

Although TVA proposes to greatly expand the scope of this CE, TVA provides no evidence to support CE 18 from its experience with EAs or EISs.<sup>376</sup> Instead, TVA cites to a select group of CECs.<sup>377</sup> Based simply on the description of the cited CECs,<sup>378</sup> CE 18 would (if finalized as proposed) categorically exclude actions that are distinct and significantly broader than those discussed in the cited CECs. TVA fails to take any look, let alone a “hard look” at the potentially significant individual and cumulative environmental effects of applying the amended CE 18.<sup>379</sup> For example, TVA provides no support for its conclusion that installing fiber optic wires across its service territory would cause no significant individual or cumulative effects. TVA includes no discussion of the individual and cumulative environmental effects of the

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<sup>373</sup> TVA, CE Supporting Documentation, 3-71.

<sup>374</sup> *Id.*

<sup>375</sup> 40 C.F.R. § 1507.3(b)(2); *see also* CEQ, Memorandum, Agency Implementing Procedures Under CEQ’s NEPA Regulations (January 19, 1979) ; *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007) (rejecting adoption of categorical exclusion where agency failed to include specific limitations on its scope); *see also* Part II, Section II.D, above.

<sup>376</sup> Att. 2, TVA, CE Support Documentation, 3-71.

<sup>377</sup> *Id.*

<sup>378</sup> Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above..

<sup>379</sup> Att. 2, TVA, CE Support Documentation, 3-71 to 3-72.

expansive activities applicable to CE 18.<sup>380</sup> Nor would TVA’s proposed “extraordinary circumstances” procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>381</sup>

The amendments to CE 18 are disconcerting because TVA’s Board of Directors recently approved a request to execute TVA’s Strategic Fiber Initiative, a \$300 million project that would install 3,500 miles of optical ground wire.<sup>382</sup> TVA has promised to install these wires only after appropriate environmental reviews.<sup>383</sup> Under proposed CE 18, however, TVA could complete this whole project without any NEPA analysis. These activities should require a programmatic analysis, and should not be excluded under this CE.<sup>384</sup>

As argued above, TVA should promulgate documentation requirements that would require that application of CE 18 be documented and be made publicly available on TVA’s website.

TVA should either adjust CE 18 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **VI. CE 19—Transmission Line Retirement and Rebuilding**

As with the other transmission CEs, TVA proposes to expansively categorically exclude activities under CE 19, including building new transmission lines “contiguous to existing rights-of-way.”<sup>385</sup> These new lines would “generally” extend no more than 25 miles in length and require a right-of-way expansion of 125 acres.<sup>386</sup> However, adding a new 25-mile 500-kV transmission line contiguous to an existing line would require a right-of-way expansion of over 450 acres, affecting nearly 200,000 mature trees.<sup>387</sup> Even limiting this example to 69-kV transmission line would require a right-of-way expansion of over 225 acres, affecting nearly

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<sup>380</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>381</sup> See Part I, Sections II.B and K and Part II, Section II.D, above.

<sup>382</sup> See Att. 56, TVA, Memorandum, Board of Directors, TVA, *Proposed Board Resolution (Strategic Fiber Initiative)* (April 18, 2017) [hereinafter TVA, Strategic Fiber Memo]; Att. 57, TVA, Board Meeting, Powerpoint Presentation (May 11, 2017)

[https://www.tva.gov/file\\_source/TVA/Site%20Content/About%20TVA/Our%20Leadership/Board%20of%20Directors/Meetings/2017/May%2011,%202017/May%2011%202017%20Board%20presentation.pdf](https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Our%20Leadership/Board%20of%20Directors/Meetings/2017/May%2011,%202017/May%2011%202017%20Board%20presentation.pdf) (last visited Sept. 5, 2017).

<sup>383</sup> See Att. 56, TVA, Strategic Fiber Memo (“Upon completion of any required environmental reviews, TVA would install 3,500 miles of new [optical ground wire]”).

<sup>384</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>385</sup> Att. 2, TVA, CE Support Documentation, 3-73.

<sup>386</sup> *Id.*

<sup>387</sup> Using the same calculations described in note 319

100,000 mature trees.<sup>388</sup> In fact, only transition of a 25-mile 69 kV line to a 161 kV line would require a right-of-way expansion of less than 125 acres.<sup>389</sup>

Including the term “generally” removes any meaning from the 25-mile and 125-acre limitations of the CE.<sup>390</sup> Moreover, even if the term “generally” was removed, TVA arbitrarily defines the 25-mile and 125-mile limit because it provides no explanation for why these limits equate to insignificant direct, indirect, individual, and cumulative effects.<sup>391</sup> Because this CE could also apply contiguously, there is no real limit on the geographic scope and potential individual and cumulative environmental effects of applying this CE.

As TVA itself states, TVA staff have “regularly cite[d] to other existing CEs when considering proposed actions” covered under CE 19.<sup>392</sup> If TVA staff has previously improperly applied other CEs to the types of activities that would only now be excluded under CE 19, then TVA has even more incentive to provide clear, specific language in its proposed CEs. Under the current language, staff may confuse CE 19 with CE 16 whenever a new transmission line would be contiguous with existing lines. Importantly, it is unclear when TVA would construct a new transmission line that is not connected to existing infrastructure.

The application of this CE across TVA’s 80,000 square mile service territory would have significant direct, indirect, and cumulative environmental effects. TVA explains that the construction of new transmission infrastructure requires the removal of most trees and shrubs across the entire new right-of-way. A 25-mile 500-kV transmission line and accompanying 450-acre right-of-way could require clearing nearly 200,000 mature trees.<sup>393</sup> TVA’s own estimates show that new transmission lines, even if contiguous to existing infrastructure, would have significant individual and cumulative effects.<sup>394</sup>

As conceded by TVA, tree clearing and vegetation management practices for *existing* transmission infrastructure have significant environmental indirect, direct, individual, and cumulative effects, thereby requiring an EIS.<sup>395</sup> If the tree clearing for maintaining rights-of-way and existing transmission has significant environmental effects, surely the same is true for new

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<sup>388</sup> Using the same calculations described in note 319.

<sup>389</sup> A 25-mile 69-kV line requires a ROW of approx. 225 acres. A 25-mile 161-kV line requires a ROW of approx. 303 acres. A 25-mile 500-kV line requires a ROW of approx. 450 acres. Using the same calculations described in note ##. Thus, moving from a 69-kV line to a 161-kV line would expand the ROW by 78 acres; from a 161-kV line to a 500-kV line would expand the ROW by 147 acres; and from a 69-kV line to a 500-kV line would expand the ROW by 225 acres.

<sup>390</sup> See Part II, Section II.D, above.

<sup>391</sup> Att. 2, TVA, CE Support Documentation, 3-73 to 3-74.

<sup>392</sup> Att. 2, TVA, CE Support Documentation, 3-73.

<sup>393</sup> Using the same calculations described in note 223.

<sup>394</sup> See Table 5 (from section on CE16).

<sup>395</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

transmission infrastructure. Moreover, TVA should demonstrate that these additional transmission lines are necessary and that no-wires alternatives would be ineffective.<sup>396</sup> Additionally, all of the transmission CEs have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation, the cumulative effects of climate on the environment, and the effects that climate change would have on new and existing transmission infrastructure.<sup>397</sup>

TVA did not take a “hard look” at the environmental effects of activities applicable to CE 19, and instead provides conclusory statements with no analysis or cited scientific evidence supporting TVA’s conclusions.<sup>398</sup> The environmental effects described by TVA do not contemplate the construction of new transmission lines that are contiguous with existing lines. The cited NEPA analyses are primarily mitigated EAs, thus limiting the environmental effects of the proposed actions.<sup>399</sup> Looking closer at these EAs, these documents require mitigation measures for protected bat species as a method for reducing environmental effects below the “significant” threshold.<sup>400</sup> However, TVA does not even mention bats in its section on wildlife effects.<sup>401</sup> Similar to other CE analyses, TVA ignores any cumulative effects of applying the proposed CE. Moreover, TVA provides no analysis of climate effects, even though the activities that apply to CE 19 would have significant climate effects. Before finalizing this CE and moving these activities behind closed doors, TVA must conduct the required environmental analysis of direct, indirect, individual, and cumulative effects.

Nor would TVA’s proposed “extraordinary circumstances” procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>402</sup>

TVA’s cited EAs and EISs do not support CE 19 because they are mitigated FONSI, and the proposed CE does not substantially integrate these mitigation measures into its language.<sup>403</sup> Putnam-Cumberland, Tennessee—Improve Power Supply Project FONSI are contingent on adherence to following best management practices and mitigating effects on threatened and endangered bats.<sup>404</sup> Conservation Groups groups could not timely access the remaining cited

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<sup>396</sup> Att. 58, Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 F.E.R.C. ¶61,051, 18 C.F.R. pt. 35 (July 2011).

<sup>397</sup> See Att. 53, NACAA, Implementing EPA’s CPP, 18-1 to 18-16; see also Part II, Section II.C.

<sup>398</sup> See Part II, Sections II.A-C, above; TVA, CE Supporting Documentation, 3-77 to 3-79.

<sup>399</sup> See TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project*, Environmental Assessment (11/13/2013); see also Part II, Section II.E, above.

<sup>400</sup> See TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project*, Environmental Assessment (11/13/2013).

<sup>401</sup> Att. 2, TVA, CE Support Documentation, 3-78.

<sup>402</sup> See Part I, Sections II.B and K and Part II, Section II.D, above.

<sup>403</sup> See Part II, Sections II.E, above.

<sup>404</sup> TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project*, Environmental Assessment (11/13/2013).

NEPA documents, but assume they suffer the same defects.<sup>405</sup> As explained above, if TVA cites to a mitigated FONSI as support, then it must ensure that these mitigation measures are an “integral component” of the actions included in the CE.<sup>406</sup>

The cited benchmarking examples do not support the broad language and application of CE 19.<sup>407</sup> TVA cites DOE’s CE on the construction of powerlines as an example, but ignores the major differences between TVA’s and DOE’s transmission systems and service territories, as described above.<sup>408</sup> While DOE’s discrete transmission construction projects may not have significant indirect, direct, individual, or cumulative effects, TVA’s construction of 25-mile transmission lines that are contiguous to existing transmission infrastructure, and the accompanying rights-of-way, would have significant individual, cumulative, direct, and indirect effects. Moreover, even if the activities were similar, the DOE CEs are more restrictive, permitting only 10-mile transmission lines, and 20-mile lines in disturbed or developed areas.<sup>409</sup> Here, TVA would be able to construct 25-mile lines in undisturbed or undeveloped areas as long as they connected to existing transmission infrastructure.<sup>410</sup> Therefore, DOE’s CE is an inappropriate benchmark for TVA’s proposed CE 19.

Similarly, the cited CE from BTOP involves different activities, with different characteristics.<sup>411</sup> BTOP’s CE limits itself to replacing or rebuilding existing lines that involve less than 12% pole replacement (without inclusion of a discretionary term like “generally”).<sup>412</sup> The Rural Utility Service CEs applies only to the financing of projects, and are still more restrictive than TVA’s CE 19.<sup>413</sup> None of the cited CEs support TVA’s proposal to construct new 25-mile transmission lines as long as they are contiguous to the existing ones.

As in the other transmission CEs, TVA is also introducing CE 19 as a means to avoid tiering to the programmatic EIS required after *Sherwood* and the EIS for TVA’s 2015 IRP.<sup>414</sup>

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<sup>405</sup> Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above.

<sup>406</sup> Att. 7, CEQ, CE Guidance, at 7.

<sup>407</sup> *See* Part II, Sections II.F, above.

<sup>408</sup> Att. 2, TVA, CE Support Documentation, 3-80.

<sup>409</sup> *Id.*

<sup>410</sup> *Id.* 3-73.

<sup>411</sup> *Id.* 3-80 to 3-81.

<sup>412</sup> *Id.* at 3-80.

<sup>413</sup> *Id.* at 3-81.

<sup>414</sup> *See* Att. 9, TVA, *Transmission System Vegetation Management Program*, <https://www.tva.gov/Environment/Environmental-Stewardship/Environmental-Reviews/Transmission-System-Vegetation-Management-Program> (last visited Aug. 29, 2017); *see also* Part II, Sections III and IV.

TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>415</sup>

Additionally, CE 19 is part of a string of proposed CEs that deal with different aspects of constructing, maintaining, transferring, purchasing, and retiring transmission infrastructure.<sup>416</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>417</sup> Therefore, TVA must consider these transmission activities together, which would require tiered EAs or EISs. TVA cannot categorically exclude them.

As argued above, TVA should promulgate documentation requirements that would require that application of CE 19 be documented and be made publicly available on TVA’s website.

TVA should either adjust CE 19 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **VII. CE 20—Transmission Transactions**

In its changes to CE 20, TVA proposes to expand the scope and types of activities covered by the CE, so that when applied cumulatively, the activities will have significant direct and indirect environmental effects.<sup>418</sup> CE 20 would now allow for any conveyance of transmission lines and rights-of way as well as associate equipment.<sup>419</sup> TVA also proposes to further expand CE 20 to include the disposal of existing transmission infrastructure.<sup>420</sup>

The proposed CE text does not set forth “specific criteria for and identification of” the actions that it proposes to categorically exclude.<sup>421</sup> There are absolutely no limits on these activities, meaning that TVA could convey or destroy all 16,200 miles of transmission lines, 513 substations, switchyards, and switching stations, and 200,000 acres of rights-of-way.<sup>422</sup> TVA’s proposed CE 20 must be rewritten to describe the specific activities.<sup>423</sup> Taken as written, the CE

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<sup>415</sup> CEQ, CE Guidance, 5.

<sup>416</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20).

<sup>417</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014); see also Part II, Sections III and IV.

<sup>418</sup> Att. 2, TVA, CE Support Documentation, 3-84.

<sup>419</sup> *Id.*

<sup>420</sup> *Id.*

<sup>421</sup> 40 C.F.R. § 1507.3(b)(2); see also CEQ, Memorandum, Agency Implementing Procedures Under CEQ’s NEPA Regulations (January 19, 1979) ; *Sierra Club v. Bosworth*, 510 F.3d 1016, 1032 (9th Cir. 2007) (rejecting adoption of categorical exclusion where agency failed to include specific limitations on its scope).

<sup>422</sup> Att. 2, TVA, CE Support Documentation, 3-84.

<sup>423</sup> See Part II, Sections II.D.

is invalid because applied individually and cumulatively, it would have a significant environmental effect.<sup>424</sup>

Although TVA proposes to greatly expand the scope of this CE, TVA provides no evidence to support CE 20 from its experience with EAs or EISs.<sup>425</sup> Instead, TVA cites to a select group of CECs, none of which were timely made available to Conservation Groups for review.<sup>426</sup>

Nor would TVA's proposed "extraordinary circumstances" procedure ensure that activities within the scope of the CE would receive adequate environmental review.<sup>427</sup>

TVA fails to take any look, let alone a "hard look" at the potentially significant individual and cumulative environmental effects of applying the amended CE 20.<sup>428</sup> All of the transmission CEs have significant air quality and climate implications because of the effect that transmission infrastructure has on the type and amount of electricity generation, the cumulative effects of climate on the environment, and the effects that climate change would have on new and existing transmission infrastructure.<sup>429</sup>

Additionally, CE 20 is part of a string of proposed CEs that deal with different aspects of constructing, maintaining, transferring, purchasing, and retiring transmission infrastructure.<sup>430</sup> These activities are sufficiently "connected" and "similar" to require TVA to consider them together, as argued above.<sup>431</sup> Therefore, TVA must consider these transmission activities together, which would require tiered EAs or EISs.<sup>432</sup> TVA cannot categorically exclude them.

As argued above, TVA should promulgate documentation requirements that would require that application of CE 20 be documented and be made publicly available on TVA's website.

TVA should either adjust CE 20 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

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<sup>424</sup> See Part II, Section II.A-D, above.

<sup>425</sup> Att. 2, TVA, CE Support Documentation, 3-84 to 3-85. Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above.

<sup>426</sup> *Id.*

<sup>427</sup> See Part I, Sections II.B and K and Part II, Sections II.D, above.

<sup>428</sup> Att. 2, TVA, CE Support Documentation, 3-71 to 3-72.

<sup>429</sup> See Att. 53, NACAA, Implementing EPA's CPP, 18-1 to 18-16; see also Part II, Section II.C.

<sup>430</sup> See Att. 2, TVA, CE Support Documentation, 3-38 (CE 15); *id.* at 3-47 (CE 16); *id.* at 3-62 (CE 17); *id.* at 3-71 (CE 18); *id.* at 3-73 (CE 19); *id.* at 3-84 (CE 20).

<sup>431</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env't'l Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>432</sup> See Part II, Sections III and IV.

### VIII. CE 21—Power Plant Acquisition

Proposed CE 21 would categorically exclude “[p]urchase or lease, and subsequent operation of existing combustion turbine or combined-cycle plants for which there is existing adequate transmission and interconnection to the TVA transmission system and whose planned operation by TVA is within existing environmental permits for the purchased or leased facility.”

Proposed CE 21 lacks the specificity required by NEPA and the CEQ Regulations to ensure that no significant environmental impacts will occur as a result of application of the CE.<sup>433</sup> In particular, CE 21 does not contain language that would ensure that relevant environmental impacts—especially greenhouse gas (GHG) and conventional air pollution—would not occur as the result of a particular decision to purchase, lease, and subsequently operate existing natural gas plants. Instead, CE 21 limits its application to situations in which the purchase or lease would not result in new physical infrastructure and TVA would plan to operate “within existing environmental permits,” metrics that would not adequately evaluate potentially relevant air and GHG emissions and other impacts or provide sufficient guidance to TVA staff to do so. Nor does TVA’s proposed “extraordinary circumstances” procedure provide such guidance.<sup>434</sup>

In particular, the proposed limitation that TVA plan to operate “within existing environmental permits” cannot demonstrate the acquisition and subsequent operation will have no individually or cumulatively significant environmental impacts. TVA is required to evaluate its proposed action against the affected environment, which means the actual baseline conditions as they exist before the agency’s proposed action occurs.<sup>435</sup> TVA’s plan to operate “within existing environmental permits” is irrelevant to the question of the actual levels of GHG and conventional air pollution being emitted from the CT or NGCC before the acquisition. The baseline must be based on the actual level of emissions at the CT or NGCC, not its permit limits. The CT or NGCC proposed for purchase or lease could be mothballed, or be run solely as a seasonal peak resource, and TVA’s plans may be to run it at far higher rates that are still within existing permit limits. In these ways, the acquisition could have both individually and cumulatively significant effects.

The failure to include limits on GHG and other air emissions is especially troubling because of TVA’s increased and increasing reliance on natural gas generation. Indeed, TVA

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<sup>433</sup> See Part II, Section II. D, above.

<sup>434</sup> See Part I, Sections II.B and K; Part II, Section II.D, above.

<sup>435</sup> See 40 C.F.R. § 1502.15 (“Affected environment”); *Half Moon Bay Fishermans' Mktg. Ass'n v. Carlucci*, 857 F.2d 505, 510 (9th Cir. 1988) (“Once a project begins, the “pre-project environment” becomes a thing of the past, thereby making evaluation of the project's effect on pre-project resources impossible.”)

acquired a 705 MW natural gas combined cycle plant in Mississippi in 2015.<sup>436</sup> TVA appears not to have performed NEPA review for the acquisition of this plant.<sup>437</sup> Moreover, in its 2015 Integrated Resource Plan, TVA’s projected capacity additions derived primarily from natural gas.<sup>438</sup> Thus, the likelihood of significant cumulative impacts is great.

Moreover, the initial choice whether to acquire a particular combustion turbine or combined cycle plant may itself may have direct and indirect environmental impacts, including but not limited to carbon and conventional air pollution impacts. By proposing to categorically exclude CTs and NGCCs without limiting application to situations where the acquisition will definitively *not* have such impacts, TVA undermines the requirement that agencies consider reasonable alternatives to a proposed action—the component that CEQ calls “the heart of the environmental impact statement.”<sup>439</sup> It is not sufficient to claim—without support—that the emissions and other impacts would occur anyway because some other party would acquire or run the plant.<sup>440</sup> In today’s electricity market, not to mention the future market, the natural gas plant proposed for acquisition could well be sidelined by demand-response, energy efficiency, solar, wind, or battery storage. Yet the claim that someone else would acquire and run the plant is implicit in TVA’s conclusion that CE 21 would not have individually or cumulatively significant effects.

TVA provides no support for its proposed CE 21 derived from its own CECs, except for one CEC that appears to have impermissibly “tiered” to a previous EA. The EAs described by TVA similarly do not support proposed CE 21.<sup>441</sup> The EA addressing construction of a *new* NGCC at John Sevier is not similar in terms of the activities proposed to be addressed in CE 21.<sup>442</sup> In particular, the baseline in the John Sevier EA would include operation of the coal-fired power plant at John Sevier, rather than the emissions levels of a pre-existing NGCC or CT.<sup>443</sup>

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<sup>436</sup> Att. 53(a), TVA, *Ackerman Combined Cycle Plant*, <https://www.tva.gov/Energy/Our-Power-System/Natural-Gas/Ackerman-Combined-Cycle-Plant> (last visited Sept. 6, 2017).

<sup>437</sup> TVA does not list the Ackerman acquisition among the CECs, EAs, and EISs it reviewed. *See* Att. 2, TVA, CE Support Documentation, 3-87-88.

<sup>438</sup> Att. 52, TVA, 2015 IRP, 116.

<sup>439</sup> 40 C.F.R. § 1502.14.

<sup>440</sup> *See Montana Environmental Information Center v. U.S. Office of Surface Mining*, 2017 WL 3480262, \*15 (August 14, 2017) (conclusion that there would be no effects from air emissions because other coal would be burned instead was “illogical” and “places [the agency’s] thumb on the scale by inflating the benefits of the action while minimizing its impacts”).

<sup>441</sup> *See* Section II, Part II.E, above.

<sup>442</sup> *See* Att. 2, TVA, CE Support Documentation, 3-89.

<sup>443</sup> The same is true of the Allen Fossil Plant Emission Control Project EA cited by TVA. *See* Att. 2, TVA, CE Support Documentation, 3-88.

The Combustion Turbine Generic EA discussed by TVA is also inapt. Although TVA claims that the scope of the EA and the proposed CE 21 are “nearly identical,”<sup>444</sup> in fact proposed CE 21 includes the acquisition of NGCCs in addition to the CTs evaluated in the Combustion Turbine Generic EA. Moreover, the Combustion Turbine Generic EA was prepared in 2006-2007, before the widespread availability of resources that compete with peaker CTs, including demand-response, energy efficiency, solar, wind, and battery storage. Indeed, TVA’s own 2015 Integrated Resource Plan acknowledges that demand response and energy efficiency may compete favorably with CTs.<sup>445</sup>

Nor does the DOE CE described by TVA provide support for its proposed CE 21.<sup>446</sup> As a preliminary matter, it is not clear that the activities described by DOE—“contracts, policies, and marketing and allocation plans related to electric power acquisition”—are similar to the specific purchasing, leasing, and operating activities described in CE 21. Moreover, DOE limits its CE to resources “operating within their normal operating limits,” which can be interpreted as their current operating plans, rather than the limits permissible in their environmental permits, as proposed by TVA. To the extent DOE applies the CE to acquisitions that would result in higher levels of emissions than the actual baseline, that application is inconsistent with NEPA.

TVA should promulgate documentation requirements that would require that application of CE 21 be documented and be made publicly available on TVA’s website.<sup>447</sup>

TVA should withdraw proposed CE 21 and subject its decisions to acquire natural gas generation resources to public scrutiny as required by NEPA. In the alternative, TVA should adjust CE 21 so that it complies with the requirements of NEPA, including making it applicable only to acquisitions that do not result in *any* increases of GHG or conventional air pollution or other impacts in addition to the existing infrastructure-oriented limitation.

## **IX. CE 22—Dispersed Recreation**

In CE 22, TVA proposes to categorically exclude its development and maintenance of dispersed recreation sites, which are used for hunting, fishing, primitive camping, wildlife observation, hiking, and mountain biking.<sup>448</sup> It would exclude activities ranging from signage to

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<sup>444</sup> Att. 2, TVA, CE Support Documentation, 3-89.

<sup>445</sup> See, e.g., Att. 52, TVA, 2015 IRP, 117 (“The key determinants of future natural gas needs are trajectories on natural gas pricing and energy efficiency and renewables availability and pricing”).

<sup>446</sup> See Section II, Part II.F, above.

<sup>447</sup> See Section II, Part V, above.

<sup>448</sup> Att. 2, TVA, CE Support Documentation, 3-92.

site stabilization, and implicate approximately 229,000 acres and the more than six million recreational visits annually.<sup>449</sup>

As with many other CEs, the language in CE 22 is unreasonably broad.<sup>450</sup> TVA's proposed CE 22 would allow it to manage all 229,000 acres under this categorical exclusion.<sup>451</sup> CE 22 would apply to the development and maintenance of "dispersed recreation sites (*generally* not to exceed 10 acres in size)."<sup>452</sup> The inclusion of "generally" removes any outer limits to this CE's application. Moreover, although the CE "generally" limits its application to areas less than or equal to 10 acres in size (about the size of 10 football fields), TVA does not prohibit the contiguous application of the CE. Under the current terms of CE 22, TVA could break down their 229,000 acres of dispersed recreation areas into contiguous 10-acre plots, and categorically exclude TVA's activities on each of these plots. The cumulative impacts of these individual actions would likely be significant. Yet TVA concludes, without analysis, that application of CE 22 will not have significant impacts.<sup>453</sup>

The CE's description of the types of activities that might be categorically excluded creates a broad spectrum in which many activities with potentially significant environmental effects might fall. The environmental effects of "signage" are vastly distinguishable from the "stabilization of sites." This distinction is demonstrated by TVA's own cited background materials: Cited CECs include fence posts, signage, and emergency lighting, while cited EAs and EISs deal with broader actions, such as land management plans for reservoirs and education and recreation area improvements. Because of the broad range of activities covered, CE 22 lacks the specificity required to reasonably assess its potential environmental impacts.<sup>454</sup>

TVA's cited EAs and EISs do not support CE 22 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 22.<sup>455</sup>

The Natural Resource Plan EIS and ROD promises to "[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and

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<sup>449</sup> *Id.*

<sup>450</sup> *See* Part II, Section II.D (Specificity), above.

<sup>451</sup> *Id.*

<sup>452</sup> Att. 2, TVA, CE Support Documentation, 3-92 (emphasis added).

<sup>453</sup> *See* Part II, Sections II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>454</sup> *See* Part II, Sections II.D, above.

<sup>455</sup> Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above; *see also* Part II, Sections II.E, III-IV.

incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>456</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>457</sup>

- The Watts Bar Reservoir Land Management Plan EIS and ROD does not support CE 22 because its conclusion that proposed activities would not have significant impacts on the environment relies on “mitigat[ion] through regulatory requirements and commitments prior to any undertaking.”<sup>458</sup>
- The Bear Creek Reservoir Land Management Plan EA and FONSI mentions mitigation to offset the long-term loss of wetland functions, stating that “[r]outine environmental review would be completed for any proposed action.”<sup>459</sup>
- The Boone Reservoir Land Management Plan EA and FONSI explains that “[w]ith the implementation of the above measures, TVA has determined that adverse environmental impacts of future land development proposals on the TVA-managed reservoir lands would be substantially reduced.”<sup>460</sup>

TVA’s discussion and analysis of the environmental effects of activities applicable to CE 22 is inadequate. TVA’s analysis is far from a “hard look,” as it includes only conclusory statements with no analysis or cited scientific evidence supporting TVA’s conclusions.<sup>461</sup> Instead, TVA cites to its own analyses in the Natural Resource Plan EIS and ROD and the Muscle Shoals Outdoor Education and Recreation Area Improvements EA and FONSI. As outlined above, however, these examples are not focused on the activities proposed in this CE or their effects, either individually or cumulatively, and are not supportive of TVA’s proposed CE 22.

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<sup>456</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>457</sup> Att. 10, CEQ, CE Programmatic Guidance, 8 n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

<sup>458</sup> TVA, *Watts Bar Reservoir Land Management Plan*, Environmental Impact Statement, S-6.

<sup>459</sup> TVA, *Bear Creek Reservoir Land Management Plan*, Environmental Assessment, 14.

<sup>460</sup> 75 Fed. Reg. 40,034, 40,036 (July 13, 2010). Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above.

<sup>461</sup> *See* Part II, Sections II.A-C, above.

The cited benchmarking examples also do not support the broad language and application of CE 22.<sup>462</sup> For example, TVA maintains that the National Park Service (NPS) and U.S. Forest Service (USFS) CEs support TVA’s categorical exclusion of “stabilization of sites,” but it is not clear that the NPS or USFS CEs actually exclude all of the activities considered “stabilization of sites.” TVA does not describe these activities, but based on a search of the terms “stabilization” and “stabilize” in TVA’s Natural Resource Plan, most examples would include shoreline and bank stabilization. NPS and USFS, however, limit themselves to maintenance of “structures, facilities, utilities, grounds, and trails,”<sup>463</sup> which might include “mowing lawns”<sup>464</sup> or “applying pesticide,”<sup>465</sup> not the kind of “bioengineering, geotextiles, and rock riprap” required for shoreline stabilization efforts.<sup>466</sup>

TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>467</sup> In the explanation of site stabilization activities in the programmatic EIS for the Natural Resource Plan, TVA states that it “conducts the appropriate site-specific environmental reviews prior to stabilizing reservoir shoreline.”<sup>468</sup> Now, it proposes to play a “shell game” and provide no site-specific environmental reviews of these activities.

Additionally, CE 22 is part of a string of proposed CEs that deal with different aspects of natural resource management, as demonstrated by their citation of the Natural Resource Plan programmatic EIS.<sup>469</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>470</sup> Therefore, TVA must consider these activities together, thereby requiring tiered EAs or EISs. TVA cannot categorically exclude them.

As argued above, TVA should promulgate documentation requirements that would require that application of CE 22 be documented and be made publicly available on TVA’s website.<sup>471</sup>

TVA should either adjust CE 22 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

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<sup>462</sup> See Part II, Section II.F, above.

<sup>463</sup> Att. 2, TVA, CE Support Documentation, 3-97.

<sup>464</sup> Att. 2, TVA, CE Support Documentation, 3-97 to 3-98.

<sup>465</sup> Att. 2, TVA, CE Support Documentation, 3-97 to 3-98.

<sup>466</sup> Att. 47, TVA, Natural Resource Plan EIS, 72.

<sup>467</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>468</sup> Att. 47, TVA, Natural Resource Plan EIS, 72.

<sup>469</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>470</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>471</sup> See Section II, Part V, above.

## **X. CE 23—Public Land Use**

TVA proposes to amend CE 23 so that it can develop its public use areas, as long as the construction of parking areas, stream access points, and day use areas “generally” result in a physical disturbance of no more than 10 acres.<sup>472</sup> CE 23 includes the same deficits surrounding use of the term “generally,” arbitrary and unexplained distinction between anything affecting 10 acres or less and anything affecting more than 10 acres, and permitting segmentation of large swaths of TVA land into 10 acre plots so as to avoid NEPA review. Essentially, under TVA’s proposal, it can break its public lands into contiguous 10-acre sections and build parking lots on all of them.<sup>473</sup>

TVA’s Supporting Documentation provides no analysis of the individual and cumulative direct and indirect environmental effects of activities applicable to CE 23.<sup>474</sup> Instead, the agency simply states that “TVA determined that most proposed activities that occur on less than 10 acres could be considered minor and unlikely to result in significant effects.”<sup>475</sup> This conclusory statement ignores the potential cumulative effects of developing parking areas, for example, on multiple 10-acre plots.<sup>476</sup> TVA provides no evidence from its current CE application or from EAs and EISs. Moreover, it provides no benchmarking examples of CEs from other federal agencies.

TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>477</sup> Because this activity would tier to the Natural Resource Plan programmatic EIS, play a “shell game” by categorically excluding it. Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>478</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>479</sup>

As argued above, TVA should promulgate documentation requirements that would require that application of CE 23 be documented and be made publicly available on TVA’s website.<sup>480</sup>

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<sup>472</sup> Att. 2, TVA, CE Support Documentation, 3-100.

<sup>473</sup> See Part II, Section II.D (Specificity), above.

<sup>474</sup> See Part II, Sections II.A-C, above.

<sup>475</sup> Att. 2, TVA, CE Support Documentation, 3-100.

<sup>476</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>477</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>478</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>479</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>480</sup> See Part II, Section V, above.

TVA should either adjust CE 23 so that it complies with the requirements of NEPA, or it should withdraw it as a CE.

## **XI. CE 24—Use of TVA Property**

TVA is proposing to amend CE 24, which deals with “minor” activities conducted by non-TVA entities on TVA property as authorized by contract, license, permit, or covenant agreements.<sup>481</sup> TVA is adding “recreational uses” to the types of activities included in this categorical exclusion, and removing “encroachments.”<sup>482</sup>

CE 24 lacks specificity because of TVA’s undefined use of the term “minor.”<sup>483</sup> Without a clear limit on these “minor” activities, TVA could arguably apply this exemption to all activities conducted pursuant to “170 agreements with private entities for commercial recreation,” “130 agreements with public agencies for public recreation,” and the “80 public recreation areas” for which it is responsible.<sup>484</sup>

Although TVA proposes to greatly expand the scope of this CE through its undefined use of the term “minor” and its addition of “recreational uses” to this CE, TVA provides no evidence to support CE 24 from its experience with EAs and EISs or benchmarking examples from other agencies’ CEs. The Supporting Documentation provides no analysis of the individual and cumulative environmental effects of activities applicable to CE 24.<sup>485</sup> TVA must take a “hard look” at the environmental effects of proposed CEs before they are finalized.

Generally, agreements regarding non-TVA recreational activities require at least an EA. For example, TVA is currently seeking public comment on an EA for a proposed management agreement with the Ocoee River Outfitters Association, USFS, and the State of Tennessee.<sup>486</sup> This proposed management agreement could have significant environmental effects because it would involve water releases on the Ocoee River. Under TVA’s proposed CE, agreements such as these would occur without public notice and knowledge, and without the benefit of NEPA’s purpose to improve decision making through the collaboration of public, private, and government representatives.

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<sup>481</sup> Att. 2, TVA, CE Support Documentation, 3-101.

<sup>482</sup> *Id.*

<sup>483</sup> See Part II.D (Specificity), above.

<sup>484</sup> Att. 2, TVA, CE Support Documentation, 3-101.

<sup>485</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>486</sup> Att. 59, TVA, *Ocoee River Whitewater Rafting Agreements*, <https://www.tva.com/Environment/Environmental-Stewardship/Environmental-Reviews/Ocoee-River-Whitewater-Rafting-Agreements> (last visited Aug. 15, 2017).

As argued above, TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>487</sup> Because this activity would tier to the Natural Resource Plan programmatic EIS, play a “shell game” by categorically excluding it. Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>488</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>489</sup>

As argued above, TVA should promulgate documentation requirements that would require that application of CE 24 be documented and be made publicly available on TVA’s website.<sup>490</sup>

TVA should either adjust CE 24 so that it complies with the requirements of NEPA, or it should withdraw it as a CE.

## **XII. CE 25—Property Transactions**

TVA seeks to amend CE 25, which deals with the transfer, lease, or disposal of land, mineral rights, land rights, and ownership of permanent structures.<sup>491</sup> TVA is adding “rights in ownership of permanent structures” and proposes to limit this CE to actions that are “minor in nature.”<sup>492</sup> TVA proposes these changes because, as currently written, this CE has not been used as intended.<sup>493</sup>

Application of the proposed CE 25 includes no specific bounds because of TVA’s use of the undefined term “minor.”<sup>494</sup> Again, TVA currently manages 293,000 acres of land and 11,000 miles of shoreline.<sup>495</sup> Under the proposed CE, TVA has the freedom to sell, lease, or transfer this land, as well as the accompanying mineral rights, landrights, and structures, as long as TVA determines that these acts are “minor,” a term that, left undefined and without appropriate context or other limits, provides TVA unfettered discretion.

Although TVA proposes to greatly expand the scope of this CE through its definition of “minor” and its addition of “transfer, lease, or disposal” to this CE, TVA provides no evidence to

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<sup>487</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>488</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>489</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>490</sup> See Part II, Section V, above.

<sup>491</sup> Att. 2, TVA, CE Support Documentation, 3-102.

<sup>492</sup> *Id.*

<sup>493</sup> *Id.*

<sup>494</sup> See Part II, Section II.D (Specificity), above.

<sup>495</sup> Att. 1, TVA, Environmental Stewardship.

support CE 25 from its experience with EAs and EISs. TVA provides no analysis of the individual and cumulative environmental effects of activities applicable to CE 25.<sup>496</sup> TVA must take a “hard look” at the environmental effects of proposed CEs before they are finalized because it is the only opportunity for the public to engage with TVA about those effects.

TVA’s benchmarking examples do not support the broad language and application of CE 25. For example, USFS only permits land purchases, and not land transfers or the transfer, lease, or disposal of mineral rights, landrights, or permanent structures.<sup>497</sup> Even for agencies that permit land transfers in their CEs, their CEs include strict limiting language. DOE only permits these types of transfers where “under reasonably foreseeable uses (1) there would be no potential for release of substances at a level, or in a form, that could pose a threat to public health or the environment and (2) the covered actions would not have the potential to cause a significant change in impacts from before the transfer.”<sup>498</sup> Thus, these benchmarking examples are distinct from and inapplicable to TVA’s proposed CE 25.<sup>499</sup>

Because this activity would tier to the Natural Resource Plan programmatic EIS, play a “shell game” by categorically excluding it. TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>500</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>501</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>502</sup>

TVA should promulgate documentation requirements that would require that application of CE 25 be documented and be made publicly available on TVA’s website.<sup>503</sup>

TVA should either adjust CE 25 so that it complies with the requirements of NEPA, or it should withdraw it as a CE.

### **XIII. CE 26—Section 26a Permitting Approvals**

In CE 26—which covers applications (i.e., Section 26a permitting applications) to construct facilities or make alterations to the 11,000 miles of shoreline that TVA manages—

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<sup>496</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>497</sup> Att. 2, TVA, CE Support Documentation, 3-103.

<sup>498</sup> Att. 2, TVA, CE Support Documentation, 3-103.

<sup>499</sup> See Part II, Section II.F (Benchmarking), above.

<sup>500</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>501</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>502</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>503</sup> See Part II, Section V.

TVA is adding “ramps” to its categorically excluded activities.<sup>504</sup> TVA receives thousands of these applications *each year*, and annually approves more than 1,500 permits under this CE.<sup>505</sup>

CE 26 lacks the required specificity due to the use of the undefined and unlimited term “minor.”<sup>506</sup> TVA provides no evidence to support CE 26 from its experience with EAs and EISs or benchmarking examples from other agencies’ CEs. The environmental effects of Section 26a permits can be significant, as demonstrated in TVA’s decision to conduct an EIS for the section 26a permitting of floating houses and nonnavigable houseboats on TVA reservoirs.<sup>507</sup> However, TVA provides no discussion of the environmental effects of the activities to be conducted under the proposed CE.<sup>508</sup> Further, TVA does not cite to any benchmarking examples from other agencies. Activities excluded under CE 26 would also tier to the Natural Resource Plan programmatic EIS, therefore TVA cannot categorically exclude them.<sup>509</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting NEPA analysis.<sup>510</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>511</sup>

As argued above, TVA should promulgate documentation requirements that would require that application of CE 26 be documented and be made publicly available on TVA’s website.<sup>512</sup> TVA should either adjust CE 26 so that it complies with the requirements of NEPA, or it should withdraw it as a CE.

#### **XIV. CE 27—TVA Shoreline Actions**

TVA proposes to add CE 27 to cover bank stabilization (“generally” up to ½ mile) as well as installation of “minor” shoreline structures or facilities, boat docks and ramps.<sup>513</sup> This CE would apply to the 11,000 miles of shoreline that TVA manages, with implications for the entire Tennessee River watershed which covers 41,000 square miles across 125 counties in portions of seven states.<sup>514</sup> TVA had previously been inappropriately applying these activities to CE 26.<sup>515</sup>

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<sup>504</sup> Att. 2, TVA, CE Support Documentation, 3-104.

<sup>505</sup> Att. 2, TVA, CE Support Documentation, 3-104.

<sup>506</sup> See Part II, Section II.D (Specificity), above.

<sup>507</sup> Att. 60, TVA, *Floating Houses Policy Review*, Environmental Impact Statement (Feb 2016).

<sup>508</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>509</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>510</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>511</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>512</sup> See Part II, Section V(Documentation), above.

<sup>513</sup> Att. 2, TVA, CE Support Documentation, 3-106.

<sup>514</sup> Att. 2, TVA, CE Support Documentation, 3-106.

Proposed CE 27 lacks the specificity required by NEPA and the CEQ Regulations.<sup>516</sup> It again only limits itself to “minor” structures, facilities, boat docks, and ramps. Further, it would permit itself to undertake bank stabilization activities that are “generally” up to ½ mile in length. The inclusion of “minor” and “generally” is inappropriate because these terms effectively remove any outer limits to this CE’s application. TVA also arbitrarily selected a ½ mile distinction between requiring an EA and being subject to this CE without any explanation of the distinction. Furthermore, even with the arbitrary ½ mile distinction, TVA could potentially apply this CE consecutively across its 11,000 miles of reservoir shoreline.

Moreover, the types of activities could have significant environmental effects, cumulatively and individually: for example, municipal or industrial water intakes, sewage outfalls, and wastewater discharges on TVA shoreline property could significantly affect the water bodies to which they would be connected.<sup>517</sup>

TVA’s cited EAs and EISs do not support CE 27 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 22.<sup>518</sup> Specifically,

- The Natural Resource Plan EIS and ROD promises to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigate adverse impact.”<sup>519</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>520</sup>
- The Shoreline Management Initiative EIS includes promises to “require special analysis of individual development proposals, and perhaps specific mitigation measures, before a permit decision could be made would be allocated to a Residential Mitigation category.”<sup>521</sup>

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<sup>515</sup> Att. 2, TVA, CE Support Documentation, 3-106.

<sup>516</sup> See Part II, Section II.D (Specificity), above.

<sup>517</sup> Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>518</sup> See *id.*, see also Part II, Section IV (Tiering/Programmatic).

<sup>519</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>520</sup> Att. 10, CEQ, Programmatic Guidance, 8 n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

<sup>521</sup> TVA, *Shoreline Management Initiative*, Environmental Impact Statement, 2-17 (June 4, 1999).

- The Duck River Bank Stabilization River Mile 176.8 EA applies mitigation measure commitments in both its FONSI and the biological opinion that the agency conducted under the Endangered Species Act. Because these mitigation measures were necessary for the agency to conclude that the proposed bank stabilization would not have a significant environmental effect, this example is not supportive of this CE.
- did not have access to the remaining NEPA documents until two business days prior to the close of the comment period, and therefore cannot comment directly on their application and support for this CE.<sup>522</sup>

TVA's discussion and analysis of the environmental effects of activities applicable to CE 27 far from the "hard look" required by NEPA and CEQ. TVA's analysis includes only conclusory statements with no analysis or cited scientific evidence supporting TVA's conclusions. Instead, TVA cites to its own analyses, which are not supportive of TVA's proposed CE 27.

The cited benchmarking examples similarly do not support the broad language and application of CE 27.<sup>523</sup> For example, the USFS, an agency similarly tasked with land management, minutely defines and strictly limits its actions related to shoreline activities.<sup>524</sup> The other examples limit themselves or apply in defined and limited manners. Notably, none of the agencies included all of the activities that TVA proposes to include in this CE.<sup>525</sup>

The activities in this CE would normally tier to the analyses of a programmatic EIS, such as the Natural Resource Plan or Shoreline Management Initiative EIS. In programmatic EISs, agencies must identify the opportunities for stakeholders to engage on issues related to site- or project-specific activities. If, as TVA now proposes, those site-and project-specific activities would be categorically excluded, TVA must identify that it will not conduct site-specific NEPA analyses and must consider the public's comments on those activities during programmatic review.<sup>526</sup>

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<sup>522</sup> Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. *See* Part I, Section VI, above; *see also* Part II, Sections II.E, III-IV.

<sup>523</sup> *See* Part II, Section II.F.

<sup>524</sup> Att. 2, TVA, CE Support Documentation, 3-114 to 3-115.

<sup>525</sup> Att. 2, TVA, CE Support Documentation, 3-117.

<sup>526</sup> *See* Part II, Sections III-IV.

Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>527</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>528</sup>

As argued above, TVA should promulgate documentation requirements that would require that application of CE 27 be documented and be made publicly available on TVA’s website.<sup>529</sup>

TVA should either adjust CE 27 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **XV. CE 28—Modifications to Land Use Allocations in TVA Plans**

TVA is proposing to add CE 28 to cover unilateral changes to land use plans that were developed in the public sphere.<sup>530</sup> Its proposal would permit TVA to categorically exclude any “minor” amendments to land use allocations that it determines implement TVA policies.<sup>531</sup> Because these “minor” land use allocations could affect broad swaths of the 293,000 acres of land that TVA manages, the individual and cumulative application of this CE could have significant effects.

CE 28 includes unreasonably broad language, bestowing upon TVA unfettered discretion. It again only limits itself to “minor” amendments to land use allocations to implement TVA’s shoreline or land management policies.<sup>532</sup> Although undersigned groups agree that TVA should seek to improve current programs, these improvements should happen during the public NEPA process, not behind closed doors. Although in the description TVA explains that these changes will not be the type of “site-specific actions” that would normally require project-specific NEPA review, the language of the proposed CE does not provide for that limitation.

Moreover, the types of activities could have significant environmental effects, cumulatively and individually: as TVA explains, “Historically the reallocation of land use had been addressed in reservoir land management plans (RLMPs), which extensive NEPA documentation through an EA or EIS.”<sup>533</sup> Now TVA proposes to avoid this type of analysis

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<sup>527</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>528</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>529</sup> See Part II, Section V.

<sup>530</sup> Att. 2, TVA, CE Support Documentation, 3-120.

<sup>531</sup> Att. 2, TVA, CE Support Documentation, 3-120.

<sup>532</sup> See Part II, Section II.D (Specificity), above.

<sup>533</sup> Att. 2, TVA, CE Support Documentation, 3-120.

completely, without having done sufficient analysis of the individually and cumulatively significant effects of its proposal.<sup>534</sup>

TVA's cited EAs and EISs do not support CE 28 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 28.<sup>535</sup> Specifically,

- The Natural Resource Plan EIS and ROD promises to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>536</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>537</sup>
- The Douglas-Nolichucky Tributary Reservoirs Land Management Plan EIS requires implementation measures as necessary based on the findings of any site-specific environmental review, whereas here, TVA would avoid this site-specific environmental review.<sup>538</sup>
- The other EAs and EISs cited by TVA include substantial mitigation measures, and many also include form language, “With the implementation of the above measures, TVA has determined that adverse environmental impacts of future land development proposals on the TVA-managed reservoir lands would be substantially reduced.”<sup>539</sup>
- Undersigned groups did not have access to the remaining NEPA documents until two business days prior to the close of the comment period, and therefore cannot comment directly on their application and support for this CE.<sup>540</sup>

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<sup>534</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>535</sup> See Part II, Section II.E; III; IV (Citations to EAs/EISs), (Segmenting), (Tiering/Programmatic).

<sup>536</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>537</sup> Att. 10, CEQ, CE Programmatic Guidance, 8 n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

<sup>538</sup> TVA, *Douglas-Nolichucky Tributary Reservoirs Land Management Plan*, EIS (8/25/2010).

<sup>539</sup> See, e.g., TVA, *Pickwick Reservoir Land Management Plan* EIS (9/10/2002).

<sup>540</sup> Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV.

TVA’s discussion and analysis of the environmental effects of activities applicable to CE 28 is far from what is required by NEPA and the CEQ Regulations. For example, TVA does not include an analysis of CE activities falling within the following category: “minor” amendments to land use allocations to implement TVA’s shoreline or land management policies. TVA’s analysis includes only a conclusory statement that the proposed CE would have “no direct environmental effects” and would not cause significant indirect environmental effects. This is insufficient to satisfy the requirements for establishing a CE under NEPA and the CEQ Regulations.<sup>541</sup>

The cited benchmarking examples similarly do not support the broad language and application of CE 28.<sup>542</sup> For example, BLM limits its CE to maintenance of land use plans.<sup>543</sup> Similarly, both NPS and FWS limit their actions to those with “minor” effects, rather than those actions that are “minor.”<sup>544</sup>

According to TVA’s prior EISs and their description of the CE, some of the activities that would apply this CE would have tiered to the analyses of a programmatic EIS, such as the Natural Resource Plan or Shoreline Management Initiative EIS. TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>545</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>546</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>547</sup>

TVA should promulgate documentation requirements that would require that application of CE 28 be documented and be made publicly available on TVA’s website.<sup>548</sup>

TVA should either adjust CE 28 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **XVI. CE 29—Wetlands, Riparian and Aquatic Ecosystem Improvements**

TVA’s proposed CE 29 would encompass actions that TVA determines restores and enhances wetlands that “generally” disturb no more than 125 acres of land.<sup>549</sup> It would

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<sup>541</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>542</sup> See Part II, Section II.D, above.

<sup>543</sup> Att. 2, TVA, CE Support Documentation, 3-123.

<sup>544</sup> *Id.*

<sup>545</sup> Att. 7, CEQ, CE Guidance, 5.

<sup>546</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>547</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>548</sup> See Part II, Section V, above.

categorically exclude activities ranging from the construction of dikes to species reintroduction.<sup>550</sup>

CE 29 suffers the same deficiencies as many of its other proposed CEs because of its unreasonably broad language. The acreage limit that TVA proposes is “generally” no more than 125 acres. 125 acres means approximately 125 football fields’ worth of wetlands that can be affected under a single activity exempted in this CE. Moreover, nothing in the CE’s language proposes to limit the 125 acres to singular locations so that TVA cannot segregate the 293,000 acres of public land for which it is responsible into 125 acre plots.<sup>551</sup>

Moreover, the types of activities could have significant environmental effects, cumulatively and individually: as TVA explains, “These areas protect some of the most biologically diverse and sensitive habitats occurring on TVA-managed lands, including unique wetlands, riparian areas, and aquatic ecosystems.”<sup>552</sup> While the installation of one recycled Christmas tree (typically used by TVA as fish attractors)<sup>553</sup> into one area considered on its own may not have significant environmental effects, 125 football fields filled with recycled Christmas trees would be detrimental to these “biologically diverse and sensitive habitats.”

TVA’s cited EAs and EISs do not support CE 29 because they include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 29.<sup>554</sup> Specifically,

- The Natural Resource Plan EIS and ROD promises to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>555</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>556</sup>

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<sup>549</sup> Att. 2, TVA, CE Support Documentation, 3-125.

<sup>550</sup> Att. 2, TVA, CE Support Documentation, 3-125.

<sup>551</sup> See Part II, Section II.D (Specificity), above.

<sup>552</sup> Att. 2, TVA, CE Support Documentation, 3-125.

<sup>553</sup> Att. 2, TVA, CE Support Documentation, 3-125.

<sup>554</sup> See Part II, Section II.E, III, IV (Citation to Other EAs/EISs), (Segmenting), (Tiering/Programmatic), above.

<sup>555</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>556</sup> Att. 10, CEQ, CE Programmatic Guidance, n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

- The other EAs and EISs cited by TVA include substantial mitigation measures, and many also include form language, “With the implementation of the above measures, TVA has determined that adverse environmental impacts of future land development proposals on the TVA-managed reservoir lands would be substantially reduced.”<sup>557</sup>

TVA’s discussion and analysis of the environmental effects of activities applicable to CE 29 does not meet the standard required by NEPA and the CEQ Regulations.<sup>558</sup> TVA’s discussion includes only conclusory statements that the proposed CE would not cause significant environmental effects while only citing prior TVA EAs and EISs and no scientific studies.

Because this activity would tier to the Natural Resource Plan programmatic EIS, play a “shell game” by categorically excluding it. TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>559</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>560</sup> These activities are sufficiently “connected” and “similar” to require TVA to consider them together, as argued above.<sup>561</sup>

The cited benchmarking examples similarly do not support the broad language and application of CE 29.<sup>562</sup> For example, each of the cited CEs are meticulously described and limited, and none of the agencies include all of the activities that TVA proposes to include in this CE.<sup>563</sup> Moreover, TVA provides no evidence that categorically excluding management of wetlands and riparian areas would be consistent with U.S. Army Corps of Engineers regulations, guidance, and practice, or with the executive orders discussed in Section I.IV, above.

TVA should promulgate documentation requirements that would require that application of CE 29 be documented and be made publicly available on TVA’s website.<sup>564</sup>

TVA should either adjust CE 29 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

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<sup>557</sup> See, e.g., TVA, *Pickwick Reservoir Land Management Plan*, Environmental Impact Study (Sept. 10, 2002). Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV.

<sup>558</sup> See Part II, Section II.A-C (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>559</sup> See Part II, Section III, IV (Segmenting), (Tiering).

<sup>560</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>561</sup> 40 C.F.R. § 1508.25(a)(1)–(2); *Tenn. Env’tl Council v. TVA*, 32 F. Supp. 3d 876, 889–90 (E.D. Tenn. 2014).

<sup>562</sup> See Part II, Section II.D, F (Specificity), (Benchmarking).

<sup>563</sup> Att. 2, TVA, CE Support Documentation, 3-134 to 3-136.

<sup>564</sup> See Part II, Section V, above.

## **XVII. CE 30—Land Management and Stewardship**

Proposed CE 30 would categorically exclude a broad and apparently limitless range of “actions to maintain, restore, or enhance terrestrial ecosystems” on TVA land, as long as the action would “generally” not physically disturb more than 125 acres. The proposed CE lacks the specificity required by NEPA and the CEQ Regulations because it employs the terms “generally” and “not limited to” without prescribing additional limitations.<sup>565</sup>

The acreage limit that TVA proposes is “generally” no more than 125 acres, again approximately 125 football fields worth of terrestrial ecosystems that could be affected under a single activity exempted in this CE. As with CE 29, nothing in this CE’s language proposes to limit the 125 acres to unconnected, singular locations. Instead, under the text of the proposed CE, TVA would be able to segregate the 293,000 acres of public land for which it is responsible into 125 acre plots, and then conduct controlled burning on all of them.<sup>566</sup>

Moreover, the types of activities could have significant environmental effects, cumulatively and individually: this CE would apply to activities in Natural Areas (16,000 acres) that include “some of the most biologically diverse and sensitive habitats occurring on TVA-managed lands” including “populations of threatened and endangered species.”<sup>567</sup> The presence of threatened or endangered species should require preparation of an environmental impact statement; however, under TVA’s proposed changes to its “extraordinary circumstances” procedures, it could apply this CE even if a threatened or endangered species were present, as long as TVA unilaterally determined it had done sufficient mitigation or wouldn’t directly “cause” an impact on the species.<sup>568</sup> Further, TVA also fails to define extraordinary circumstances that are likely to be implicated by this indiscriminate CE, such as PETs, rare habitat, erosive soils, and unstable slopes.

TVA’s cited EAs and EISs do not support CE 30 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 30.<sup>569</sup> Specifically,

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<sup>565</sup> See Part II, Section II.D (Specificity).

<sup>566</sup> See Part II, Section II.A-C, III (Significant Impacts), (Cumulative Impacts), (Climate Impacts), (Segmenting), above.

<sup>567</sup> Att. 2, TVA, CE Support Documentation, 3-138.

<sup>568</sup> See Part I, Sections II.B and K, above (Extraordinary Circumstances).

<sup>569</sup> See Part II, Section II.E. Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV. However, based on the descriptions in the CE Supporting

- The Natural Resource Plan EIS and ROD promises to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>570</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>571</sup>

Again, TVA’s discussion and analysis of the environmental effects of activities applicable to CE 30 is conclusory and does not represent a “hard look,” as required by NEPA.<sup>572</sup>

Because this activity would tier to the Natural Resource Plan programmatic EIS, play a “shell game” by categorically excluding it. TVA cannot categorically exclude any segment or interdependent part of a larger proposed action.<sup>573</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>574</sup>

The cited benchmarking examples similarly do not support the broad language and application of CE 30.<sup>575</sup> For example, while BLM applies a limit of 250 acres to some of its CEs, this acreage is only used in certain, defined activities that BLM takes.<sup>576</sup> Noticeably absent from TVA’s benchmarking for CE 30 are examples from U.S. Forest Services (USFS) categorical exclusions, because TVA’s proposed CE 30 is out of step with the Forest Service’s CE on land management practices: “Proposals for actions that approve projects and activities, or that command anyone to refrain from undertaking projects and activities, or that grant, withhold or modify contracts, permits or other formal legal instruments, are outside the scope of this [categorical exclusion] and shall be considered separately under Forest Service NEPA procedures.”<sup>577</sup>

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Documentation, these CECs involve minute actions conducted on much smaller acreages (ranging from 0.5–51 acres).

<sup>570</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>571</sup> Att. 10, CEQ, CE Programmatic Guidance, at n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a “shell game” of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

<sup>572</sup> See Part II, Section II.A-C, III (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>573</sup> See Part II, Section IV.

<sup>574</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>575</sup> See Part II, Section II.F, above.

<sup>576</sup> Att. 2, TVA, CE Support Documentation, 3-146.

<sup>577</sup> 36 C.F.R. § 220.6(e)(16).

TVA also should promulgate documentation requirements that would require that application of CE 30 be documented and be made publicly available on TVA's website.<sup>578</sup>

TVA should either adjust CE 30 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

### **XVIII. CE 31—Forest Management**

Proposed CE 31 would categorically exclude a broad range of forest management activities, including tree harvesting, prescribed burns, salvage, and replanting.

CE 31 lacks the specificity required by NEPA and the CEQ Regulations.<sup>579</sup> TVA again proposes to “generally” limit its categorically excluded activities to no more than 125 acres (and 250 acres in some instances). It does not limit the 125 acres to unconnected, singular locations, rather than contiguous forest. In addition, the CE lists specific activities as examples but expressly states that application of the CE is “not limited to” those activities.

Moreover, the types of activities could have significant environmental effects, cumulatively and individually because the proposed CE would include timber harvesting.<sup>580</sup> As demonstrated in *Sherwood v. TVA*, the policy and decisions surrounding timber harvesting and tree clearing requires NEPA review.<sup>581</sup>

TVA's cited EAs and EISs do not support CE 31 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 31.<sup>582</sup> Specifically,

- The Natural Resource Plan EIS and ROD promises to “[c]onduct[ ] site and/or activity-specific environmental reviews of its actions to implement the [Natural Resource Plan] and incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>583</sup> Rather than properly tiering EAs or EISs to the Natural Resource Plan EIS, TVA proposes to categorically exclude many of the activities that would

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<sup>578</sup> See Part II, Section V.

<sup>579</sup> See Part II, Section II.D (Specificity), above.

<sup>580</sup> Att. 2, TVA, CE Support Documentation, 3-152.

<sup>581</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

<sup>582</sup> Many of the EAs and EISs are not publicly available on TVA's website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV. However, based on the descriptions in the CE Supporting Documentation, these CECs involve minute actions conducted on much smaller acreages (ranging from 4–51 acres).

<sup>583</sup> Att. 51, TVA, Natural Resources Plan, ROD; see also Part II, Section II.E (Citation to EAs/EISs), above.

require this type of site- or activity-specific review, leading to the exact kind of “shell game” that CEQ was seeking to avoid in its programmatic guidance.<sup>584</sup>

TVA’s discussion and analysis of the environmental effects of activities applicable to CE 31 is far from the “hard look” required by NEPA.<sup>585</sup>

The cited benchmarking examples similarly do not support the broad language and application of CE 31. The cited CEs include multiple qualifications and minutely defined activities, whereas TVA’s proposed CE includes broad activity descriptions with no real limitation.<sup>586</sup> Although TVA cites the U.S. Forest Service’s CEs for support, TVA’s proposed CE 31 is out of step with the Forest Services, which adopted forest management CEs only for particular forest management activities undertaken for specific purposes with defined limits and standards.<sup>587</sup>

To avoid the “shell game” in programmatic NEPA review, TVA must clearly explain whether it will not conduct site-specific NEPA analyses activities or categorically excluded them under this CE.<sup>588</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>589</sup>

TVA should promulgate documentation requirements that would require that application of CE 31 be documented and be made publicly available on TVA’s website.<sup>590</sup>

TVA should either adjust CE 31 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **XIX. CE 32—Invasive Plant Management**

Proposed CE 32 would apply to “[a]ctions to manage invasive plants including, but not limited to, chemical applications, mechanical removal, and manual treatments that generally do not physically disturb more than 125 acres of land.”<sup>591</sup>

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<sup>584</sup> Att. 10, CEQ, CE Programmatic Guidance, 8 n. 10 (“[R]eliance on programmatic NEPA documents has resulted in public and regulatory agency concern that programmatic NEPA documents often result in a ‘shell game’ of when and where deferred issues will be addressed, undermining agency credibility and public trust.”)

<sup>585</sup> See Part II, Section II.A-C, III (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>586</sup> See Part II, Section II.F (Benchmarking), above.

<sup>587</sup> Att. 2, TVA, CE Support Documentation, 3-158 to 3-159.

<sup>588</sup> See Part II, Section IV (Tiering/Programmatic), above.

<sup>589</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>590</sup> See Part II, Section V (Documentation), above.

<sup>591</sup> Att. 2, TVA, CE Support Documentation, 3-166.

The language in CE 32 lacks specificity because it would allow TVA to take any action related to invasive plant management that “generally” occurs on 125 acres of land or less and does not limit the types of activities covered, as long as they pertain to “invasive plant management.”<sup>592</sup> TVA does not require that these 125 acre plots be non-contiguous. The language of this CE should be limited so that proposed activities that could have significant effects on the environment cannot be conducted without proper NEPA review.

TVA’s cited EAs and EISs do not support CE 32 because they either include mitigation measures that limit the environmental effects that the activities might have or they commit to further environmental reviews for site- or project-specific actions, such as those that would be excluded under CE 32.<sup>593</sup> TVA again cites to the Natural Resource Plan EIS, which promises to conduct “site and/or activity-specific environmental reviews” and to “incorporate appropriate measures to avoid, minimize, or mitigated adverse impact.”<sup>594</sup> Moreover, the Putnam-Cumberland Tennessee-Improve Power Supply Project EA includes mitigation measures to protect endangered and threatened bat species, making the FONSI “contingent upon adherence to the mitigation measures described.”<sup>595</sup>

TVA’s discussion and analysis of the environmental effects of activities applicable to CE 32 is far from the “hard look” required by NEPA.<sup>596</sup> This inadequacy is particularly concerning given the multiple cited EAs that require mitigation for endangered bat species.<sup>597</sup>

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<sup>592</sup> See Part II, Section II.D (Specificity), above.

<sup>593</sup> See Part II, Section II.E (Citation to EAs/EISs), above. Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV. However, based on the descriptions in the CE Supporting Documentation, these CECs involve minute actions conducted on much smaller acreages (ranging from 4–51 acres).

<sup>594</sup> Att. 51, TVA, Natural Resources Plan, ROD.

<sup>595</sup> TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project*, Environmental Assessment (chemical and mechanical ROW maintenance) (Nov.13, 2013). See also TVA, *Union-Tupelo No. 3 161kV Transmission Line*, Environmental Assessment (chemical and mechanical ROW maintenance) (Oct. 9, 2014). Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV.

<sup>596</sup> See Part II, Section II.A-C, III (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>597</sup> TVA, *Putnam-Cumberland, Tennessee – Improve Power Supply Project*, Environmental Assessment (chemical and mechanical ROW maintenance) (Nov. 13, 2013) (only removing Indiana bat roosting habitat between Oct 15 and April 1); TVA, *Union-Tupelo No. 3 161kV Transmission Line*, Environmental Assessment (chemical and mechanical ROW maintenance) (Oct. 9, 2014) (only removing Indiana and/or northern long-eared bat habitat between Dec 1 and March 15)); TVA, *Selmer-West Adamsville 161-kV Transmission Line and Switching Station*, Environmental Assessment(chemical and mechanical ROW maintenance) (Jan. 6, 2015) (contributing money to the Indiana Bat Conservation Fund and only removing roosting habitat between Oct 15 and March 31).

The proposed CE does not include such limitations on harvesting the habitat of these bats, and the discussed environmental effects do not even mention the potential individual and cumulative effects to endangered bats.

The cited benchmarking examples similarly do not support the broad language and application of CE 32.<sup>598</sup> The cited CEs include multiple qualifications and minutely defined activities, whereas TVA’s proposed CE includes broad activity descriptions with no real limitation. Further, the cited examples do not support TVA’s proposed CE. For example, the U.S. Forest Service’s cited CEs include no mention of invasive species, instead involving the repair and maintenance of administrative and recreational sites.<sup>599</sup> The Forest Service instead has created a national strategic framework for invasive species management, explicitly recognizing that the NEPA process is vital for an issue like invasive species, where problems are often “unanticipated side effects of otherwise desirable actions.”<sup>600</sup>

To avoid the “shell game” in programmatic NEPA review, TVA must clearly explain whether it will not conduct site-specific NEPA analyses activities or categorically excluded them under this CE.<sup>601</sup> Moreover, TVA cannot segment the activities of CE 22–33 so that it can avoid conducting tiered EAs and EISs.<sup>602</sup>

TVA should promulgate documentation requirements that would require that application of CE 32 be documented and be made publicly available on TVA’s website.<sup>603</sup>

TVA should either adjust CE 31 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

## **XX. CE 35—Wells**

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<sup>598</sup> See Part II.F (Benchmarking), above.

<sup>599</sup> Att. 2, TVA, CE Support Documentation, 3-172.

<sup>600</sup> Att. 60a, USFS, *National Strategy and Implementation Plan for Invasive Species Management* (Oct. 2004); Att. 60b, USFS, *Policy and Authorities: Forest Service Authorities for Invasive Species Management*, <https://www.fs.fed.us/invasivespecies/policy.shtml> (last visited Sept. 5, 2017) (“The rationale behind the NEPA process—that agencies should be fully informed of the consequences of their actions before making a decision—is especially important when dealing with an issue like invasive species, where problems are often unanticipated side effects of otherwise desirable actions. Analysis and interagency, intergovernmental, and public review and comment that identify potential problems with invasive species for a particular proposed action may also yield ideas for alternative methods of approaching an issue or other forms of mitigation.”).

<sup>601</sup> See Part II, Section II.IV (Tiering/Programmatic), above.

<sup>602</sup> See Att. 2, TVA, CE Support Documentation, 3-92 (CE 22); *id.* at 3-100 (CE 23); *id.* at 3-101 (CE 24); *id.* at 3-102 (CE 25); *id.* at 3-104 (CE 26); *id.* at 3-106 (CE 27); *id.* at 3-119 (CE 28); *id.* at 3-125 (CE 29); *id.* at 3-138 (CE 30); *id.* at 3-152 (CE 31); *id.* at 3-166 (CE 32); *id.* at 3-174 (CE 33).

<sup>603</sup> See Part II, Section II.V (Documentation), above.

Proposed CE 35 would categorically exclude “installation or modification (but not expansion) of groundwater withdrawal wells, or plugging and abandonment of groundwater or other wells. Site characterization must verify a low potential for seismicity, subsidence, and contamination of freshwater aquifers.”<sup>604</sup>

Proposed CE 35 lacks the specificity required by NEPA and the CEQ Regulations to ensure that no significant environmental impacts will occur as a result of application of the CE.<sup>605</sup> Like the use of the undefined term “minor” in other CEs, proposed CE 35 leaves it entirely to TVA’s discretion to determine whether a particular groundwater withdrawal well has a “low” potential for seismicity, subsidence, or contamination of freshwater aquifers.<sup>606</sup> TVA offers no definition or context that would limit application of the “low” threshold. Nor does TVA’s proposed “extraordinary circumstances” procedure provide such guidance.<sup>607</sup> CE 35 therefore provides insufficient guidance for TVA staff to implement NEPA.

This lack of guidance is particularly troubling because CE 35 does not, on its face, limit application of the CE to groundwater monitoring wells, but instead applies to *all* groundwater withdrawal wells, including those wells used for water supply.<sup>608</sup> In the Supporting Documentation, TVA admits the broad scope of the CE: “While the majority of these wells are for monitoring groundwater, the proposed CE does not specify the purpose of the wells.”<sup>609</sup>

Recent experience at TVA’s Allen coal and gas plants in Memphis clearly demonstrate why the scope of this CE should be limited to groundwater monitoring wells, rather than applying to all groundwater withdrawal wells without limitation. In April 2016, TVA unilaterally decided to withdraw thousands of gallons of water per minute from wells it proposed to drill into the Memphis Sand Aquifer, Memphians’ primary drinking water source, to help run its new Allen gas plant.<sup>610</sup> TVA made this decision without seeking public comment through NEPA.<sup>611</sup> The US Geological Survey groundwater study relied upon by TVA expressly noted that it did not

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<sup>604</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26,631.

<sup>605</sup> See Part II, Section II. D, above.

<sup>606</sup> See Part II, Section II.D, above.

<sup>607</sup> See Part I, Sections II.B and K; Part II, Section II.D, above.

<sup>608</sup> At a press conference following the August 2017 TVA Board meeting, TVA’s CEO Bill Johnson inaccurately claimed that the categorical exclusion does not apply to groundwater supply wells. See Steve Ahillen, *TVA Move Toward more NEPA Exemptions Concerns Environmental Groups*, The Tennessean, Aug. 25, 2017, at <http://www.knoxnews.com/story/news/local/tennessee/2017/08/25/tva-move-toward-more-nepa-exemptions-concerns-environmental-groups/597062001/> (last visited Sept. 1, 2017).

<sup>609</sup> Att. 2, TVA, CE Support Documentation, 3-187.

<sup>610</sup> Att. 61, TVA, *Allen Fossil Plant Emission Control Project*, Supplemental Environmental Assessment 1-21 (April, 2016) [hereinafter TVA, Allen SEA]; Att. 62, TVA, *Allen Fossil Plant Emission Control Project*, Finding of No Significant Impact 1-3 (April, 2016) [hereinafter TVA, Allen FONSI].

<sup>611</sup> Att. 63, Letter from Robert Deacy, Senior Vice President, TVA, to The Honorable Steve Cohen 2 (Sept. 13, 2016).

analyze potential impacts on groundwater quality from TVA's proposed withdrawal wells, and further noted past reports of impacts to the Memphis Sand Aquifer through leakage in the shallow aquifer.<sup>612</sup> Despite the USGS analysis, as well as questions raised by local groups like the Sierra Club and Protect Our Aquifer, TVA claimed there was no risk of contamination to the aquifer.<sup>613</sup>

One year later, citing high levels of toxic pollutants, including arsenic, found in groundwater at coal ash ponds at the TVA's Allen Fossil Plant, the Tennessee Department of Environment and Conservation has ordered an investigation.<sup>614</sup> TDEC is particularly concerned about the risk these pollutants may pose to the Memphis Sand Aquifer once TVA begins withdrawing water from the gas plant wells, as evidenced by a second letter the state agency sent to TVA outlining the parameters of the investigation.<sup>615</sup> In fact, those concerns led TDEC to obtain TVA's agreement not to use the groundwater withdrawal wells at Allen until the investigation has been completed.<sup>616</sup>

The Allen experience demonstrates TVA's lack of ability to properly evaluate whether a particular risk to freshwater aquifers is "low" without additional specificity and without public comment when it conducts an environmental assessment, let alone in the context of a CE.

The Allen experience further illustrates the substantial difference in scope and type of potential environmental impacts associated with groundwater withdrawal wells for supply and groundwater withdrawal wells for monitoring. As illustrated by the facts at Allen, because of the significant amount of water withdrawn, groundwater supply wells are much more likely to cause significant impacts on water supply, hydrogeology/subsurface flow, and contaminant transport, among other things.<sup>617</sup> In addition to having individually significant effects, the effects of multiple groundwater supply wells in a specific geographic area may have significant cumulative effects.<sup>618</sup> The proposed limitations on application of CE 35 do not adequately capture these

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<sup>612</sup> Att. 64, USGS, *Evaluation of Effects of Groundwater Withdrawals at the Proposed Allen Combined-Cycle Combustion Turbine Plant*, Scientific Investigations Report 7, 10, 13 (2016).

<sup>613</sup> Att. 61, TVA, Allen SEA 11 ("[N]o significant impacts to groundwater quality are expected to occur for any of the proposed alternatives").

<sup>614</sup> Att. 65, Letter from Steve Goins, Director, Division of Remediation, TDEC, to Susan Smelley, Operations Manager, TVA (June 20, 2017).

<sup>615</sup> Att. 66, Letter from Steve Goins, Director, Division of Remediation, TDEC, to Winifred Brodie, Remediation Specialist, Environmental Compliance and Operations, TVA (July 18, 2017).

<sup>616</sup> Att. 67, Tom Charlier, *TVA Agrees to Hold Off Using New Wells Pending Outcome of Contamination Probe*, Memphis Commercial Appeal, Aug. 24, 2017, at <http://www.commercialappeal.com/story/news/2017/08/24/tva-limit-use-cooling-wells-pending-outcome-contamination-probe/594913001/> (last visited Sept. 1, 2017).

<sup>617</sup> Att. 68, Email from Robert Wilkinson, Coal Combustion Residual (CCR) Technical Manager, TDEC, to Beth Rowan et al., TDEC (July 11, 2017).

<sup>618</sup> Att. 69, Email from John Boatright, Field Officer, Division of Solid Waste Management, TDEC to Rob Burnette et al., TDEC (June 2, 2017).

potential impacts. For these reasons, the installation or modification of groundwater supply wells should not be included within the scope of CE 35, and indeed, should not be categorically excluded at all.

The text of CE 35 similarly does not limit its application to the plugging or abandonment of groundwater wells. Instead, the Supporting Documentation indicates that TVA anticipates applying CE 35 to plugging or abandoning oil and gas wells: “The proposed CE is not intended to apply to the installation of wells for oil or gas exploration or production but may be applied to plugging or abandoning such wells.”<sup>619</sup> The potential environmental impacts associated with plugging or abandoning oil and gas wells are substantially different in scope and type than those associated with abandoning groundwater wells. In particular, the potential for hazardous waste to contaminate surrounding soil and groundwater is much higher for oil and gas wells.<sup>620</sup> Oil and gas wells may also emit dangerous levels of methane gas into the air.<sup>621</sup> The proposed limitations on application of CE 35 do not adequately capture these potential impacts. For these reasons, the plugging and abandoning of oil and gas wells should not be included within the scope of CE 35, and indeed, should not be categorically excluded at all.

For the same reasons, the environmental analysis provided in the Supporting Documentation falls far short of demonstrating that the activities covered in CE 35 will not have significant individual or cumulative effects.<sup>622</sup> In particular, the environmental analysis concludes, with no analysis, that “[m]ajor impacts to aquifers from limited well installation and resulting water usage would be unlikely.”<sup>623</sup> It also concludes that no significant impacts will occur to groundwater quality based on the vague limitation of “low” potential for contamination of freshwater aquifers.<sup>624</sup> The Allen experience directly contradicts both of these findings.

Similarly, TVA concedes that impacts to soils and groundwater from hazardous waste “may vary by the type of well being plugged or abandoned,” but nevertheless concludes, without analysis, that in all cases the impacts would be “minor and short-term.” Contamination from abandoned oil and gas wells generally is not “minor and short-term,” as TVA’s own environmental documents regarding remediation of Potter’s Ford wells show.<sup>625</sup> TVA explains that “[t]he well, located within a wildlife management area and adjacent to the Obed Wild and

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<sup>619</sup> Att. 2, TVA, CE Support Documentation, 3-186.

<sup>620</sup> Att. 70, Ben Hall, *Cost of Cleaning Abandoned Oil Wells Could Shift to Taxpayers*, NewsChannel 5 Nashville, Oct. 28, 2016, at <http://www.newschannel5.com/news/newschannel-5-investigates/cost-tf-cleaning-abandoned-oil-wells-could-shift-to-taxpayers> (last visited Sept. 1, 2017).

<sup>621</sup> *Id.*

<sup>622</sup> See Part II, Sections II.A-C.

<sup>623</sup> Att. 2, TVA, CE Support Documentation, 3-190.

<sup>624</sup> *Id.*

<sup>625</sup> Att. 2, TVA, CE Support Documentation, 3-189.

Scenic River, was known to discharge a mixture of oil, gas, and water to the surface and into Underwood Branch.”<sup>626</sup>

TVA’s past environmental documentation does not support its conclusion that CE 35 would not have individual or cumulatively significant impacts.<sup>627</sup> Based on the titles, the categorical exclusion checklists identified by TVA apply primarily to groundwater monitoring well installation or abandonment.<sup>628</sup> Nor do the EAs cited in the Supporting Documentation provide adequate support for proposed CE 35.<sup>629</sup> With respect to the two EAs TVA discusses, it contends that that actions described and analyzed in the EAs are “atypical.”<sup>630</sup> Yet nothing in proposed CE 35 would prevent TVA from applying CE 35 to those types of “atypical” actions. Nor does TVA’s proposed “extraordinary circumstances” procedure provide any basis for limiting the scope of CE 35.<sup>631</sup>

Tellingly, TVA does not cite to or discuss its supplemental EA for the water withdrawal wells at the Allen gas plant site (“Allen SEA”). The Allen SEA concluded that there would be no potential for impacts to water quality in the Memphis Sand Aquifer.<sup>632</sup> As described above, the state regulator is concerned enough about those potential impacts to have required TVA to conduct an extensive investigation, and has prevented TVA from using the wells in the meantime. The Allen SEA therefore provides no support for including groundwater supply wells within the scope of CE 35. Nor does it provide confidence in TVA’s ability to determine when there is a “low” potential for contamination of freshwater aquifers.

The Department of Energy CEs that TVA identifies in its benchmarking exercise also do not support adoption of CE 35 because they include additional specific limitations not proposed in CE 35, including but not limited to the following:

- B1.18 does not apply to the installation of new groundwater supply wells unless in existing well field and limits application based on drawdown effects, decline in water table, degradation of aquifer.
- B3.7 is limited to exploratory and experimental wells in existing well fields and contains language re: site characterization verified “low potential for seismicity,

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<sup>626</sup> *Id.*

<sup>627</sup> *See* Part II, Section II.E.

<sup>628</sup> TVA declined to provide its categorical exclusion checklists to Environmental Groups during the comment period. *See* Part I, Section VI, above.

<sup>629</sup> TVA does not discuss the details of a third EA it cites, for administration of an ARC grant, and the EA was not timely made publicly available by TVA. *See* Part I, Section VI, above.

<sup>630</sup> Att. 2, TVA, CE Support Documentation, 3-189.

<sup>631</sup> *See* Part I, Sections II.B and K; Part II, Section II.D.

<sup>632</sup> Att. 61, TVA, Allen SEA 11 (“[N]o significant impacts to groundwater quality are expected to occur for any of the proposed alternatives”).

subsidence, and contamination of freshwater aquifers,” but expressly invokes other DOE protocols to further define “low potential.”

- B5.3 contains additional limits including “covered modifications would not be part of site closure,” and expressly invoking other DOE protocols.
- B5.12 contains additional limits including expressly invoking other DOE protocols.
- B5.13 contains additional express limits.

In addition, the scope and specificity of the DOE CEs is very different from proposed CE 35.

TVA should promulgate documentation requirements that would require that application of CE 35 be documented and be made publicly available on TVA’s website.<sup>633</sup>

TVA should adjust CE 35 so that it complies with the requirements of NEPA, including making it applicable only to groundwater monitoring wells (defined as wells solely for the monitoring and measuring groundwater) and providing for additional specific limits on its application, including but not limited to requiring TVA to comply with state and local laws and regulations addressing groundwater and groundwater wells.

## **XXI. CE 36—In-Kind Replacement**

In proposed CE 36, TVA proposes to categorically exclude a vast range of activity: everything fitting under the umbrella of routine operation, repair, in-kind replacement, and maintenance for “existing buildings, infrastructure systems, facility grounds, public use areas, recreation sites, and operating equipment.”<sup>634</sup> Not only is this proposed CE extremely vague, by TVA’s own tacit admission, it would incorporate actions that would result in significant impacts to the environment. As a result, proposed CE 36 is contrary to NEPA, and should not be included in any final regulation.

TVA’s proposal offers only hazy limitations that are insufficient to render it a proper categorical exclusion.<sup>635</sup> TVA does not offer definitions on what is “routine,” or “in-kind replacement,” or what actions may be “required” to “maintain” or “preserve” assets.<sup>636</sup> As a result, it is impossible for members of the public to understand just what *is not* included, as

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<sup>633</sup> See Section II, Part V, above.

<sup>634</sup> See Att. 2, TVA, CE Support Documentation, 3-194. Indeed, under TVA’s proposal, this activity need not even occur at TVA sites, as TVA proposes including also activities within the “vicinity of TVA’s generation and other facilities.” *Id.*

<sup>635</sup> See Part II, Section II.D, above.

<sup>636</sup> *Id.*

nearly every activity TVA could undertake could be described as something “required” to “maintain” TVA’s assets.

Nor is the proffered limitation of actions that do not “result in a substantial change in the design capacity, function, or operation”<sup>637</sup> particularly meaningful. Besides failing to define what a “substantial change” might or might not be, by proposing to limit a contemplated categorical exemption based on exclusion of all activities that cause “substantial” impact, TVA simply moves a critical aspect of NEPA analysis behind the shield of an exemption. This is because the question of whether or not a proposed action has “substantial” or significant impact is precisely what NEPA analysis is supposed to determine. In other words, TVA is proposing to decide what does and does not threaten significant impact, not through the public process of NEPA analysis, but through the internal a priori decision to cover a vast range of activities in the blanket of a categorical exemption.

This problem is evident in the very first example of an action TVA suggests would be covered by its proposed CE. TVA discusses “[r]egular servicing of in-plant and on-site equipment . . . that do not substantially increase emissions or discharges beyond current permitted levels.”<sup>638</sup> Again, TVA makes no attempt to define what “substantially” means here. Nor does TVA explain why increasing emissions or discharges at less than “substantial” levels would not be problematic or lead to significant impacts if they are *above* “current permitted” amounts. Instead, TVA appears to suggest that scenarios in which changes to plant equipment lead to increases in emissions or discharges are properly exempt from NEPA analysis as long as TVA, without public process, quietly determines that such increases are not substantial. This is completely contrary to the purpose of NEPA.

As noted above, a category of action is only appropriate for a categorical exclusion if those activities are incapable of causing significant environmental impact. But as TVA concedes in its Supporting Documentation, much of the action that would be covered by proposed CE 36 is entirely capable of causing significant impact. For example, TVA suggests it “has found that several environmental resources may be affected by such activities” as those within the ambit of CE 36, but that “these activities **typically** do not have significant environmental effects.”<sup>639</sup> Likewise, TVA later admits several times that activities covered by proposed CE 36 “could” have long-term significant impacts.<sup>640</sup>

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<sup>637</sup> *Id.*

<sup>638</sup> *Id.*

<sup>639</sup> *Id.* at 3-199 (emphasis added); *see also id.* at 3-201 (“TVA concludes that these activities do not typically cause significant environmental effects”).

<sup>640</sup> *Id.* at 3-201.

But this is the wrong analysis. For something to be *categorically excluded*, it should *never* have significant environmental effects.<sup>641</sup> TVA is conceding that some—perhaps much—of the time, the items covered by proposed CE 36 do in fact have significant environmental effects. This is *precisely* the sort of scenario for which NEPA was intended: TVA must perform some level of NEPA process before determining whether or not there is a significant impact. It cannot simply categorically waive that obligation on the front end based on the unsubstantiated hope that “typically” there would not be a significant impact.

Even TVA’s cited examples of categorical exclusions from other agencies show how proposed CE 36 goes too far.<sup>642</sup> TVA cites approvingly of Department of Energy (“DOE”) categorical exclusion B1.3; however, DOE’s categorical exclusion contains significant limiting language absent from TVA’s proposal.<sup>643</sup> The DOE’s exclusion is limited to an action that “does not result in significant change in the expected useful life, design capacity, or function of the facility.”<sup>644</sup> Similarly, DEO defines the “routine maintenance” covered by the exemption as specifically *not* including “replacement of a major component that significantly extends the originally intended useful life of a facility.”<sup>645</sup> Likewise, in Department of Homeland Security (“DHS”) categorical exclusion D3—again, cited approvingly by TVA—the exclusion extends only to actions “which do not result in a change in functional use or an impact to a historically significant element or setting . . . .”<sup>646</sup> Contrary to TVA’s proposed CE 36, the DHS exclusion is limited to those activities that do not result in significant changes or impacts.

None of these limitations are present in TVA’s proposal. As a result, CE 36 sweeps in far too much, and would exempt from NEPA review exactly the sort of activities that should be reviewed under NEPA. Accordingly, CE 36 should be rejected. At the very least, TVA should promulgate documentation requirements that would require that application of CE 36 be documented and be made publicly available on TVA’s website.<sup>647</sup>

## **XXII. CE 37—Modifications of Existing Plant Equipment**

TVA’s Proposed CE 37 is even more problematic than proposed CE 36. With proposed CE 37, TVA proposes to exempt “[m]odifications, upgrades, uprates, and other actions that alter existing buildings, infrastructure systems, facility grounds, and plant equipment, or their

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<sup>641</sup> See Part II, Sections II.A-C, above.

<sup>642</sup> See Part II, Section II.F, above.

<sup>643</sup> See *id.* at 3-201-02.

<sup>644</sup> *Id.*

<sup>645</sup> *Id.*

<sup>646</sup> *Id.* at 3-203.

<sup>647</sup> See Section II, Part V, above.

function, performance, and operation.”<sup>648</sup> In other words, CE 37 would exempt from NEPA review nearly every action TVA could possibly take regarding property it already controls that would not already be covered by CE 36. Nearly any activity TVA could conceive of could be a “modification” of an existing facility, particularly if it includes anything that alters the “function” or “operation” of that facility.<sup>649</sup> This would appear to include things, concerning generating units, like boiler expansions, turbine rebuilds, or other on-site modifications that could dramatically change the output of a generator, significantly change its emissions or discharges, or substantially change the lifespan of that generating unit, with severe environmental impact resulting.

The only quasi-limitation that TVA offers in CE 37 is that covered actions “generally will not physically disturb more than 10 acres,” but this limitation does not limit much, given that many existing facilities already consist of built or “disturbed” land, and at any rate, TVA appears to not even view this as a guideline, as it suggests that only “generally” will fewer than 10 acres be disturbed.<sup>650</sup>

TVA’s own language in the Supporting Documentation makes it clear that the proposed CE, as currently drafted, would exempt actions likely to cause significant impacts.<sup>651</sup> For example, TVA notes that “under normal circumstances the activities covered by the proposed CE do not individually or cumulatively have a significant effect on the quality of the human environment.”<sup>652</sup> The words “normal circumstances” are undefined, and are doing a lot of very heavy lifting here—plainly, not every action will take place under “normal” circumstances. Similarly, in discussing hazardous waste, TVA notes that such waste “could be generated from some of the activities under the proposed CE” but then goes on to say that it would be treated according to legal requirements and therefore the “effects on human health and safety” would be “limit[ed].”<sup>653</sup> But this is not the same thing as “no significant impact”—TVA is expected to comply with the law no matter what it does, and this expectation is not the same thing as satisfying the requirement for a categorical exemption that no significant impact is possible.<sup>654</sup>

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<sup>648</sup> Att. 2, TVA, CE Support Documentation, 3-208.

<sup>649</sup> See Part II, Section II.D, above.

<sup>650</sup> *Id.* CE 37 subpart (b) might offer a further limitation by excluding from the exemption actions that “substantially alter emissions or discharges beyond current permitted limits.” *Id.* However, this language does not explain what is meant by “substantially,” and at any rate, subpart (b) is part of a list of examples “include[d]” by CE 37, but to which CE 37 is “not limited,” and as such, is not a limit at all.

<sup>651</sup> See Part II, Sections II.A-C, above.

<sup>652</sup> Att. 2, TVA, CE Support Documentation, 3-210.

<sup>653</sup> *Id.* at 3-213. TVA makes a similar observation regarding solid waste. See *id.*

<sup>654</sup> See 40 C.F.R. § 1508.4 (“Categorical exclusion means a category of actions which do not individually or cumulatively have a significant effect on the human environment and which have been found to have no such effect in procedures adopted by a Federal agency in implementation of these regulations”).

TVA appears to recognize that proposed CE 37 sweeps in far too much, and would incorporate actions that would have significant impact:

For routine actions under CE #37, some substantive change, improvement or alteration would be made to existing operations, structure, equipment, or emissions. Because the actions would result in some substantive change, TVA would continue to review actions under CE #37 more thoroughly by documenting its application in the ENTRAC database.<sup>655</sup>

TVA adds, hopefully, that “[c]ompletion of a CEC for every application of the proposed CE #37 will ensure that the CE would not be applied to actions that could have significant effects on the environment.”<sup>656</sup> But this is much less than NEPA requires. If there is a possibility of significant impacts, NEPA is not satisfied if TVA merely records the action in a database listing actions it has categorically excluded. Instead, TVA is required to actually perform NEPA analysis, including analysis of impacts and alternatives.

In support for its proposed CE, TVA cites to examples from other agencies; however, these examples are far less sweeping than proposed CE 37.<sup>657</sup> For example, TVA cites to DOE categorical exclusion B1.3, yet this exclusion (as discussed above) is far more limited than the exclusion TVA proposes. DOE’s categorical exclusion, discussing equipment replacements, only covers the action “. . . provided that the replacement does not result in a significant change in the expected useful life, design capacity, or function of the facility. Routine maintenance does not include replacement of a major component that significantly extends the originally intended useful life of a facility.”<sup>658</sup> TVA lacks this qualifier, which makes all the difference. Likewise, TVA cites to a DHS categorical exclusion, but this exclusion only addresses actions “that do not result in a change in the functional use of the real property.”<sup>659</sup> Not only does TVA lack this qualifier, but CE 37 seems specifically written to include actions that deliberately result in changes in the functional use of the facilities being modified.

As with other categorical exclusions discussed above, CE 37 is inconsistent with the requirements of NEPA. The actions covered by proposed CE 37 are exactly of the sort that should be subjected to NEPA analysis. Proposed CE 37 should accordingly be rejected.

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<sup>655</sup> Supporting Documentation, 3-209.

<sup>656</sup> *Id.*

<sup>657</sup> *See* Part II, Section II.F, above.

<sup>658</sup> *Id.* at 3-215.

<sup>659</sup> *Id.* at 3-217.

### **XXIII. CE45—Renewable Energy Sources at Existing Facilities**

In Proposed CE 45, TVA proposes to categorically exclude a broad range of renewable and waste-heat-to-energy projects at existing TVA facilities, each of which has its own particular set of potential environmental impacts.

The language in CE 45 is unreasonably broad because it would allow TVA to install electricity generators (like combined heat and power or cogeneration systems) “generally comprising of physical disturbance to no more than 10 acres of undisturbed land and 25 acres of previously-disturbed land.”<sup>660</sup> TVA provides itself discretion to comply with the 10- and 25-acre limits of the proposed CE and does not require that these 10 and 25 acre plots be non-contiguous. The language of this CE should be specific enough to ensure that proposed activities that could have significant effects on the environment cannot be planned and decided upon behind closed doors and without proper NEPA review.<sup>661</sup>

Of particular concern is the leeway that this language provides TVA so that it can build and install a natural gas turbine at an existing facility (that constitutes part of a combined heat and power or cogeneration system), resulting in significant environmental effects, both cumulatively and individually.

TVA’s cited EAs and EISs do not support CE 45 because they include mitigation measures that limit the environmental effects of the activities.<sup>662</sup> For example, the Johnsonville Cogeneration Plant EA requires the use of “best management practices (BMPs) listed in the EA for avoiding or reducing minor adverse environmental effects from the construction, operation, and maintenance of the proposed cogeneration plant.”<sup>663</sup> Undersigned groups were not provided access to the other NEPA documentation until two business days before the end of the comment period and therefore cannot provide insights on whether the following support TVA’s proposed CE.

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<sup>660</sup> *Sherwood v. TVA*, No. 3:12-CV-156-TAV-HBG, 2017 WL 3261769 (E.D. Tenn. July 31, 2017).

<sup>661</sup> See Part II, Section II.D (Specificity), above.

<sup>662</sup> See Part II.E (Citations to EAs/EISs), above. Many of the EAs and EISs are not publicly available on TVA’s website, and TVA did not timely provide its CE supporting materials to the public during this comment period despite multiple requests under the Freedom of Information Act (FOIA) to provide these documents, or at least portions of them. See Part I, Section VI, above; see also Part II, Sections II.E, III-IV. However, based on the descriptions in the CE Supporting Documentation, these CECs involve minute actions conducted on much smaller acreages (ranging from 4–51 acres).

<sup>663</sup> TVA, *Johnsonville Cogeneration Plant EA* (7/1/2015). See also TVA *Solar Photovoltaic Projects Programmatic EA* (9/30/2014) (requiring developers to “adhere to reasonable and feasible routine environmental protections measures mentioned in the PEA.”)

TVA's discussion and analysis of the environmental effects of activities applicable to CE 45 is far from the "hard look" required by NEPA and CEQ Regulations.<sup>664</sup> This inadequacy is particularly clear given TVA's failure to include any consideration of the effects of these activities on climate change and greenhouse gas emissions, as required by NEPA.<sup>665</sup>

The cited benchmarking examples similarly do not support the broad language and application of CE 45.<sup>666</sup> The cited CEs include multiple qualifications and apply only to discretely defined activities, whereas TVA's proposed CE includes broad activity descriptions with no real limitation on its activities. For example, even though DOE includes a CE on cogeneration and combined heat and power systems, it limits the CE's application to situations where the activity will "not have the potential to cause a significant increase in the quantity or rate of air emissions and would not have the potential to cause significant impacts to water resources."<sup>667</sup>

These types of activities would normally tier to TVA's Integrated Resources Plan EIS, but now would be categorically excluded. Thus, to avoid the "shell game" in programmatic NEPA review, TVA must clearly explain whether it will not conduct site-specific NEPA analyses activities or categorically excluded them under this CE.<sup>668</sup>

TVA should promulgate documentation requirements that would require that application of CE 45 be documented and be made publicly available on TVA's website.<sup>669</sup>

TVA should either adjust CE 45 so that it complies with the requirements of NEPA, or it should withdraw it as a proposed CE.

#### **XXIV. CE 47—Modifications to Rate Structure and Associated Contracts**

In proposed CE 47, TVA would categorically exclude "[m]odifications to the TVA rate structure (i.e., rate change) and any associated modifications to contracts for pricing energy or demand for wholesale end-users or direct serve customers of TVA power or development of new or modified pricing products that result in no or only minor increases in peak or base load energy generation or that result in system-wide demand reduction."<sup>670</sup>

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<sup>664</sup> See Part II, Section II.A-C, III (Significant Impacts), (Cumulative Impacts), (Climate Impacts), above.

<sup>665</sup> See *id.* Part II, Section II.C.

<sup>666</sup> See Part II, Section II.F (Benchmarking), above.

<sup>667</sup> Att. 2, TVA, CE Support Documentation, 3-292.

<sup>668</sup> Part II, Section IV (Tiering/Programmatic), above.

<sup>669</sup> See Part II, Section V (Documentation).

<sup>670</sup> Att. 2, TVA, CE Support Documentation, 3-304.

In this CE, TVA proposes to reverse its longstanding practice of analyzing rate changes in EAs and EISs.<sup>671</sup> In the past, “...TVA has not applied existing CEs to proposed changes to rate structures, modifications to associated contracts, or development of pricing products. TVA has prepared EAs or EISs for such proposals on multiple occasions....” Now, however, TVA proposes to exempt most rate changes from public disclosure and scrutiny under NEPA.

TVA is proposing to adopt this CE in advance of planned February 2018 rate change that is intended to address the proliferation of distributed energy resources (“DERs”), like solar photovoltaics and energy efficiency, across its service territory.<sup>672</sup> The potential impact of CE 47 on the energy choices available to residents and businesses across the Valley cannot be overstated. In contrast to the rates of monopoly utilities in most states, TVA’s rates are not subject to independent scrutiny by a public utility commission because of its federal status. Indeed, at the August 23, 2017, TVA Board meeting, TVA’s Chief Executive Officer, Bill Johnson, asserted that the Board has “unfettered discretion” to establish rates, regardless of whether it has any basis or justification for doing so.<sup>673</sup>

If TVA also exempts the environmental impacts associated with its rate changes from public scrutiny under NEPA, the public will be left in the dark about important policy decisions that could have an effect on their ability to save money on electricity bills and reduce their impact on GHG and conventional pollution.<sup>674</sup>

Across the nation, public utility regulators have recognized that rate design is vitally important to distributed energy proliferation and environmental benefits associated with it.<sup>675</sup> Indeed, because of the increasing availability of energy choices for end-use customers, the National Association of Regulatory Utility Commissioners advises *more* transparency about distribution grid operations, not less:

[I]n any evaluation, the utility’s specific characteristics and the most likely reaction to any rate design changes must be clearly and thoroughly determined before questions and challenges arising from DER are

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<sup>671</sup> Att. 2, TVA, CE Support Documentation, 3-306.

<sup>672</sup> Att. 71, Press Release, TVA, A New Pricing Paradigm, <https://www.tva.gov/Newsroom/A-New-Pricing-Paradigm> (last visited Sept. 6, 2017); Att. 72, Associated Valley Industries, *TVA Pricing Update*, Powerpoint Presentation to Board of Directors, TVA, slides 3-9 (May 4, 2015) [hereinafter AVI, TVA Pricing Update].

<sup>673</sup> Video of the August 23, 2017 Board meeting, <https://tva.mediaplatform.com/#!/video/342/TVA+Board+of+Directors+Meeting+-+August+23,+2017>.

<sup>674</sup> Att. 73, Southern Environmental Law Center & Caroline Golin, The Greenlink Group, *A Troubling Trend in Rate Design: Proposed Rate Design Alternatives to Harmful Fixed Charges* (Dec. 2015).

<sup>675</sup> Att. 74, National Association of Regulatory Utility Commissions, *Resolution Creating Staff Subcommittee on Rate Design* (Nov. 2015) <http://pubs.naruc.org/pub/D2DDD7AC-E73C-B386-630C-B88491DD0608> (last visited Sept. 5, 2017); Att. 75, National Association of Regulatory Utility Commissions, *Manual on Distributed Energy Resources Rate Design and Compensation*, 71-73; 97-156 (2016) [hereinafter NARUC, DER Manual].

addressed through ratemaking changes. The required level of transparency and detail for the operations and physical characteristics of a utility's distribution system may be significantly more than may have been employed in the past.<sup>676</sup>

TVA's proposed CE 47 would be a step backward in terms of the transparency, rather than the step forward necessary to operate a 21<sup>st</sup> century grid. Although TVA only operates the transmission grid, its rate structures send strong signals to the local distribution utilities that provide electricity to 9 million people across the Tennessee Valley, as well as to its directly-served industrial customers.<sup>677</sup>

Moreover, TVA acts as the "regulator" for the rates established by distribution utilities. In a recent change to its rate review policy, TVA moved its retail rate review behind closed doors as well, shifting primary responsibility from the Board of Directors to TVA staff.<sup>678</sup> Proposed CE 47 appears to be TVA's next step toward cutting end-use customers out of the rate design conversation—at precisely the time when end-use customers are becoming active participants in energy efficiency and distributed generation.

Proposed CE 47 lacks the specificity required by NEPA and the CEQ Regulations to ensure that no significant environmental impacts will occur as a result of application of the CE.<sup>679</sup> First, TVA does not provide sufficient parameters for CEQ, the public, or TVA staff to evaluate what would be considered a "minor" increase in peak or baseload generation.<sup>680</sup> Moreover, given the growing threat of climate-related impacts, *any* increase in peak or baseload generation could be step in the wrong direction, to the extent that TVA is likely to satisfy that increase with coal- or natural gas-fired generation.<sup>681</sup>

Second, limiting application of the CE based on a rate structure's potential influence on load does not adequately address the potential environmental impacts associated with that rate structure. TVA is currently projecting flat and declining load for the foreseeable future.<sup>682</sup> Thus, even a rate structure that would substantially *deter* end-use customer investment in energy efficiency or other DERs, such as increasing the fixed charge portion of rates to distribution

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<sup>676</sup> Att. 75, NARUC DER Manual, 58

<sup>677</sup> See Att. 19, TVA, Rate Change EA, 2; Att. Att. 72, AVI, TVA Pricing Update, slides 3-9.

<sup>678</sup> Att. 76, Memorandum, Board of Directors, TVA, *Approval of Modified Revised Rate Review Process* (July 24, 2015).

<sup>679</sup> See Part II, Section II. D, above.

<sup>680</sup> See Part II, Section II.D, above.

<sup>681</sup> See Part I, Section II.C, above.

<sup>682</sup> Att. 77, TVA, Board Meeting, Powerpoint Presentation (Aug. 23, 2017), [https://www.tva.gov/file\\_source/TVA/Site%20Content/About%20TVA/Our%20Leadership/Board%20of%20Directors/Meetings/2017/August%202017/August%2023%202017%20Board.pdf](https://www.tva.gov/file_source/TVA/Site%20Content/About%20TVA/Our%20Leadership/Board%20of%20Directors/Meetings/2017/August%202017/August%2023%202017%20Board.pdf) (last visited Sept. 5, 2017)

utilities and direct serve customers,<sup>683</sup> might fall within the scope of proposed CE 47. As long as peak or base load was not predicted to increase above baseline (in a scenario of flat or declining growth), or TVA deemed any increases “minor,” the rate structure would not be subject to review under the proposed CE 47.

The same rate structure would, however, potentially increase environmental impacts above baseline conditions because it would encourage TVA to run existing coal or gas generation at higher rates or to purchase or build additional generation instead of relying on DERs. Rate design can be used to shape customer usage—including total consumption and time of consumption—in a way that allows the utility to dispatch higher-efficiency or lower-efficiency generation resources, resulting in lower or higher emissions, respectively.<sup>684</sup> These changes may impact the utility’s dispatch of existing generation and shape TVA’s future generation needs, both of which could have significant environmental impacts. As TVA has acknowledged, the environmental benefits of DERs may include avoided environmental compliance costs as well as avoided GHG and conventional pollution impacts and avoided water supply impacts.<sup>685</sup> DERs can also reduce wasted energy by limiting line losses associated with the transmission of electricity.<sup>686</sup>

TVA’s own Distributed Generation Integrated Value report demonstrates that rate structure and pricing for DERs is likely to be highly “controversial,” which has been interpreted by the courts as “a substantial dispute as to the size, nature, or effect of the action.”<sup>687</sup> In the DG-IV report, stakeholders disagreed substantially about the value of DERs to the grid and to society, and therefore about how much TVA should encourage their adoption through pricing and rate structures.<sup>688</sup> Indeed, expert peer reviewers also disagreed with TVA’s methodology and analysis.<sup>689</sup> Thus, even under TVA’s impermissibly narrow definition of the term, a rate structure that affects DER penetration is likely to be highly “controversial.”<sup>690</sup> Under the terms of TVA’s

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<sup>683</sup> Att. 73, Southern Environmental Law Center & Caroline Golin, The Greenlink Group, *A Troubling Trend in Rate Design: Proposed Rate Design Alternatives to Harmful Fixed Charges* (Dec. 2015).

<sup>684</sup> See Att. 78, Lazar and Colburn, *Rate Design as a Compliance Strategy for the EPA’s Clean Power Plan*, Regulatory Assistance Project (2015), available at <http://www.raonline.org/wp-content/uploads/2016/05/lazarcolburn-ratedesigncppcompliancestrategy-2015-nov.pdf> (last visited Sept. 5, 2017)

<sup>685</sup> Att. 79, TVA, *Distributed Generation – Integrated Value (DG-IV): A Methodology to Value DG on the Grid 4* (Oct. 2015) [hereinafter TVA, DG-IV Study].

<sup>686</sup> *Id.* at 15-16.

<sup>687</sup> See Part I, Section II.A, above.

<sup>688</sup> Att. 79, TVA, DG-IV Study and Appendix A.

<sup>689</sup> Att. 80, Virginia Lacy et al., *TVA Value of Solar Reviewer Comments*.

<sup>690</sup> Att. 79, TVA, DG-IV study; Part I, Section II.A, above.

Proposed NEPA Rule, any rate structure that would have an impact on DER adoption rates should therefore constitute “extraordinary circumstances” and require preparation of an EIS.<sup>691</sup>

At the same time, TVA should not have unilateral power to decide whether a rate structure is “controversial” or is otherwise outside the scope of the proposed CE 47 and/or meets the standard for “extraordinary circumstances.” TVA has historically prepared EAs and EISs for its rate structure changes,<sup>692</sup> and it should continue to do so. Promulgation of CE 47 is unnecessary and unwise. As CEQ cautions in its guidance on adoption of CEs: “If used inappropriately, categorical exclusions can thwart NEPA’s environmental stewardship goals, by compromising the quality and transparency of agency environmental review and decisionmaking, as well as compromising the opportunity for meaningful public participation and review.”<sup>693</sup> Proposed CE 47 invites such inappropriate closed-door decisions in the context of rate-making, one of TVA’s most important responsibilities—and one that, unlike in other jurisdictions, generally is not otherwise subject to public scrutiny through a public ratemaking process.

The Supporting Documentation does not adequately analyze the individually and cumulatively significant effects of rate structure decisionmaking.<sup>694</sup> TVA relies primarily on its previous EISs and EAs to conclude that any energy use, socioeconomic, and environmental impacts would be insignificant. As explained above, however, in an era characterized by flat and declining demand and the proliferation of customer-sited DERs, TVA’s previous EISs and EAs are of limited relevance. Moreover, the fact that TVA concluded that the specific proposals analyzed in those EISs and EAs would not have significant impacts on the environment is not predictive of the impacts of future rate structure proposals, particularly when TVA’s proposed “limits” on the application of CE 47 are not really limits at all. For example, TVA’s 2015 EA generally proposed changes intended to reflect the cost of producing electricity at the moment of use, which, if properly designed, would tend to send price signals to TVA’s customers to reduce peak usage.<sup>695</sup> As discussed above, however, nothing in the proposed CE 47 would limit its application to rate structures intended to send better price signals based on consumption, and as DERs have become more economic and accessible, any rate structure change is likely to be controversial in the nature of its effects.

Even when TVA has prepared EAs for its rate changes, TVA has not always subjected its analyses to public scrutiny. For example, TVA issued its 2015 rate structure EA as a final EA

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<sup>691</sup> Att. 5, TVA, Proposed NEPA Rule, 82 Fed. Reg. 26625-26626 (to be codified at 18 C.F.R. § (a)(2)) and 18 C.F.R. § 1318.400(a)(3).

<sup>692</sup> See Att. 2, TVA, CE Support Documentation, 3-306-307.

<sup>693</sup> Att. 7, CEQ, CE Guidance, 3.

<sup>694</sup> See Part I, Section II.A-C, above.

<sup>695</sup> Att. 19, TVA, Rate Change EA, 20-21.

and FONSI on the same day, without having circulated a draft EA for public comment. Rather than seeking public comment from the broad range of stakeholders that might be affected by the rate change, TVA consulted only with its customers, the distribution utilities and direct-serve customers.<sup>696</sup> As discussed in Section Part I, Section III above, this is inconsistent with the requirements of NEPA and the CEQ Regulations.<sup>697</sup> In addition, TVA's failure to seek public comment on at least some of its proposed rate change EAs in the past casts doubt the rigor of its analyses and conclusions in those EAs and further limits the value of their support for proposed CE 47.

The CEs developed by DOE and BOR also do not support adoption of proposed CE 47. Although TVA concludes that that the other agencies CEs "include activities similar to those of TVA's proposed CE,"<sup>698</sup> they do not. DOE CE B1.1 appears to be limited on its face to rate increases, not changes in rate structure as proposed by TVA in CE 47.<sup>699</sup>

DOE B4-3 applies only to rate changes for the Power Marketing Administrations. Unlike TVA, those entities generate electricity from hydropower resources, which are not likely to cause impacts to GHG and air quality.<sup>700</sup> Moreover, the Power Marketing Administrations "generally do not own electric generating plants" and receive financial support from the federal government.<sup>701</sup> Accordingly, their pricing incentives and rate structure decisions are likely to be substantially different from TVA's. In addition, in contrast to TVA in most circumstances, the Power Marketing Administrations' rates are regulated by the Federal Energy Regulatory Commission, providing an additional level of regulatory and public scrutiny.<sup>702</sup> Finally, DOE limits application of its CE to circumstances in which generation would stay within "normal operating limits." First, "normal operating limits" is very different for hydroelectric resources than for the fossil resources upon which TVA relies, in particular for peak generation. Second, as described above, CE 47 would impose a purported limit based on *load* not operating limits, and these are two very different metrics, as explained above.

BOR CE D5 is inapt for similar reasons. As a preliminary matter, it is not clear whether CE D5 is intended to apply only to rate increases or also to rate structure changes. In any case,

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<sup>696</sup> See Att. 19, TVA, Rate Change EA, 6; Att. 19(a), TVA, Rate Change FONSI, 2-3.

<sup>697</sup> See Part I, Section III.A, above.

<sup>698</sup> Att. 2, TVA, CE Support Documentation, 3-309.

<sup>699</sup> See Att. 2, TVA, CE Support Documentation, 3-310.

<sup>700</sup> Att. 81, U.S. Energy Information Administration, *Federal Power Marketing Administrations Operate Across much of the United States* (June 12, 2013) <https://www.eia.gov/todayinenergy/detail.php?id=11651> (last visited Sept. 5, 2017).

<sup>701</sup> *Id.*

<sup>702</sup> *Id.*

BOR's portfolio is primarily hydroelectric resources.<sup>703</sup> Moreover, BOR operates its dams within Power Marketing Administrations and is therefore subject to the same oversight by FERC.<sup>704</sup> BOR also manages its dams for multiple uses and has a cost allocation process very different from the process employed by TVA.<sup>705</sup> Accordingly, BOR's rate setting process is not analogous to TVA's.

For these reasons, TVA's benchmarking CEs do not provide support for the adoption of CE 47.

TVA should withdraw CE 47 as a proposed CE. To the extent that TVA nevertheless adopts CE 47, TVA should promulgate documentation requirements that would require that application of CE 47 be documented and be made publicly available on TVA's website.<sup>706</sup>

## **XXV. Remaining CEs**

TVA is not proposing changes to CEs 3, 4, 5, and 7.

CEs 1, 2, 8-14, 33, 34, 38-44, 46, and 48 through 50 have many of the same inadequacies discussed in Parts II and III of these comments. In particular, many of these CEs lack the specificity to ensure no significant environmental impacts will occur as a result of the activities proposed to be excluded.<sup>707</sup> Nor does TVA's proposed extraordinary circumstances procedure provide the required specificity to ensure no significant impacts will occur.<sup>708</sup>

## **XXVI. Conclusion**

For all of the foregoing reasons, TVA should revise the Proposed NEPA Rule to ensure it complies with NEPA and the CEQ Regulation, and involves the public in a manner that increases transparency in its decision-making. Any revisions should be circulated for public review and comment.

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<sup>703</sup> Att. 82, U.S. Dep't Int., *Reclamation's Role in Hydropower* (Feb. 4, 2016) [https://www.usbr.gov/power/data/role\\_rpt.html](https://www.usbr.gov/power/data/role_rpt.html) (last visited Sept. 5, 2017).

<sup>704</sup> *Id.*

<sup>705</sup> *Id.*

<sup>706</sup> See Section II, Part V, above.

<sup>707</sup> See Part II, Section II.D, above.

<sup>708</sup> See Part I, Section II.B and K, above.