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Sequence Number: 02-30-13
Notice ID(s): 1960-1961
File Date: 2/13/13

Notice of Rulemaking Hearing

Hearings will be conducted in the manner prescribed by the Uniform Administrative Procedures Act, T.C.A. §4-5-204. For questions and copies of the notice, contact the person listed below.

Agency/Board/Commission:	Environment and Conservation
Division:	Water Resources
Contact Person:	Bob O'Dette
Address:	6th Floor, L & C Annex 401 Church Street Nashville, Tennessee 37243-1531
Phone:	(615) 253-5319
Email:	Robert.Odette@tn.gov

Any Individuals with disabilities who wish to participate in these proceedings (to review these filings) and may require aid to facilitate such participation should contact the following at least 10 days prior to the hearing:

ADA Contact:	ADA Coordinator
Address:	12th Floor L&C Tower 401 Church Street Nashville, Tennessee 37243
Phone:	1-866-253-5827 (toll free) or (615) 532-0200 Hearing impaired callers may use the TN Relay Service at 1-800-848-0298.
Email:	Beverly.Evans@tn.gov

Hearing Location(s) (for additional locations, copy and paste table)

Address 1:	17th Floor Conference Room A, L & C Tower		
Address 2:	401 Church Street		
City:	Nashville, Tennessee		
Zip:	37243		
Hearing Date :	04/09/13		
Hearing Time:	9:00 a.m.	X CST/CDT ___EST/EDT	

Additional Hearing Information:

This rulemaking is intended to move the rules from Chapter 1200-04-07 to Chapter 0400-40-07 and to edit the document to correct typos and incorrect references.

Oral or written comments are invited at the hearing. In addition, written comments may be submitted prior to or after the public hearing to: Tennessee Department of Environment and Conservation, Water Resources Division; Attention: Mr. Bob O'Dette, 6th Floor, L & C Annex; 401 Church Street; Nashville, Tennessee 37243; telephone 615-532-0445 or fax 615-532-0199. However, such written comments must be received by 4:30 PM CDT, April 9, 2013, in order to assure consideration. For further information, please contact Mr. Bob O'Dette at the above address or telephone number or by e-mail at Robert.Odette@tn.gov.

Revision Type (check all that apply):

___ Amendment
X New
X Repeal

Rule(s) (**ALL** chapters and rules contained in filing must be listed. If needed, copy and paste additional tables to accommodate more than one chapter. Please enter only **ONE** Rule Number/Rule Title per row.)

Chapter Number	**Chapter Title**
0400-40-07	Aquatic Resource Alteration
Rule Number	**Rule Title**
0400-40-07-.01	General
0400-40-07-.02	Exemptions
0400-40-07-.03	Definitions
0400-40-07-.04	Permits

Chapter Number	**Chapter Title**
1200-04-07	Aquatic Resource Alteration
Rule Number	**Rule Title**
1200-04-07-.01	General
1200-04-07-.02	Exemptions
1200-04-07-.03	Definitions
1200-04-07-.04	Permits
1200-04-07-.05	Repealed
1200-04-07-.06	Repealed
1200-04-07-.07	Repealed
1200-04-07-.08	Repealed
1200-04-07-.09	Repealed
1200-04-07-.10	Repealed
1200-04-07-.11	Repealed

(Place substance of rules and other info here. Statutory authority must be given for each rule change. For information on formatting rules go to http://state.tn.us/sos/rules/1360/1360.htm)

Repeal

Chapter 1200-04-07
Aquatic Resource Alteration

Chapter 1200-04-07 Aquatic Resource Alteration is repealed.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

New Rules

Chapter 0400-40-07
Aquatic Resource Alteration

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0400-40-07-.01 General
0400-40-07-.02 Exemptions
0400-40-07-.03 Definitions
0400-40-07-.04 Permits

0400-04-07-.01 General

(1) These rules are promulgated in order to prevent the future pollution of state waters and to plan for the future use of such waters so that the water resources of Tennessee might be used and enjoyed to the fullest extent consistent with the maintenance of unpolluted waters, T.C.A. § 69-3-102(b). Persons who wish to conduct an activity that may impact a water of the state shall consider avoidance and minimization of such impacts. If impacts to the waters will occur, mitigation as set forth in paragraph (7) of Rule 0400-40-07-.04 must be proposed to offset any lost resource value.

(2) The Federal Water Pollution Control Act or Clean Water Act, § 401 (33 U.S.C. §1341), provides that an applicant for a federal license or permit for a discharge into the waters of the United States must provide the federal licensing or permitting agency a certification from the State in which the discharge originates or will originate, and that any such discharge will comply with the applicable provisions of §§ 301, 302, 303, 306 and 307 of that Act.

(3) Additionally, the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-108(b)(1), provides that it is unlawful for any person, except in accordance with the conditions of a valid permit, to carry out any activity which may result in the alteration of the physical, chemical, radiological, biological, or bacteriological properties of any waters of the State, including wetlands. These activities include, but are not limited to: the discharge of dredge or fill material, dredging, stream channel modifications, water withdrawals, wetlands alterations including drainage, and other construction activities which result in the alteration of the waters of the State. State permits for these activities are either § 401 Water Quality Certifications or Aquatic Resource Alteration Permits.

(4) This Chapter prescribes procedures peculiar to these permits, in addition to the general requirements and procedures of Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation, and the Tennessee Water Quality Control Act of 1977. This regulation only applies to activities which do not require a National Pollutant Discharge Elimination System (NPDES) permit or which do not result from the operation of a treatment system.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

0400-40-07-.02 Exemptions

(1) Management activities such as timber harvesting and beaver control which do not alter or adversely affect

the classified uses of waters of the state are not subject to these requirements.

(2) Agriculture and forestry activities and activities necessary to the conduct thereof and lands devoted to the production of agricultural or forestry products are exempt from the requirements of the Act and these rules, unless there is a point source discharge, as provided in T.C.A. § 69-3-120(g). Thus, normal farming, forestry and livestock management activities such as plowing, seeding, cultivating, minor drainage, water withdrawal for irrigation, and harvesting for the production of food, fiber, and forest products are exempt if they are part of an established (i.e., on-going) farming, forestry, or livestock management operation, unless there is a point source discharge.

(3) The Department of Agriculture provides guidance for development of best management practices (BMP's) for agriculture and forestry. One of the primary goals of these BMP's is the prevention of soil erosion and discharge of silt and sedimentation to streams. These BMP's should be followed. If silvicultural activities fail to use BMP's and a point source discharge results in water pollution, the Commissioner is authorized to issue a stop work order under P.Ch. 680 of the Acts of 2000.

(4) Existing water withdrawals on July 25, 2000 which do not adversely alter or effect the classified use of the source stream are not subject to these requirements.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

0400-40-07-.03 Definitions

As used in this Chapter and in any ARAP permit issued, including General Permits, the following terms have these meanings:

(1) "Act" means The Tennessee Water Quality Control Act of 1977, as amended, T.C.A. §§ 69-3-101 et seq.

(2) "Activity" means any and all work or acts associated with the performance, or carrying out of a project or a plan, or construction of a structure.

(3) "Adjacent" means bordering, contiguous, or neighboring. Wetlands separated from other waters of the State by man-made dikes or barriers, natural river berms and the like are "adjacent wetlands".

(4) "Aquatic Resource Alteration Permit" means a permit pursuant to T.C.A. § 69-3-108 of the Tennessee Water Quality Control Act of 1977, which authorizes the alteration of properties of waters of the State which result from activities other than discharges of wastewater through a pipe, ditch or other conveyance. Such a permit shall impose conditions, including standards and terms of periodic review, as are necessary to accomplish the purposes of the Act.

(5) "Background Conditions" means the biological (plant and animal species), chemical and physical conditions of the wetland or water body prior to the proposed activity. If the water body is disturbed, it may be necessary to use the biological, chemical and physical conditions of a similar water body as a reference condition.

(6) "Best Management Practices" means a schedule of activities, prohibition of practices, maintenance procedures and other management practices to prevent or reduce the pollution of waters of the State. BMP's include methods, measures, practices, and design and performance standards.

(7) "Certification" means an Aquatic Resource Alteration Permit under the Tennessee Water Quality Control Act of 1977, as required by § 401 of the Federal Water Pollution Control Act, which certifies, either unconditionally or through imposition of terms under which the activity must be carried out, that the activity will comply with applicable provisions of §§ 301, 302, 303, 306, and 307 of the Federal Water Pollution Control Act and Chapter 0400-40-01 of the rules of the Board of Water Quality, Oil and Gas and the Department of Environment and Conservation and the Act.

(8) "Channelization" means the alteration of stream channels including but not limited to straightening, widening, or enlarging.

(9) "Cofferdam" means an enclosure from which water can be pumped to expose the bottom of a body of

water or a barrier constructed to divert the flow of water to allow construction work.

(10) "Commence Construction" means the physical initiation of on-site structural or earthmoving work.

(11) "Constructed Wetland" means intentionally designed, built and operated on previously nonwetland sites for the primary purpose of wastewater treatment or stormwater retention; such wetlands are not created to provide mitigation for adverse impacts or other wetlands.

(12) "Clearing and Grubbing" means the removal of vegetation by cutting and digging up roots and stumps.

(13) "Cumulative Impacts" means the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. A cumulative impact to a wetland can be the loss of the variety of the natural wetland types, wetland acreage, functions and classified uses.

(14) "Debris" means woody materials, trash, flotsam, dislodged vegetation, and other potentially mobile materials which may, when located within a stream channel, contribute to flow blockage. This does not include gravel, sand, soil or its constituents such as silt, clay or other sediments.

(15) "Ditch" means a man-made excavation for the purpose of conveying water. Ditches do not include streams, modified streams or canals.

(16) "Dredging" (sand and gravel dredging) means the removal of sand, gravel and similar sediments or deposits from a stream, river, or lake bed or wetland by any method.

(17) "Earthmoving" means any construction or other activity, which disturbs the surface of the land including, but not limited to, excavation, embankment, fill, and cut of soil, rock, or earth.

(18) "Emergency" means a situation where life or substantive improvements to real property is in immediate danger.

(19) "Erosion" means the process by which the land surface is worn away by the action of water, wind, gravity, chemicals, or a combination thereof.

(20) "Excavation" (a) means a cavity formed by digging, quarrying, uncovering, displacing, or relocating soil or rock; or, (b) means to dig or remove soil, rocks, or other materials resulting in a change in all or part of the elevation of a site.

(21) "General Permit" means a permit issued under the Act and this rule authorizing an alteration to state waters within the state for a specified category of activities that are substantially similar in nature.

(22) "Ground water" means water beneath the surface of the ground within the zone of saturation, whether or not flowing through known and definite channels.

(23) "Ground water table" means the upper surface of the zone of saturation by ground water.

(24) "Hydrogeomorphic System" means a classification system for wetlands based on geomorphic setting, water source, and hydrodynamics; used to identify and group functionally similar wetlands.

(25) "Individual Permit" means a permit issued by the Division of Water Resources to a specified person to conduct specified activities at a specified location. This type of permit does not authorize an activity by a class of persons or the public in general.

(26) "Interflow" means the runoff infiltrating into the surface soil and moving toward streams as shallow, perched water above the main ground water level.

(27) "In the Dry" means in such a manner that no equipment or dredged material is in contact with the stream or wetland and that the soil water boundary is not disturbed by equipment or that no infiltration is pumped to the stream from the dredge site.

(28) "Minimal Impacts" means an activity for which the scope is very limited in area, the impact is very short in duration, and has no impact to waters just downstream of the location of the activity. Examples of activities with 'minimal impacts' include, but are not limited to, (1) minor channel changes associated with bank stabilization; and (2) an activity typically authorized by General Permit, but which requires an Individual Permit because the project falls under one of the listed exclusions.

(29) "Minor Road Crossing" is a bridged or culverted roadway fill across a stream or river which results in the alteration of 200 linear feet or less of stream bed or shoreline.

(30) "Mitigation" means compensating for impacts in regulated areas as provided by paragraph (7) of Rule 0400-40-07-.04.

(31) "Multiple populations" means two or more individuals from each of two or more distinct taxa, in the context of obligate lotic aquatic organisms.

(32) "Normal weather conditions" are those within one standard deviation of the cumulative monthly precipitation means for at least the three months prior to the hydrologic determination investigation, based on a 30-year average computed at the end of each decade. Precipitation date shall come from National Oceanographic and Atmospheric Agency's National Climatic Data Center, National Resources Conservation Service's National Climatic Data Center, Natural Resources Conservation Service's National Water and Climate Center, or other well-established weather station.

(33) "Obligate lotic aquatic organisms" means organisms that require flowing water for all or almost all of the aquatic phase of their life cycles.

(34) "Perched water" means water that accumulates above an aquitard that limits downward migration where there is an unsaturated interval below it, between the aquitard and the zone of saturation.

(35) "Practicable alternative" is an alternative that is available and capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes.

(36) "Resource Values" are the benefits provided by the water resource. These benefits include, but are not limited to, the ability of the water resource to:

(a) filter, settle and/or eliminate pollutants;

(b) prevent the entry of pollutants into downstream waters;

(c) assist in flood prevention;

(d) provide habitat for fish, aquatic life, livestock and water fowl;

(e) provide drinking water for wildlife and water fowl;

(f) provide and support recreational uses; and

(g) provide both safe and adequate quality and quantity of drinking water.

(37) "Sediment" means soil or its constituents that has been deposited in water, is in suspension in water, is being transported, or has otherwise been removed or disturbed from its site of origin.

(38) "Sedimentation or Siltation" means the process by which sediment is deposited in or by the waters of the State.

(39) "Settling Basin" means a prepared storage area constructed to trap and store sediment from erodible areas in order to protect any streams below the construction areas from excessive siltation; an impoundment that accumulates transported sediment and has provisions for a principal spillway; a reservoir which retains high flows sufficiently to cause deposition of transported sediment.

(40) "Stabilize" means the proper placing, grading, and/or covering of soil, rock, or earth to insure their

resistance to erosion, sliding or other movement.

(41) "Stream" means a surface water that is not a wet weather conveyance.

(42) "Structure" means any building, pier, wharf, dolphin, weir, boom, breakwater, bulkhead, revetment, riprap, jetty, mooring structure, moored floating vessel, piling, aid to navigation, bridge, culvert or any other obstacle or obstruction.

(43) "Utility Line" means any pipe or pipeline for the transportation of any gaseous, liquid, liquefiable or slurry substance, for any purpose, and any cable, line, or wire for the transmission for any purpose of electrical energy, telephone and telegraph messages, and radio and television communication.

(44) "Watercourse" means a manmade or natural hydrologic feature with a defined linear channel which discretely conveys flowing water, as opposed to sheet-flow.

(45) "Water Dependent" describes an activity that requires location in or adjacent to surface waters or wetlands in order to fulfill its basic purpose.

(46) "Wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs, and similar areas.

(47) "Wetland Dependent" means that the location of a project or conducting an activity in a wetland is essential to fulfill the purpose of the project. Examples of such projects are fish and wildlife management, nature trails, wildlife observation points, etc.

(48) "Wet Weather Conveyances" are man-made or natural watercourses, including natural watercourses that have been modified by channelization, that flow only in direct response to precipitation runoff in their immediate locality, whose channels are at all times above the ground water table, that are not suitable for drinking water supplies, and in which hydrological and biological analyses indicate that, under normal weather conditions, due to naturally occurring ephemeral or low flow there is not sufficient water to support fish, or multiple populations of obligate lotic aquatic organisms whose life cycle includes an aquatic phase of at least two months.

(49) "Wet weather conveyance determination" means the decision based on site specific information of whether a particular conveyance is a stream or a wet weather conveyance. It is synonymous with "stream determination" and "hydrologic determination."

(50) "Zone of saturation" means a subsurface zone below the ground water table in which all of the interconnected voids and pore spaces are filled with water.

(51) Terminology not specifically defined herein shall be defined in accordance with the Tennessee Water Quality Control Act of 1977, T.C.A. § 69-3-101 et seq., and the rules adopted thereunder.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

0400-40-07-.04 Permits

(1) Application for a Permit.

(a) Any person who plans to engage in any of the activities outlined in T.C.A. § 69-3-108 must obtain a permit from the Commissioner to lawfully engage in such activity. There are three (3) types of permits: Individual Permits; § 401 Water Quality Certifications; and General Permits. There are several types of General Permits: (1) a General Permit that authorizes the implementation of the activity in accordance with all the terms and conditions of the General Permit without prior notice and approval from the Commissioner; (2) a General Permit which requires the applicant notify TDEC of the planned activity prior to implementing the activity in accordance with the terms and conditions of the General Permit; and (3) a General Permit which requires the applicant to notify the Commissioner of the planned activity and receive approval from the Commissioner prior to

implementing the activity in accordance with the terms and conditions of the General Permit. Certain of the General Permits authorize an activity that is authorized by a Nationwide Permit of the U.S. Corps of Engineers and therefore serve as a § 401 Certification. Persons need not file an application with the Commissioner if they are conducting an activity pursuant to a General Permit that does not require Notice or approval. Persons who desire to implement an activity pursuant to a General Permit which requires Notice or Notice and prior approval, must submit the necessary documentation required by the General Permit prior to implementing the planned activity in accordance with the terms and conditions of the General Permit. A person must file an application for an Individual Permit or for a § 401 Water Quality Certification with the Department, in accordance with paragraphs (3) and (5) of this rule, to implement any activity that is not authorized by a General Permit. All General Permits in effect as of the date of this rule shall continue in effect, and are not revoked by these rules.[1]

(b) The application to the Commissioner for certification of activities which require § 404 permits from the United States Army Corps of Engineers (Corps) shall be the application filed with the Army Corps of Engineers. The Joint Public Notice which shall be issued by the Corps, describes the activity and notifies the general public of the application for the § 404 permit and state certification and of the public's right to submit comments and requests for public hearing. If further information is required for project evaluation, the Commissioner may request it from either the applicant or the Corps.

(2) General permits.

The Commissioner may use General Permits to authorize alterations to state waters for specific categories of activities that are substantially similar in nature within the state or other specified geographical areas. When the Commissioner determines that a category or activity is suitable for coverage by a General Permit, or that substantive modification of existing General Permits is consistent with T.C.A. § 69-3-108 of the Tennessee Water Quality Control Act of 1977, the Commissioner will provide notice of and conduct a minimum of one public hearing. The public notice will contain the relevant information, as set forth in subparagraph (4)(c) of this rule. TDEC will distribute the public notice to interested persons who have requested TDEC notify them of ARAP applications and by posting on the TDEC website. Interested persons may submit written comments on the General Permit within thirty (30) days of the public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a General Permit.

(3) § 401 Water Quality Certification.

(a) General.

Any person who plans to engage in any of the activities outlined in § 404 of the Federal Clean Water Act must obtain a federal permit as well as either a state permit or a state water quality certification under § 401 of the Clean Water Act to lawfully engage in such activity in the State of Tennessee. Section 401 of the Federal Clean Water Act requires the Commissioner to certify that the issuance of the federal § 404 permit meets the requirements of sections of the Federal Clean Water Act and the Water Quality Control Act. Persons must make application for the planned activity with the Army Corps of Engineers for an individual § 404 permit or make use of a Corps of Engineers' nationwide permit.

(b) An individual § 404 permit.

Where the activity requires an individual § 404 permit, the application filed with the Army Corps of Engineers will serve as the application for either the state permit or the state § 401 certification. The applicant must file the completed federal application with TDEC for the Commissioner to

[1] The following activities were authorized by a General Permit on the date these rules were promulgated: Bank Stabilization, Gravel Dredging, Launching Ramps, Road Crossings, Alteration of Wet Weather Conveyance, Stream Restoration and Habitat Enhancement, Minor Wetlands, Bridge Scour Repair, Emergency Road Repair, Utility Line Crossings, Surveying and Geotechnical Exploration, Minor Dredging, Alteration and Restoration of Intermittent Streams for Mining, Maintenance Activities, Relocation of Intermittent Streams, Wetlands Restoration and Enhancement, and Impoundment of Intermittent Streams.

process and evaluate. The Commissioner will review a completed application and make a determination whether to issue a § 401 Water Quality Certification. The application must describe the proposed activity and include all the necessary technical information for the Commissioner to make a determination, including an evaluation of practicable alternatives. The practicable alternatives analysis required by this subparagraph shall be satisfied by the applicants' submittal to the Division of a practicable alternatives evaluation for the proposed activity which has been submitted to the Army Corps of Engineers.

(c) A nationwide permit.

Where the activity can be authorized by a Corps of Engineers nationwide permit, the § 401 certification can be obtained through the use of a state general permit, if applicable, or an individual permit pursuant to paragraph (5) of this rule. If the Commissioner issues a § 401 Certification, the § 401 Certification is the state permit.

(4) Public Notice and Participation.

(a) An ARAP Individual Permit or a § 401 Certification requires the issuance of Public Notice seeking public participation and comment on the planned activity. However, Public Notice is not required for an activity authorized by General Permit since Public Notice is provided pursuant to paragraph (2) of this rule. Each completed application shall be subject to the public notice and participation requirements of subparagraph (b) of this paragraph with the following exceptions:

1. § 401 Certification.

The Department's procedure for issuing public notice for certification of an application for a federal license or permit pursuant to § 401 of the Clean Water Act may be either a public notice issued jointly with the Corps, or a public notice issued by the Department. Such notice will describe the activity, advise the public of the scope of certification, their rights to comment on the proposed activity and to request a public hearing. The notice will also inform the public to whom they should send their requests and comments.

2. Minimal impact activities.

For activities that are projected to have only minimal impacts to state waters, which can be readily addressed, the Commissioner may utilize a twenty (20) day public notice period.

3. When the Commissioner determines that a proposed permit modification will not materially change water quality aspects of the project, or will result in an improvement of water quality, as compared to the originally permitted activity, a permit may be modified without public notice.

4. Where the Commissioner determines an emergency situation exists, a permit for remedial action may be issued without prior public notice and participation. The emergency permit shall be advertised by public notice, however, no later than twenty (20) days after issuance. This permit shall be subject to all other provisions of subparagraph (b) of this paragraph. The remedial actions allowed shall be limited to those necessary to remedy the emergency.

(b) Upon receipt of a completed ARAP application, the Commissioner will review and evaluate the proposed activity or project to make a determination whether to issue an Individual Permit, as described in paragraph (5) of this rule. In order to inform interested and potentially interested persons of the proposed activity, a Public Notice seeking public participation and comment on the activity will be given.

(c) The Public Notice will include the following information:

1. Name, address, and telephone number of the applicant;

2. Name and address of TDEC contact person;

3. A brief description of the proposed activity;

4. A brief description of the scope of the proposed activity;

5. The location of the state waters impacted by the proposed activity;

6. A sketch or detailed description of the location of the proposed activity and the subject waters of the state;

7. The purpose of the proposed activity;

8. The watershed of the subject waters;

9. A description of the conditions of the subject waters and the watershed, (e.g., physical conditions of the waters, quality of the waters such as size, flow, substrate, channel, etc.);

10. The procedure to submit comments on the proposed activity;

11. The procedure for requesting a public hearing; and

12. A brief description of the procedure for the Commissioner to make a final determination to issue a permit.

(d) The approved Public Notice shall be distributed to interested persons and shall be circulated within the geographical area of the proposed activity as follows:

1. TDEC will distribute the approved Public Notice to interested persons who have requested TDEC notify them of ARAP applications and by posting on the TDEC website.

2. The Applicant shall distribute the approved Public Notice to the neighboring landowners by publishing in a local newspaper of general circulation and by posting a sign within view of a public road in the vicinity of the proposed project site as specified by the Division. The sign shall contain those provisions as specified by the Division. The sign shall be of such size that is legible from the public road. Also, the sign shall be maintained for at least thirty (30) days following distribution of the approved Public Notice.

3. The applicant shall provide certification to the Division of compliance with part 2 of this subparagraph.

(e) A copy of the public notice shall be sent to any person who specifically requests one. Interested persons may submit written comments on the proposed activity within thirty (30) days of public notice or such greater period as the Commissioner allows. All written comments submitted shall be retained and considered in the final determination to issue a permit.

(f) Interested persons, including the applicant, may request, in writing, that the Commissioner hold a public hearing on any application. Said request from interested persons must be filed no later than the end of the period allowed for public comment, and must indicate the interest of the party filing it, must concisely state the water quality issues being raised, and the reasons why a hearing is warranted. If there are water quality issues and significant public interest in having a hearing, the Commissioner shall hold one in the geographical area of the proposed activity. No less than thirty (30) days in advance of the hearing, public notice of it shall be circulated at least as widely as was notice of the application. The Commissioner will distribute notice of the public hearing as set forth in part (d)1 of this paragraph, and by publishing in a local newspaper. The notice shall cite the date, time and place of the public hearing, a statement of the issues raised by the person requesting the hearing, and the purpose of the public hearing.

(5) Individual Permits.

(a) Persons who plan to engage in any activity that requires an Aquatic Resource Alteration Permit which is not governed by a General Permit or a § 401 Water Quality Certification, must submit an application to the Commissioner for review and approval prior to implementing the planned activity. The Commissioner will review a completed application and make a determination whether to issue an Individual Permit. The application must describe the proposed activity and include all the necessary technical information for the Commissioner to make a determination. The applicant shall assess the practicable alternatives for a planned activity. If the activity does not avoid impacts to state waters, the individual must comply with paragraph (7) of this rule. However, if the nature of the affected waters is such that mitigation is not reasonably likely to result in no net loss of water resource values, and if there is a practicable alternative to the activity which through avoidance or minimization of impacts would result in no net loss, then such alternative shall be selected.

(b) An applicant shall describe the proposed project including the use of technical terms defined in Rule 0400-40-07-.03 where relevant. The sketch or plans and specifications submitted with the application shall describe the method for implementation of the planned activity. Where the proposed activity would result in an appreciable permanent loss of resource value, the applicant must propose adequate mitigation actions so that there is no overall net loss of state water resource values. The applicant shall set forth in the application a brief summary of the practicable alternatives considered to implement the proposed activity.

(c) An Individual Permit is required for water withdrawals which will or will likely result in alteration of the properties of the source stream.

1. Persons proposing to withdraw water from waters of the state in a manner which will or will likely result in an alteration of the properties of the source stream, shall file an application with the Department which includes the following minimum information:

(i) proposed withdrawal rates and volumes;

(ii) proposed withdrawal schedule; and

(iii) flow data of the source stream (if free flowing).

2. Where a permit for water withdrawal is required, the Commissioner shall establish permit conditions which are protective of the source stream's resource value. These conditions may include flow levels below which no withdrawal may occur. The Commissioner may also establish a maximum withdrawal rate in order to maintain the natural flow fluctuation characteristics of the source stream.

(6) Permit Evaluation Criteria.

(a) Some activities may not be entitled to a permit. When a permit is granted, it shall require compliance with all provisions of the Act, the regulations adopted pursuant to the Act, and any special terms or conditions the Commissioner determines are necessary to fulfill the purposes or enforce the provisions of the Act.

(b) A permit may be modified, suspended, or revoked for cause by the Commissioner upon such notice to the permittee as required by law. Permits for activities that have been completed are not subject to modification. If a modification results in a less restrictive permit, then public notice and opportunity for hearing must be given prior to modification. Cause shall include, but not be limited to the following:

1. violation of any terms or conditions of the permit;

2. obtaining a permit by misrepresentation or failure to disclose fully all relevant facts;

3. causing a condition of pollution;

4. violation(s) of the Act or other environmental statutes;

5. a change in the Act or regulations that substantively impacts the content of the permit;

6. a change in the Federal Clean Water Act that substantively impacts the content of the permit; and

7. a significant change of the physical condition(s) of the site or the waters.

(c) The Act requires that no activity be authorized by the Commissioner unless any lost resource value associated with the proposed impact is offset by mitigation sufficient to result in no overall net loss of resource value. In a situation in which an applicant proposes mitigation that would not result in no overall net loss, the Commissioner shall not issue the permit unless the applicant redesigns the project to avoid impacts, minimize them, or provide mitigation as provided in paragraph (7) of this rule so that the redesigned project would result in no net loss of resource value. In making a decision on a permit application, the Commissioner shall determine the lost resource value associated with a proposed impact and the resource value of any proposed mitigation and shall consider the following factors:

1. direct loss of stream length, waters, or wetland area due to the proposed activity;

2. direct loss of in-stream, waters, or wetlands habitat due to the proposed activity;

3. impairment of stream channel stability due to the proposed activity;

4. diminishment in species composition in any stream, wetland, or state waters due to the proposed activity;

5. direct loss of stream canopy due to the proposed activity;

6. whether the proposed activity is reasonably likely to have cumulative or secondary impacts to the water resource;

7. conversion of unique or high quality waters as established in Rule 0400-40-03-.06 to more common systems;

8. hydrologic modifications resulting from the proposed activity;

9. the adequacy and viability of any proposed mitigation including, but not limited to, quantity, quality, likelihood of long term protection, and the inclusion of upland buffers;

10. quality of stream or wetland proposed to be impacted;

11. whether the state waters is listed on the § 303(d) list; whether the proposed activity is located in a component of the National Wild and Scenic River System, a State Scenic River, waters designated as Outstanding National Resource Waters, or waters identified as high quality waters as defined in Rule 0400-40-03-.06, known as Tier II waters; whether the activity is located in a waterway which has been identified by the Department as having contaminated sediments; and whether the activity will adversely affect species formally listed in State and Federal lists of threatened or endangered species; and

12. any other factors relevant under the Act.

(d) All permits which require mitigation of impacts shall contain conditions requiring that the mitigation is performed properly, performed in a timely manner and is adequately maintained.

(7) Mitigation.

(a) Mitigation of state waters other than wetlands.

If an applicant proposes an activity that would result in an appreciable permanent loss of resource

value of a state water, the applicant must provide mitigation which results in no overall net loss of resource values. The applicant shall provide the Commissioner with a time schedule for completion of all mitigation measures for approval. Further, for any mitigation involving the relocation or re-creation of a stream segment, to the extent practicable, the applicant shall complete the mitigation before any impact occurs to the existing state waters. Mitigation measures include, but are not limited to:

1. Restoration of degraded stream reaches and/or riparian zones;

2. New (relocated) stream channels;

3. Removal of pollutants from and hydrologic buffering of stormwater runoff; and

4. Any other measures which have a reasonable likelihood of increasing the resource value of a state water.

The Commissioner will assess the proposed mitigation to assure there is no overall net loss of resource value. The mitigation measures or actions should be prioritized in the following order: restoration, enhancement, re-creation, and protection.

(b) Mitigation of Wetlands.

1. If an applicant proposes an activity that would result in an appreciable permanent loss of resource value of wetlands, the applicant must provide mitigation, which results in no overall net loss of resource value. The applicant shall provide the Commissioner with a time schedule for completion of all mitigation measures for approval. Further, for any mitigation involving the enhancement or preservation of existing wetlands, to the extent practicable, the applicant shall complete the mitigation before any impact occurs to the existing state waters. For any mitigation involving restoration or creation of a wetland, to the extent practicable, the mitigation shall occur either before or simultaneously with impacts to the existing state waters. Mitigation for impacts to wetlands are prioritized as follows:

   (i) Restoration of a previously degraded or impacted wetland (with emphasis on prior converted areas) on-site or in the immediate project area;

   (ii) Restoration, including mitigation banking, off-site but within the eight digit United States Geological Survey hydrological unit in which the project is located;

   (iii) Restoration, including mitigation banking, outside of the eight digit United States Geological Survey hydrological unit in which the project is located;

   (iv) Creation of wetlands on-site or in the immediate project area;

   (v) Creation of wetlands off-site;

   (vi) Enhancement of existing wetlands;

   (vii) Preservation of existing wetlands; or

   (viii) A combination of any of the above activities.

2. The ratio of acres required for wetland mitigation should not be less than 2:1 for restoration activities; 4:1 for creation and enhancement; and 10:1 for preservation. Alternatively, the applicant may propose and utilize, subject to the Division's approval, best professional judgment ratios. The best professional judgment ratios shall be based on the resource value and functions of the affected wetland, resource value of the mitigation, and the likelihood of success of the mitigation.

3. All wetland mitigation projects shall include a monitoring and reporting program to

document timely achievement of a successful mitigation wetland and remedial actions to correct any deficiency.

(8) Duration and Re-issuance of Permits.

(a) Each permit issued shall have a fixed term not to exceed five (5) years.

(b) Re-issuance of permits is not required for one-time alterations such as construction, as long as the alterations are completed within the time limit established by permit.

(c) For on-going alterations, such as water withdrawals, any permittee who wishes to continue the permitted activity after the expiration date of the permit must make application at least ninety (90) days prior to its expiration date.

(d) The Commissioner shall follow the procedures for public notice and participation detailed in paragraph (4) of this rule, regarding each application for re-issuance of a permit.

(9) Review of Permit Denials, Suspensions, Revocations, Terms and Conditions.

Permittees and applicants for permits who disagree with the denial, suspension or revocation of a permit or the terms and conditions of a permit are entitled to review of the Commissioner's decision by the Board of Water Quality, Oil and Gas pursuant to T.C.A. § 69-3-105. Any action taken by the Commissioner regarding a permit remains in effect unless and until an order of the Board of Water Quality, Oil and Gas or a reviewing court becomes final.

(10) Alteration of wet weather conveyances

(a) The alteration of wet weather conveyances, as defined in T.C.A. § 69-3-103, by any activity is permitted by this paragraph and shall require no notice to or approval by the department, provided it is done in accordance with the following conditions:

1. The activity may not result in the discharge of waste or other substances that may be harmful to humans or wildlife;

2. Material may not be placed in a location or manner so as to impair surface water flow into or out of any wetland area; and

3. Sediment shall be prevented from entering other waters of the state.

(i) Erosion and sediment controls shall be designed according to the size and slope of disturbed or drainage areas to detain runoff and trap sediment and shall be properly selected, installed, and maintained in accordance with the manufacturer's specifications and good engineering practices.

(ii) Erosion and sediment control measures shall be in place and functional before earthmoving operations begin, and shall be constructed and maintained throughout the construction period. Temporary measures may be removed at the beginning of the work day, but shall be replaced at the end of the work day.

(iii) Checkdams shall be utilized where runoff is concentrated. Clean rock, log, sandbag or straw bale checkdams shall be properly constructed to detain runoff and trap sediment. Checkdams or other erosion control devices are not to be constructed in stream. Clean rock can be of various type and size depending on the application. Clean rock shall not contain fines or other wastes or contaminants.

4. Appropriate steps shall be taken to ensure that petroleum products or other chemical pollutants are prevented from entering waters of the state. All spills shall be reported to the appropriate emergency management agency and to the department. In the event of a spill, measures shall be taken immediately to prevent pollution of waters of the state,

including ground water.

5. There shall be no additional conditions upon a person's activity within a wet weather conveyance. This provision does not apply to National Pollutant Discharge Elimination System Permits.

Authority: T.C.A. §§ 69-3-101 et seq. and 4-5-201 et seq.

I certify that the information included in this filing is an accurate and complete representation of the intent and scope of rulemaking proposed by the agency.

Date: 2/12/13

Signature: Sandra K Dudley

Name of Officer: SANDRA K. DUDLEY

Title of Officer: DIRECTOR, WATER RESOURCES

BETH B. SMITH
STATE OF TENNESSEE NOTARY PUBLIC
DAVIDSON COUNTY, TENN.
My Commission Expires JULY 6, 2015

Subscribed and sworn to before me on: 2-12-13

Notary Public Signature: Beth B Smith

My commission expires on: July 6, 2015

Department of State Use Only

Filed with the Department of State on: 2/13/13

Tre Hargett
Secretary of State

2013 FEB 13 PM 3:58
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